

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**The Competence of the International Criminal Court with regard to
Witnesses**



Thesis submitted in partial fulfilment of the requirements for the award of the LL.M degree

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Declaration of Authorship

I, Franziska Tolksdorf, declare that **The Competence of the International Criminal Court with regard to Witnesses** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Abstract

This research paper examines whether the International Criminal Court has the competence to compel the appearance of witnesses before it, and if the States Parties to the Rome Statute have an obligation to serve and enforce a witness summons issued by the Court. In December 2013 the Office of the Prosecutor requested the International Criminal Court to summon witnesses and ascribed to the Court the power to order some States Parties to enforce witness summonses. The defence counsel in the particular case and the Kenyan government, the requested State Party, opposed the request. In April 2014 Trial Chamber V (A) of the International Criminal Court delivered a decision on that matter in which it found that it had indeed the power to compel witnesses and to order Kenya to enforce the summonses. The decision was confirmed on appeal in October 2014. This paper analyses the issue with reference to the decision of the Trial Chamber, the judgement of the Appeals Chamber, and the assertions by the parties in the present case. It also introduces other approaches on how to deal with this issue. The paper essentially analyses the text of the Rome Statute, the history of its drafting, and compares the enabling laws and jurisdictional competence of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone with regard to the theme under discussion. The paper furthermore analyses how the domestic laws of some states deal with the matter. Finally it examines the measures that the ICC can implement to enforce its orders.

Key Words

International Criminal Court

ICC Statute

Witness

Cooperation

Compellability

Subpoena

States Parties

Domestic law

Ad hoc Tribunals

Hybrid Court



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Introduction

According to Rule 65 of the Rules of Procedure and Evidence¹ of the International Criminal Court¹ ‘a witness who appears before the Court is compellable by the Court to provide testimony’. But the Rome Statute of the International Criminal Court² (hereafter ICC Statute), does not provide for sanctioning instruments which the International Criminal Court (hereafter ICC or Court) may use to enforce the presence of witnesses, ‘who are not physically present on the Court’s premises or in its custody.’³ The lack of direct enforcement powers constitutes a serious weakness of the ICC Statute, especially because Article 69(2) of the ICC Statute states that at the trial the witness testimony ‘shall be given in person’.⁴ Therefore, the crucial question this study seeks to answer is whether the duty of the States Parties to cooperate with the ICC includes the duty to compel witnesses who find themselves in the requested state to testify before it. This study will include the examination of several possibilities of compelling a witness. It will discuss not only whether a witness can be forced to travel to the seat of the Court, but also whether a witness may give testimony in his or her home country, either (a) before ICC judges who have travelled to the witness’s home country, or (b) before state officials of the home country, who then transfer a transcript of the testimony to the ICC, or (c) by ICC judges via video link. This study will first analyse crucial provisions of the ICC Statute and outline different possibilities of interpretation and

¹ Rules of Procedure and Evidence ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

² Rome Statute of the International Criminal Court 37 ILM 1002 (1998) [hereafter ‘ICC Statute’].

³ Office of the Prosecutor of the ICC ‘Corrected and amended version of “Prosecution’s request under Article 64(6)(b) and Article 93 to summon witnesses”’ (ICC-01/09-01/11-1120-Conf-Exp) ICC-01/09-01/11-1130-Red2_Corr (2013) Para 67 [hereafter ‘OTP (2013)’]; See Schabas WA *The International Criminal Court: A Commentary on the Rome Statute* (2010) 1020 [hereafter ‘Schabas WA (2010)’].

⁴ OTP (2013) Para 64; See Nderitu W, Common Legal Representative for Victims ‘Common Legal Representative for Victims’ Response to the Prosecution’s Request and Supplementary Request under Article 64(6)(b) and Article 93 to Summon Witnesses’ ICC-01/09-01/11-1201 (2014) Para 44 [hereafter ‘Nderitu W (2014)’].

will then look at the process of the making of the ICC Statute. In the third chapter this study will examine the legal nature of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY), the International Criminal Tribunal for Rwanda (hereafter ICTR) and the Special Court for Sierra Leone (hereafter SCSL) and analyse some decisions that dealt with the compellability of witnesses before these courts. The fourth chapter studies the domestic law of some of the States Parties to the ICC Statute, analysing their respective provisions regulating cooperation with the ICC and how they, in their domestic law, deal with the issue of compelling witnesses. The final chapter deals with the issue of enforcing Court orders, especially witness summonses.



Chapter One - The Duty of the States Parties to compel Witnesses under the ICC Statute

The ICC Statute contains provisions from which subpoena powers of the Court can be deduced, as well as provisions that speak against such an interpretation of the Statute. Before discussing the issue of witness compellability under the ICC Statute, it is necessary to define generally what a compellable witness is.

1. What is a compellable witness?

A Compellable witness is someone who can lawfully be required to give evidence and who may be lawfully punished if he or she refuses to do so. National criminal justice systems do not compel someone who is related in a special way to the accused to give testimony if such testimony would result in a conflict of interests. A witness is also not obliged to answer self-incriminating questions. According to Rule 75 of the Rules of Procedure and Evidence of the ICC '[a] witness appearing before the Court, who is a spouse, child or parent of an accused person, shall not be required by a Chamber to make any statement that might tend to incriminate that accused person.' Rule 74 of the Rules of Procedure and Evidence of the ICC allows a witness to 'object to making any statement that might tend to incriminate him or her.'

This study focuses on the compellability of witnesses only insofar as they are witnesses whose testimony can be used by the Court. At times the power of the ICC to request States Parties to assist in compelling witnesses will be referred to as subpoena powers of the Court.

2. Article 64(6)(b) of the ICC Statute

According to Article 64 (6)(b) of the ICC Statute ‘the Trial Chamber may [...] [r]equire the attendance and testimony of witnesses [...] by obtaining, if necessary, the assistance of the States as provided in the Statute’. There are two questions that arise when reading this article. The first is what the word ‘require’ means in its context,⁵ and the second is what kind of assistance the ICC Statute envisages.

The term ‘require’ may sound weak compared, for example, to the term ‘order’ or ‘request’, as used in other provisions of the Statute.⁶ This could speak against the power of the Court to ask States Parties to compel witnesses.⁷ But, according to the *Oxford Thesaurus*, the synonyms of the word ‘require’ are ‘order’, ‘command’, ‘ask (for)’, ‘call (for)’, ‘press (for)’, ‘instruct’, ‘coerce’, ‘force’, ‘insist’ and ‘demand’.⁸ Another fact that speaks in favour of the word ‘require’ connoting a form of compulsion is that both the French and Spanish texts of the ICC Statute have the analogous word ‘ordonner’ (to order) and ‘ordenar’ (to order), respectively.⁹

The answer to the second question, which concerns the kind of assistance that the ICC envisages from a State Party, could lie in Article 93 of the ICC Statute. Article 93 of the ICC Statute contains

⁵ See OTP (2013) Para 74.

⁶ See Article 87, 91, 95 and 96 of the ICC Statute.

⁷ Sluiter G “‘I beg you, please come Testify’-The problematic absence of subpoena powers at the ICC’ *New Criminal Law Review* Vol 12 No 4 (2009) 590 600 [hereafter ‘Sluiter G (2009)’]; Government of the Republic of Kenya, represented by the Attorney General of Kenya ‘The Government of the Republic of Kenya’s Submission on the ‘Prosecution’s Request under Article 64(6)(b) and Article 93 to Summon Witnesses’ ICC-01/09-01/11-1184 (2014) Para 8.

⁸ Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation ICC (Trial Chamber) in *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC (Trial Chamber) Case No.-01/09-01/11-1274 (2014), Trial Chamber, decision of 17 April 2014 Para 98 [hereafter ‘Trial Chamber (2014)’].

⁹ OTP (2014) Para 6.

one provision which deals specifically with witnesses, one that covers '[t]he taking of evidence' and a 'catch all provision'¹⁰ which could cover a State Party's assistance in the form of compelling witnesses.

Article 93(1)(e) of the ICC Statute refers merely to the fact that States Parties are required to provide assistance in the form of '[f]acilitating the *voluntary* appearance of witnesses [...] before the Court' (emphasis added).

Article 93(1)(l) of the ICC Statute, however, provides for a general form of assistance that States Parties must render, which includes '[a]ny other type of assistance which is not prohibited by the law of the requested State'. Some argue that the term 'other' excludes types of assistance which are explicitly dealt with otherwise in Article 93(1) of the ICC Statute.¹¹ According to this argument, the fact that Article 93(1)(e) of the ICC Statute provides for the facilitation of 'the *voluntary* appearance of witnesses' (emphasis added), precludes the application of Article 93(1)(l) of the ICC Statute to assistance involving the involuntary appearance of a witness. However, as shall be shown below, Articles 64(6)(b) and 93(1)(d) of the ICC Statute speak against such a narrow understanding of the provision.

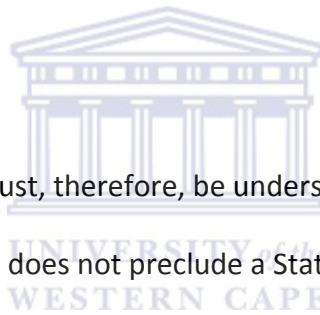
Article 64(6)(b) expressly authorizes the ICC to seek the assistance of a States Party with regard to the attendance of witnesses. The argument that this article applies only to witnesses who are

¹⁰ OTP (2013) Para 92.

¹¹ Schabas WA (2010) 1020; Defence for Mr. William Samoei Ruto 'Public redacted version of "Defence response to the corrected and amended version of Prosecution's request under article 64(6)(b) and article 93 to summon witnesses"' ICC-01/09-01/11-1136-Red2 (2014) Para 8.

already before the Court is unconvincing since, in such a case, the Court does not need the assistance of its States Parties.¹²

Article 93(1)(d) of the ICC Statute obligates States Parties to serve judicial documents if requested to do so by the ICC. This provision has consistently been interpreted to include summonses of witnesses.¹³ According to the Office of the Prosecutor of the ICC the duty of the States Parties to issue a summons at the request of the Court, includes the obligation to enforce the summons.¹⁴ This is a persuasive interpretation, for the provision would be unnecessary if a summons served only as ‘an invitation to appear’.¹⁵



Article 93 (1)(e) of the ICC Statute must, therefore, be understood to mean the minimum that is required of States Parties, but which does not preclude a State Party from cooperation that goes further.¹⁶ Article 93(1)(l) of the ICC Statute is more a ‘catch all provision’¹⁷ that ‘is included in a non-exhaustive list’.¹⁸ To exclude all measures not mentioned in Article 93(1)(a-k) of the ICC Statute would limit its scope and run counter ‘its express open-ended formulation.’¹⁹

What needs to be discussed next is the meaning of ‘not prohibited by the law of the requested state’ pursuant to Article 93(1)(l) of the ICC Statute. If one takes the plain wording of the provision it obligates a State to yield to the Court’s demand as long as the domestic law of the requested

¹² OTP (2013) Para 91.

¹³ OTP (2013) Para 92.

¹⁴ OTP (2013) Para 73.

¹⁵ OTP (2013) Para 73.

¹⁶ OTP (2014) Para 73; Nderitu W (2014) Para 8.

¹⁷ OTP (2013) Para 92.

¹⁸ OTP (2013) Para 92.

¹⁹ OTP (2013) Para 92.

State Party does not specifically exclude the type of assistance demanded by the Court. But such an interpretation of Article 93 (1)(e) of the ICC Statute could, in the case of the Court asking a State to compel a witness, be tantamount to violating the freedom of the witness concerned, since the constitution of the state of his or her nationality could, and in most cases does, guarantee the individual the right to freedom, limitable only by formal, national law.²⁰ However, generally, a national court may compel a witness to appear before it by way of a subpoena, which it is authorised to issue. By ratifying the ICC Statute, the concerned state accepts the jurisdiction of the ICC as complementary to its domestic jurisdiction. This means that it agrees that the ICC interferes if the state itself is 'unwilling or unable'²¹ to investigate or prosecute the case.²² The state thus declares the ICC to be a 'back-up court' complementing its national courts. Trial Chamber V (A) of the ICC recognized this explicitly in its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*.²³ The Chamber stated as follows:

'[F]or purposes of compellability, witnesses from situation countries must be deemed to be under the same legal obligation to appear under an ICC subpoena as they would be if their national courts were genuinely exercising jurisdiction over the case being tried by the Trial Chamber.'²⁴

The fact that the ICC Statute does not provide for measures that the ICC could use to enforce the appearance of a witness before it speaks in favour of a duty of the States Parties to assist the ICC otherwise the drafters of the ICC Statute would have given the ICC subpoena powers. This argument is supported by the preamble of the ICC Statute and Article 4(1) of the ICC Statute, as

²⁰ See Mugai, Attorney General of Kenya at the Status Conference on 14 February 2014 before Trial Chamber V (a) 'ICC-01/09-01/11-T-86-Red-ENG WT 14-02-2014 1-120 SZ T' (2014) 49 [hereafter 'Mugai (2014)'].

²¹ Article 17(1)(a) of the ICC Statute.

²² Article 17(1)(a) of the ICC Statute.

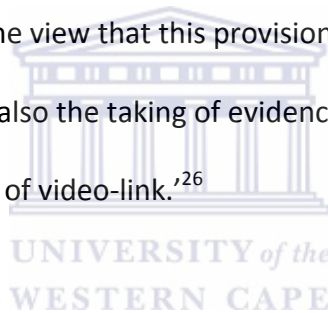
²³ Trial Chamber (2014).

²⁴ Trial Chamber (2014) Para 140.

will be shown below. However, where a State Party is unwilling to investigate or prosecute, it is unlikely that it is willing to cooperate. This issue, however, will be dealt with in Chapter Five.

The Appeals Chamber of the ICC did not even deem it necessary to resort to Article 93(1)(l) of the ICC Statute to infer from the ICC Statute the power of the Court to compel witnesses, but was of the opinion that such a power can be deduced directly from Article 93(1)(b) of the ICC Statute.²⁵

According to this provision, States Parties are under the obligation to comply with a request for assistance by the Court that contains '[t]he taking of evidence, including testimony under oath [...]'. The Appeals Chamber was of the view that this provision not only covers 'requests that a State Party itself take evidence, but also the taking of evidence on a State Party's territory, either by the Court sitting *in situ* or by way of video-link.'²⁶



3. Rule 65(1) of the Rules of Procedure and Evidence

An argument against assistance in the form of compelling witnesses can be found in Rule 65(1) of the Rules of Procedure and Evidence. According to this Rule, '[a] witness *who appears before the Court is compellable by the Court to provide testimony*' (emphasis added). It can be argued that since, pursuant to this Rule, a witness can be compelled on condition that he or she '*appear[ed] before the Court*', a witness who does not fulfil this requirement cannot be compelled.²⁷ However,

²⁵ Judgement on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation" ICC (Appeals Chamber) in *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC (Appeals Chamber) Case No.-01/09-01/11 OA 7 OA 8 (2014), Appeals Chamber, judgement of 9 October 2014 Para 128 [hereafter 'Appeals Chamber (2014)'].

²⁶ Appeals Chamber (2014) Para 130.

²⁷ Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor ICC (Pre-Trial Chamber) in *Situation in the Republic of Kenya* ICC (Pre-Trial Chamber) Case No.-01/09-39 (2011), Pre Trial Chamber,

according to Article 51(5) of the ICC Statute, the ICC ‘Statute shall prevail’ in the case of a ‘conflict between the Statute and the Rules of Procedure and Evidence’.

4. Articles 70 and 71 of the ICC Statute

It has been argued that the missing of an element in Article 70 or 71 of the ICC Statute, which contains the ‘[f]ailure of a witness to appear before the Court’²⁸, speaks against the possibility of requesting the forcible appearance of a witness.²⁹

Article 70 of the ICC Statute gives the Court jurisdiction over certain serious ‘offences against its administration of justice’. Since the ICC is a court established to try persons responsible ‘for the most serious crimes of international concern’³⁰, this focus of its mandate would have been watered down if Article 70 contained a provision, which penalised the refusal of a witness to testify. As a court of ‘last resort’³¹ the aim of the ICC is to support the exercise of national jurisdiction as far as possible. In this sense, to leave it up to the state where the crime is committed to take care of procedural matters is in harmony with the principle of complementarity.³² To address this issue in Article 71 of the ICC Statute would not have made

decision of 31 January 2011 Para 20; Defence for Mr. Joshua arap Sang ‘Sang Defence Response to the Prosecution’s Request under Article 64(6) and Article 93 to Summon Witnesses’ ICC-01/09-01/11-1138-Red (2014) Para 21 [hereafter ‘Defence for Mr. Sang (2014)’].

²⁸ Calvo-Goller KN *The Trial Proceedings of the International Criminal Court ICTY and ICTR Precedents* (2006) 271 [hereafter Calvo-Goller KN (2006)].

²⁹ Calvo-Goller KN (2006) 271; See also Archbold JF, Khan KAA & Dixon R (eds) *International Criminal Courts Practice, Procedure and Evidence* 3 ed (2009) para 4-66 at 133; Sluiter G (2009) 598 and Dissenting Opinion of Judge Herrera Carbuca on the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’ in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC (Trial Chamber) Case No.-01/09-01/11-1274Anx (2014) dissenting opinion of 29 April 2014 Para 11.

³⁰ Article 1 of the ICC Statute.

³¹ See Article 17 of the ICC Statute.

³² Appeals Chamber (2014) Para 110.

sense since the provision addresses only misconduct that occurs in the courtroom.

5. Does the ICC Statute provide for a right not to be compelled to testify?

A duty of the States Parties to compel witnesses, if asked for by the Court to do this, could be refuted if the ICC Statute provides for a right of the concerned witness not to be compelled to testify at the criminal proceedings. Such a right could be derived from Article 93(7)(a)(i) of the ICC Statute, which provides for the request by the Court for a ‘temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance’ on condition that ‘[t]he person freely gives his or her informed consent to the transfer’. It could be argued that if a person in custody has the right to refuse to be transferred, then a person who is not in custody has this right *a fortiori*.³³ But this provision, as will be shown in Chapter Two, has been copied from a provision found in a mutual assistance treaty, which deals with a specific procedural scenario. The transformation occurred hastily and the provision should therefore not be given much prominence.³⁴ Moreover, Rule 193(1) of the Rules of Procedure and Evidence declares Article 93(7) of the ICC Statute inapplicable in case the appropriate Chamber has ordered the temporary transfer ‘of any person sentenced by the Court whose testimony or other assistance is necessary to the Court’.

³³ Zahar A and Sluiter G *International Criminal Law* (2008) 368 and 472 [hereafter ‘Zahar A and Sluiter G (2008)’].

³⁴ Kress C and Prost K in Triffterer O *Commentary of the Rome Statute of the International Criminal Court* 2 ed (2008) 1576 [Kress C and Prost K (2008)]; Nderitu W (2014) Para 93; See Defence for Mr. Sang (2014) Para 22.

6. Article 4 of the ICC statute

According to Article 4(1) of the ICC Statute the Court has international legal personality as well as an international legal capacity to carry out its functions and to fulfil its purposes. In its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation* Trial Chamber V (A) of the ICC held that 'legal capacity' includes competence, power, ability and capability.³⁵ Given the fact that the ICC is a criminal court, Article 4(1) could be interpreted in a way, which gives the ICC subpoena powers as well. In fact, it was along these lines that the European Court of Human Rights (ECtHR) decided in the case of *Djokaba Lambi Longa v The Netherlands*³⁶ when it held as follows:

'It would, in the Court's view, be unthinkable for any criminal tribunal, domestic or international, not to be vested with powers to secure the attendance of witnesses, for the prosecution or the defence as the case may be. The power to keep them in custody, either because they are unwilling to testify or because they are detained in a different connection, is a necessary corollary.'³⁷

In the above-mentioned *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*, the Trial Chamber of the ICC cited this statement.³⁸

The Chamber also stated that the Court's power to compel the attendance of witnesses is an accompanying power that is essential for the performance of its key functions.³⁹

Article 4(2) of the ICC Statute, however, limits the exercise of the Court's powers to those expressed in the Statute. But this does not mean that these powers have to be explicitly defined in

³⁵ Trial Chamber (2014) Para 83.

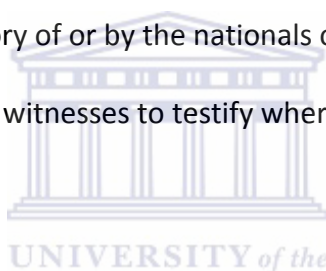
³⁶ *Djokakaba Lambi Longa v The Netherlands* (2012), Application No.-33917/12, Judgement of 8 November 2012 [ECtHR] [hereafter 'ECtHR (2012)'].

³⁷ ECtHR (2012) Para 72; Trial Chamber (2014) Para 84.

³⁸ Trial Chamber (2014) Para 84.

³⁹ Trial Chamber (2014) Para 86.

the ICC Statute. It suffices if the powers are implied.⁴⁰ Nevertheless, an order issued by the Court to a State Party to compel a witness could constitute the imposition of a new obligation on the part of States Parties. The Court's competence to issue such an order could be seen as the limit of its implied powers.⁴¹ But, for the national judicial systems of the States Parties to the ICC, the concept of the compellability of witnesses is not new. There is, therefore, no reason why asking a State Party to compel a witness on behalf of the ICC should be an unbearable burden for it. At least compelling the witness to a place located in the territory of the state in question should be ensured. Indeed, it should come as no surprise to a State Party that the ICC, which has jurisdiction over crimes committed in the territory of or by the nationals of its States Parties, requests for assistance in the form of compelling witnesses to testify where the case is tried by the ICC.



7. The Preamble of the ICC Statute (objects and purposes of the ICC Statute)

According to the preamble of the ICC Statute, the purpose of setting up the Court was to end impunity. This purpose shall be reached primarily through actions taken by its States Parties. They must ensure that international crimes are prosecuted at the national level and must have measures in place to enhance international cooperation to ensure that such crimes do not go unpunished.⁴²

⁴⁰ Martines F 'Legal Status and Powers of the Court' in Cassese A *The Rome Statute of the International Criminal Court* Vol 1 (2002) 215-16 [hereafter 'Martines F (2002)'].

⁴¹ Martines F (2002) 217.

⁴² Para 4 of the Preamble of the ICC Statute.

The ICC therefore follows the principle of complementarity and declares itself as a court of 'last resort'. This means that the ICC only steps in if the state of commission is 'unwilling or unable'⁴³ to investigate or prosecute.⁴⁴ This, however, means that if the ICC actually takes over a case, the state of commission has, contrary to its recognized obligations, failed to fulfil its duty of investigating and prosecuting the case itself, or is simply unable to do so. The least that the state of commission can be requested to do in such a case is to cooperate with the ICC. To take the position that, seeing that the ICC has taken over the case, nothing further needs to be done by the state concerned, runs counter to the expressed obligations laid down and accepted by each State Party, as set out in the preamble of the ICC Statute.



8. Article 86 of the ICC Statute

Article 86 of the ICC Statute requires States Parties to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction. It could be argued that since the cooperation has to be in line with the ICC Statute, in case a subject matter has not explicitly been specified, Article 86 of the ICC Statute does not cover it. This interpretation of Article 86 of the ICC Statute, however, contradicts with the wording of the provision. A form of cooperation is in accordance with the Statute when it is in line with its purpose, aim and spirit. As has been shown above, the power to compel witnesses corresponds with the purpose and spirit of the ICC Statute.

That Article 86 includes the compelling of a witness as a form of cooperation on the part of a State Party may be deduced from Article 21 which provides for the application of 'treaties and the

⁴³ Article 17 (1)(a) of the ICC Statute.

⁴⁴ Article 17 (1)(a) of the ICC Statute.

principles and rules of international law’ by the Court, and Article 4 of the ICC Statute which has been specified above.

9. The Rule of Good Faith

The rule of good faith is expressed in the Vienna Convention on the Law of Treaties (VCLT), Article 26 of which states that States Parties to the Convention must implement treaties in good faith.

According to Article 31(1) of the VCLT ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’. The ICTY gave effect to this rule in its decision in the *Blaskic* case where it stated as follows:

‘[I]t is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal. The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal.’⁴⁵

Referring to this statement, Trial Chamber V (A) of the ICC, in its *Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation*, found that interpreting the ICC Statute in the light of the rule of good faith means ascribing to the Court subpoena powers:

‘[T]he efforts of the States Parties in creating a permanent criminal court of last resort, and giving it the mandate to ensure accountability on the part of those suspected of committing crimes that shock the conscience of humanity, would have been reduced only to creating a merely ‘illusory or nominal’ institution – were it to be accepted that States Parties did not intend the Court to have the power to compel the appearance of witnesses either of its own force or with the assistance of States Parties’⁴⁶

⁴⁵ Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 ICTY (Appeals Chamber) in *Prosecutor v. Tihomir Blaskic* ICTY Case No IT-95-14 (1997), Appeals Chamber, decision of 20 October 1997 Para 26 [hereafter ‘Appeals Chamber ICTY (1997)’].

⁴⁶ Trial Chamber (2014) Para 124.

10. Article 67(1) of the ICC Statute

According to Article 67(1) of the ICC Statute ‘the accused shall be entitled [...] to a fair hearing conducted impartially’. A lack of subpoena powers of the Court would not only complicate the work of the prosecution, but would also hinder the defence, thus jeopardising the right of the accused to a fair trial. This was the basis upon which the International Criminal Tribunal for Rwanda (ICTR) decided against the transfer of a case to a Rwandan court, arguing that, due to the lack of subpoena powers of the national courts in respect of foreign witnesses, a fair trial could not be assured.⁴⁷ This finding was confirmed on appeal.⁴⁸



⁴⁷ Decision on Prosecutor’s Request for Referral to the Republic of Rwanda ICTR (Trial Chamber) in *The Prosecutor v. Gaspard KANYARUKIGA* ICTR Case No.-ICTR-2002-78-R11bis (2008), Trial Chamber, decision of 6 June 2008 Paras 80-1 and 104 [hereafter ‘Trial Chamber ICTR (2008)’].

⁴⁸ Decision on the Prosecution’s Appeal Against Decision on Referral under Rule 11bis ICTR (Appeals Chamber) in *The Prosecutor v. Gaspard KANYARUKIGA* ICTR Case No.-2002-78-R11bis (2008), Appeals Chamber, decision of 30 October 2008 [hereafter ‘Appeals Chamber ICTR (2008)’].

Chapter Two - The Making of the ICC Statute

In order to establish whether the ICC was intended to be vested subpoena powers, it could prove instructive to examine more closely the process of the making of the ICC Statute.

1. The 45th Session of the International Law Commission

The matter of the attendance of witnesses before the ICC was discussed at the 45th session of the International Law Commission (ILC) in 1993. The Report of the session authorised the prosecutor to request the issuance of subpoenas by the Court during investigations and the preparation of the indictment.⁴⁹



2. The 46th Session of the International Law Commission

The same matter was discussed during the 46th session of the International Law Commission (ILC) in 1994. The 1994 Draft Statute for an International Criminal Court provided for the issuance of subpoenas and warrants by the Presidency if requested by the Prosecutor.⁵⁰ In the commentary to this provision it was also mentioned that the prosecutor would have the competence to seek state cooperation and to 'request the court to issue orders to facilitate the investigation'⁵¹.

Furthermore, the Draft Statute provided for a prosecutor's request for subpoenas and warrants during the investigations.⁵² The Presidency was empowered to issue subpoenas, given the fact

⁴⁹ *Report of the International Law Commission on the work of its forty-fifth session A/48/10* (1993) at 113.

⁵⁰ Article 26(3) of the Draft Statute for an International Criminal Court with commentaries (1994) in *Yearbook of the International Law Commission*, 1994 vol II Part Two [hereafter 'Draft Statute (1994)'].

⁵¹ Commentary (2) to Article 26 of the Draft Statute (1994).

⁵² Commentary (2) to Article 26 of the Draft Statute (1994).

that a chamber would only be convened at a later stage.⁵³ Moreover, it was mentioned that cooperation, including 'execution of subpoenas and warrants',⁵⁴ would be regulated in Part 7 of the Statute under the heading 'International cooperation and judicial assistance'.⁵⁵

The same Draft Statute granted the Trial Chamber the power to require, subject to the Statute and its Rules, 'the attendance and testimony of witnesses'⁵⁶, either on the application of a party, or on its own motion.⁵⁷ This provision is the predecessor of Article 64(6)(b) of the ICC Statute, which is similarly worded. Since, in the draft provision, which was supposed to be applicable in the investigation stage, the term 'subpoena' is explicitly mentioned with regard to the Presidency, it is obvious that the intention of the ILC was to give the Trial Chambers subpoena powers as well. This argument can also be derived from the above-mentioned commentary to the provision, which mentioned that the prosecutor should, in the investigation stage, 'request the Presidency to issue subpoenas and warrants, *since a chamber will not be convened until a later stage [...]*'⁵⁸ (emphasis added). The fact that the draft provision appears in the same wording in the ICC Statute speaks in favour of interpreting the term 'require' in such a way that it permits the Trial Chamber to order States Parties to compel witnesses.

⁵³ Commentary (2) to Article 26 of the Draft Statute (1994).

⁵⁴ Commentary (2) to Article 26 of the Draft Statute (1994).

⁵⁵ Part Seven of the Draft Statute (1994).

⁵⁶ Article 38(5)(b) of the Draft Statute (1994).

⁵⁷ Article 38(5)(b) of the Draft Statute (1994).

⁵⁸ Commentary (2) to Article 26 of the Draft Statute (1994).

3. Report of the *ad hoc* Committee on the Establishment of an International Criminal Court

The General Assembly discussed the issue of witness compellability during its 50th session.⁵⁹ The Report of the *ad hoc* Committee on the Establishment of an International Criminal Court contains a comment on the issue of witness compellability.⁶⁰ The commission that dealt with this matter reported on the discussion that arose on whether or not the ICC would be able to compel the attendance of witnesses directly, or would have to operate through state authorities.⁶¹ It was noted that the constitutions of many countries prohibited the citizens from being forced to leave the country to ensure their attendance at foreign judicial proceedings.⁶² It was suggested that in order to obtain a witnesses' testimony, request for assistance be made to the residential State which, using coercive means provided in its domestic law, would conduct the examination of the witness and furnish the ICC with a transcript.⁶³ It was also proposed that an ICC judge or prosecutor be permitted to participate actively during such an examination.⁶⁴ One view was that 'in highly exceptional cases',⁶⁵ it should be possible to apply indirect coercive measures.⁶⁶ The proposed means of enforcement were fines or imprisonment.⁶⁷ Others suggested the taking of testimonies through live video links connected with the Court, or the arrangement of hearings by

⁵⁹ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court A/50/22 (1995)* [hereafter '*Report (1995)*'].

⁶⁰ *Report (1995)* Para 233.

⁶¹ *Report (1995)* Para 233.

⁶² *Report (1995)* Para 233.

⁶³ *Report (1995)* Para 233.

⁶⁴ *Report (1995)* Para 233.

⁶⁵ *Report (1995)* Para 233.

⁶⁶ *Report (1995)* Para 233.

⁶⁷ *Report (1995)* Para 233.

the Court in the territory of the requested state.⁶⁸ The final suggestion, however, was that it be made a requirement to seek first the agreement of the state concerned.⁶⁹

It is remarkable that the manner in which the issue was discussed leaves no doubt that the possibility of compelling witnesses, as such, was not questioned.⁷⁰ The only controversial issue was which institution would have the competence and what the appropriate manner of executing the summons should be, and the extent to which the ICC authorities should be involved in the taking of testimonies.

4. Report of the Preparatory Committee on the Establishment of an International Criminal Court

The matter of witness compellability is also mentioned in the Report of the Preparatory Committee of the 51st session of the General Assembly on the Establishment of an International Criminal Court,⁷¹ which states that '[w]itnesses or experts may not be compelled to testify *at the seat of the court*'⁷² (emphasis added). The Report states furthermore that 'if they do not wish to travel to the seat of the Court, their testimony shall be taken in the country in which they reside or in some other place which they may determine by common accord with the Court.'⁷³ The exact same wording is found in bracketed text in Volume III of the Official Records of the Diplomatic

⁶⁸ Report (1995) Para 233.

⁶⁹ Report (1995) Para 233.

⁷⁰ OTP (2013) Para 76.

⁷¹ Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume II A/51/22 (1996) [hereafter 'Report vol II (1996)'].

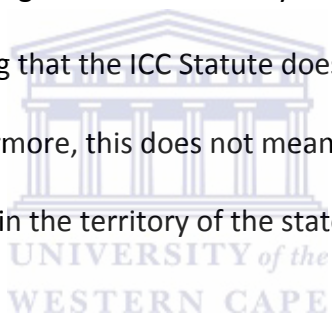
⁷² Report vol II (1996) Article 57bis at 284.

⁷³ Report vol II (1996) Article 57bis at 284.

Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which took place in 1998.⁷⁴

5. The Part Nine Working Group

According to Sluiter, who attended some of the negotiations of the working group that dealt with Part 9 of the ICC Statute ('International Cooperation and Judicial Assistance'), there was an intense discussion about the extent to which the ICC should be able to interfere with national sovereignty. He recalls that the possibility of forcing witnesses to testify *at the seat* of the Court was strongly opposed.⁷⁵ But, hence, it is surprising that the ICC Statute does not contain a clear wording against the compelling of witnesses. Furthermore, this does not mean that the possibility of compelling a witness to give testimony at a place in the territory of the state of his or her residence was opposed.



6. Interpreting the ICC Statute in the Light of its Draft Statutes

On the one hand, it may be argued that since the language of the ICC Statute with regard subpoena powers of the Court is not as clear as it was in the Statute's earlier drafts, it could be said that the States Parties, ultimately, did not want the Court to have such powers. On the other hand, the Draft Statutes show that the possibility of compelling witnesses as such was not really questioned; only the forcible transfer of witnesses is reported to have been an issue. Furthermore, what needs to be noted here is that the States Parties did not foresee that the interpretation of

⁷⁴ *Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Official Records Volume III* (1998) Article 91(7)(a)-(b) at 75.

⁷⁵ Sluiter G (2009) 597.

the term 'required' in the English version of Article 64(b) of the ICC Statute would turn out to be so controversial, and that the term 'voluntarily' in Article 93(1)(e) ICC Statute would be interpreted as having the function of limiting the possible forms of assistance inferred from a reading of Article 93(1)(l) of the ICC Statute.

The reason why the States Parties were concerned about the forcible transfer of witnesses is because of the tradition maintained by states in dealing with witness summonses issued in a foreign jurisdiction. Traditional mutual legal assistance agreements do not contain a mandatory obligation compelling obedience to such a summons issued in a foreign jurisdiction, or the imposition of a criminal sanction against a witness who disobeys such a summons.⁷⁶ According to standard mutual legal assistance practice, a witness who is in custody in the requested state can be transferred to the requesting state only with his or her consent.⁷⁷ This explains (as already mentioned in Chapter One) the existence of Article 93(7)(a)(i) of the ICC Statute, which reflects this provision.⁷⁸ The reservation regarding the transfer of witnesses to another country, however, does not mean that the compellability of witnesses, whose testimony is supposed to serve before a foreign judicial process, is generally excluded. In fact, mutual assistance agreements provide for the execution of a letter rogatory for the taking of witnesses' statements within the territory of the requested state, and by using the enforcement mechanisms provided for in the domestic law of the requested state.⁷⁹ Some mutual assistance agreements also provide for the use of

⁷⁶ Articles 14-15 of the Model Treaty on Mutual Assistance in Criminal Matters ARES/53112 (1990).

⁷⁷ Article 13 of the Model Treaty on Mutual Assistance in Criminal Matters ARES/53112 (1990).

⁷⁸ Kress C and Prost K (2008) 1576; Nderitu W (2014) Para 93; See Defence for Mr. Sang (2014) Para 22.

⁷⁹ Section 13 of the Mutual Assistance in Criminal Matters Act (1987) [Australia]; Section 46 of the Canada Evidence Act (RSC 1985).

technology that enables the visual presence of the witness at the trial or that allows for his or her hearing and examination.⁸⁰

In summary, it can be said that although the possibility of compelling witnesses to testify *at the seat of the Court* was controversial, the general possibility of compelling witnesses was not challenged. In the end, as has been illustrated in Chapter One, the drafters of the ICC Statute decided to place the emphasis on a State Party's cooperation when it comes to compelling witnesses.



⁸⁰ Sections 46-7 of the Canada Evidence Act (RSC 1985).

Chapter Three - The ICTY, ICTR, SCL and SCSL

1. The Legal Basis and Statutes of the ICTY, ICTR, SCL and SCSL

The ICTY and ICTR are *ad hoc* Tribunals created by the Security Council (hereafter SC) acting under Chapter VII of the UN Charter, which empowers it to take appropriate actions for keeping peace and security on the international level. The legal basis of the ICTY is the SC Resolution 827⁸¹, adopted in 1993, and the establishment of the ICTR is based on the SC Resolution 955⁸², adopted in 1994. The reason for the creation of the ICTY was the on-going conflict in the former Yugoslavia which started in 1991. The ICTR was established as a reaction to the genocide that occurred in Rwanda in 1994.



The SCSL is a *hybrid* Court, which was set up in 2002 as a reaction of the humanitarian crimes committed since 1996 during the Sierra Leonean civil war. The Court was 'established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000.'⁸³

The Statutes and Rules of all three tribunals have far-reaching cooperation provisions. The ICTR Statute⁸⁴ empowers the judge, if requested by the Prosecutor, and after the indictment has been confirmed, to issue 'orders and warrants for the arrest, detention, surrender or transfer of

⁸¹ SC Res. 827 (1993) reprinted in 32 *ILM* (1993) 1203 [hereafter 'SC Res. 827 (1993)'].

⁸² SC Res. 955 (1994) reprinted in 33 *ILM* (1994) 1602 [hereafter 'SC Res. 955 (1994)'].

⁸³ Statute of the Special Court for Sierra Leone (2002) 2178 UNTS 138, 145; 97 *AJIL* 295; UN Doc. S/2002/246, appendix II.

⁸⁴ Statute of the International Criminal Tribunal for Rwanda SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 *ILM* 1598 (1994) [hereafter 'ICTR Statute'].

persons, and any other orders as may be required for the conduct of the trial.⁸⁵ An identical provision is found in the ICTY Statute.⁸⁶ The Rules of the ICTR, ICTY, and SCSL provide for the issuance of 'orders, summonses, *subpoenas*, warrants and transfer orders'⁸⁷ [emphasis added] by a Judge of the Trial Chamber '[a]t the request of either party or *proprio motu*'⁸⁸ if 'necessary for the purposes of an investigation or for the preparation or conduct of the trial.'⁸⁹ The Rules of the Special Court for the Lebanon (SCL) have a similar provision. In its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*, Trial Chamber V (A) of the ICC cited the mentioned provisions and concluded as follows:

'The result of these repeated procedural laws is inescapably the crystallisation of customary international criminal procedural law, which recognises that a trial chamber of an international criminal court may subpoena a witness to appear for testimony.'⁹⁰

Based on this conclusion, the Chamber found that if the States Parties to the ICC had intended not to provide the Court with subpoena powers they would have expressed this in clear language.⁹¹ It substantiated this argument by citing the permanent nature of the ICC and its purpose to fight impunity for grave breaches of international criminal law. The Chamber considered it absurd to assume that the ICC, of all courts, should be the only one without such powers.⁹² What needs to be taken into account, though, is that the ICTY and the ICTR are *ad hoc* tribunals established under

⁸⁵ Article 18(2) of the ICTR Statute.

⁸⁶ Article 19(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993).

⁸⁷ Rule 54 of the ICTY Rules of Procedure and Evidence (2009) IT/32/Rev.44 [hereafter 'ICTY Rules (2009)']; Rule 54 of the ICTR Rules of Procedure and Evidence (1996) ICTR: 3/Rev 2 [hereafter 'ICTR Rules (1996)']; SCSL Rules of Procedure and Evidence (2010) [hereafter 'SCSL Rules (2010)'].

⁸⁸ Rule 54 of the ICTY Rules (2009); Rule 54 of the ICTR Rules (1996); Rule 54 of the SCSL Rules (2010).

⁸⁹ Rule 54 of the ICTY Rules (2009); Rule 54 of the ICTR Rules (1996); Rule 54 of the SCSL Rules (2010).

⁹⁰ Trial Chamber (2014) Para 91.

⁹¹ Trial Chamber (2014) Para 92.

⁹² Trial Chamber (2014) Para 92.

Chapter VII of the UN Charter⁹³, whereas the ICC is a treaty-based court. The duty of the UN Member States to cooperate with the *ad hoc* Tribunals derives from the SC resolutions, which served as the legal basis for the establishment of the Tribunals. The SC was using its peacekeeping power under Chapter VII of the UN Charter when adopting these resolutions.⁹⁴ The duty to cooperate with the ICC, on the other hand, derives from the ICC Statute, which is an international treaty.

2. The Law and Jurisdiction of the ICTY and ICTR on Cooperation

The law and jurisdiction of the ICTY and the ICTR are very much in favour of an effective cooperation of states and do not pay much attention to state sovereignty. This, however, was *inter alia* inferred from the special role of the tribunals as a creation of the SC, based on Chapter VII of the UN Charter. In the *Blaskic* case, the Appeals Chamber of the ICTY referred to the "vertical" relationship⁹⁵ between the ICTY and the Member States of the UN and its 'primacy over national courts.'⁹⁶ It described the nature of the relationship between two national judicial systems as 'horizontal,'⁹⁷ indicating by this the dependence of national jurisdiction systems on bilateral treaties and voluntary cooperation.⁹⁸ Since the ICC is a treaty-based court, its relation to its States Parties is also more horizontal in nature.⁹⁹

⁹³ See Ciampi A 'The Obligation to Cooperate' in Cassese A *The Rome Statute of the International Criminal Court: A Commentary* Vol 2 (2002) 1631 [hereafter 'Ciampi A (2002)'].

⁹⁴ SC Res. 827 (1993); SC Res. 955 (1994); Ciampi A (2002) 1610.

⁹⁵ Appeals Chamber ICTY (1997) Para 26.

⁹⁶ Appeals Chamber ICTY (1997) Para 47.

⁹⁷ Appeals Chamber ICTY (1997) Para 47.

⁹⁸ Appeals Chamber ICTY (1997) Para 47.

⁹⁹ Cryer R, Friman H, Robinson D & Wilmschurst E *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 510 [hereafter 'Cryer R, Friman H, Robinson D & Wilmschurst E (2010)']; Friman H 'Cooperation with the International Criminal Court: Some Thoughts on Improvements Under the Current Regime' in Politi M & Gioia F (ed)

Another difference between the ICC and the *ad hoc* Tribunals is that the procedural laws of the ICTY and ICTR are mostly judge-made¹⁰⁰, whereas the Rules of Procedure and Evidence of the ICC were adopted by the Assembly of States Parties and can therefore hardly be questioned by the Court. They only have to step back in case of a conflict with the Statute.¹⁰¹

But despite all these differences between the ICC and the ICTY, as well as the ICC and the ICTR, the law and jurisdiction of the ICTY and ICTR, as well as other international or *hybrid* tribunals, can still influence the jurisdiction of the ICC when their Statutes, Rules or decisions achieve the status of customary law. Article 21(1)(b) of the ICC Statute allows the Court to resort, where appropriate, to ‘applicable treaties and the principles and rules of international law [...]’ and, as has been shown in Chapter One, according to Article 64(6)(b) of the ICC Statute, the Trial Chamber can ‘[r]equire the attendance and testimony of witnesses [...] *as provided in this Statute.*’ Since the ICC Statute does not explicitly provide for subpoena powers of the Court, but does not exclude them either (see also Chapter One), the application of customary law by Trial Chamber V (A) in its Decision on *Prosecutor’s Application for Witness summonses and resulting Request for State Party cooperation* seemed necessary to find a legitimate solution to the issue.¹⁰²

The International Criminal Court and National Jurisdictions (2008) 93; Kaul HP ‘The ICC and International Criminal Cooperation – Key Aspects and Fundamental Necessities’ in Politi M & Gioia F (ed) *The International Criminal Court and National Jurisdictions* (2008) 87; Defence for Mr. William Samoei Ruto and Mr. Joshua arap Sang ‘Public Redacted Version of “Additional Defence submission on the corrected and amended version of ‘Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses”’ ICC-01/09-01/11-1200-Red (2014) Para 43 [hereafter ‘Defence (2014)’].

¹⁰⁰ Sluiter G (2009) 593.

¹⁰¹ Article 51(5) of the ICC Statute.

¹⁰² See Trial Chamber (2014) Para 103.

Despite this apparent necessity' the question still remains if the application of the law and jurisdiction of the *ad hoc* Tribunals is limited to courts similar in nature to the *ad hoc* Tribunals established under Chapter VII of the UN Charter, or if it can also be applied by treaty-based international courts. The Appeals Chamber of the ICTY commented on the issue of state cooperation in its *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*,¹⁰³ emphasising the reliance of the tribunal on state cooperation:

[I]t is self-evident that the International Tribunal in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence summon witnesses and have indictees arrested and surrendered to the International Tribunal.¹⁰⁴

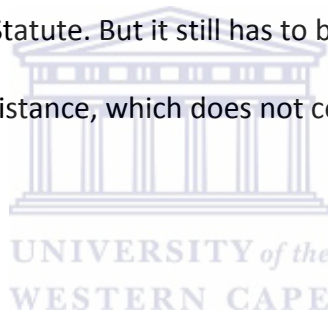
What the Appeals Chamber was stressing here is the importance of state cooperation for the effective working of the Tribunal. The same applies to the ICC, which also lacks its own enforcement powers. This holds irrespective of the legal basis on which the Court was founded. However, the Appeals Chamber continued outlining the consideration of the necessity of state cooperation by the drafters of the ICTY Statute, who explicitly laid down a far-going duty of states to cooperate with the Tribunal in Article 29 of the ICTY Statute (Co-operation and judicial assistance) and Paragraph 4 of the SC resolution 827.¹⁰⁵ Article 29 of the ICTY Statute obligates States to cooperate with the Tribunal. It asks the States for immediate compliance 'with any request for assistance or an order issued by a Trial Chamber'. Certain forms of cooperation are specified in the Article but have, as explicitly mentioned in the Article, no limiting effect on forms of cooperation not mentioned in the provision. Specified is the taking of testimony, but the power

¹⁰³ Appeals Chamber ICTY (1997).

¹⁰⁴ Appeals Chamber ICTY (1997) Para 26.

¹⁰⁵ SC Res. 827 (1993).

to compel witnesses is not included. Article 86 of the ICC Statute, which commences Part 9 of the ICC Statute (International Cooperation and Judicial Assistance), limits the duty of the States Parties to cooperate with the Court to forms of cooperation that are 'in accordance with the provisions of this Statute'. Thus, the provision in the ICC Statute, which delineates the duty to cooperate with the Court, limits this duty to forms of cooperation that can be found in the Statute, whereas Article 29 of the ICTY Statute leaves open the possibility of requesting forms of cooperation that are not included in the Statute. However, this does not mean that the duty of the States Parties of the ICC to cooperate with the Court is, where it exists, of a weaker form than the duty to cooperate, deducing from the ICTY Statute. But it still has to be clarified if compelling a witness constitutes a form of State Party assistance, which does not contradict the intention of the drafters of the ICC Statute.



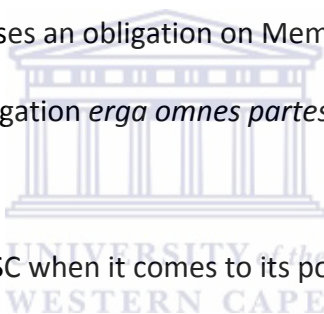
In Paragraph 4 of the SC Resolution 827 the SC expressed its decision for full cooperation of all States, in accordance with the Resolution and the ICTY Statute. It obligated all States to implement the provisions of the Resolution and the ICTY Statute into their domestic law. In doing so, The SC explicitly mentioned the obligation to cooperate found in Article 29 of the ICTY Statute. Paragraph 4 of the Resolution is comparable to Article 86 of the ICC Statute in that it limits the duty to cooperate to those forms of assistance expressed in the Resolution or the ICTY Statute. Since Article 29 of the ICTY Statute includes *any* requested form of assistance, the limitation to forms of assistance expressed in the ICTY Statute in Paragraph 4 of the Resolution seems void. But the same applies to the ICC Statute, which expands the possible requests for assistance to those 'not prohibited by the law of the requested State,' in Article 93(1)(l) and thus, making void the

abovementioned limitation of Article 86 of the ICC Statute. This brings us (again) to the question of what the term *prohibited* in Article 93(1)(l) of the ICC Statute means. This question is accompanied by the question of how much power the States Parties of the ICC intended to grant the ICC. The ICC, as a treaty-based court, has – in contrast to the *ad hoc* tribunals- a relation with its States Parties that is more horizontal in nature (see above). One could, therefore, come to the conclusion that the term *prohibited* in Article 93(1)(l) of the ICC Statute does not actually mean a State that is requested by the ICC to assist the Court by compelling a witness, has to prove that its domestic law explicitly prohibits this form of assistance in order to refuse it. However, if the drafters of the ICC Statute intended to limit the power of the ICC regarding the assistance of States Parties, they could have phrased the limitation by using a clearer language, which excludes forms of assistance *not provided for* in the law of the requested State. Thus, taking into account the above-cited statement of the Appeals Chamber of the ICTY and the mentioned provisions in the ICTY Statute and the SC Resolution 827, there is no reason why the ICC should not, under Article 21(1)(b) of the ICC Statute, apply the law and jurisdiction of the ICTY (and the ICTR) when it comes to cooperation.

However, the Appeals Chamber referred to another source of power, which is special in its impact on the *ad hoc tribunals*. The Appeals Chamber determined that the binding force, deducing from Article 29 of the ICTY Statute and Paragraph 4 of the SC Resolution 827 (1993), ‘derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council Resolution adopted pursuant to those provisions.’¹⁰⁶ The Appeals Chamber described the

¹⁰⁶ Appeals Chamber ICTY (1997) Para 26.

legal basis of Article 29 of the ICTY Statute as ‘exceptional’¹⁰⁷ and found that it provided the Tribunal with ‘novel and [...] unique power’¹⁰⁸ which allows it to ‘issue orders to sovereign States’¹⁰⁹. The Appeals Chamber stated that in principle, under customary international law, states ‘cannot be “ordered” either by other States or by international bodies’.¹¹⁰ It then emphasised the special role of the SC as a peace and security keeping institution. It stressed that the SC, in its function as such an institution, required ‘all Member States to comply with orders and requests of the International Tribunal.’¹¹¹ It pointed out that ‘the nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations’¹¹², but that it rather ‘imposes an obligation on Member States towards all other Members or, in other words an “obligation *erga omnes partes*” [...]’.¹¹³



The ICC cannot (always) rely on the SC when it comes to its powers, but it can rely on its States Parties that are bound by the rule of *pacta sunt servanda*, which ‘houses the rule of good faith’.¹¹⁴ In its *Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation*, Trial Chamber (V)(A) of the ICC ascribed the rule a strong effect:

‘The consideration of an international institution that is effective in the performance of its functions and the fulfilment of the mandate entrusted to it by member States firmly justifies, as a matter of good faith, a general obligation on Rome Statute States Parties to assist the Court in compelling the appearance of a witness who is under the subpoena of a Trial Chamber.’¹¹⁵

¹⁰⁷ Appeals Chamber ICTY (1997) Para 26.

¹⁰⁸ Appeals Chamber ICTY (1997) Para 26.

¹⁰⁹ Appeals Chamber ICTY (1997) Para 26.

¹¹⁰ Appeals Chamber ICTY (1997) Para 26.

¹¹¹ Appeals Chamber ICTY (1997) Para 26.

¹¹² Appeals Chamber ICTY (1997) Para 26.

¹¹³ Appeals Chamber ICTY (1997) Para 26.

¹¹⁴ Trial Chamber (2014) Para 133.

¹¹⁵ Trial Chamber (2014) Para 134.

The Trial Chamber then explained that the system of cooperation of the ICC is, when it comes to witnesses, not comparable with mutual assistance treaties between states whose judicial systems of their contractual partners is unknown.¹¹⁶ It found that because of this lack of knowledge, it made sense to restrict the compellability of witnesses.¹¹⁷ The ICC, in contrast, is a court created by its States Parties, which entrusted it with a 'mandate and functions of great magnitude'.¹¹⁸ The Trial Chamber found that it follows from this that 'those States Parties have a shared interest in the effective discharge and performance of the Court's mandate and functions.'¹¹⁹

If the SC, while acting under Chapter VII of the UN Charter, refers a situation to the ICC and accompanies it with cooperation obligations, the ICC even deduces its powers from the SC, just like the *ad hoc* tribunals. In that case it can be argued that the ICC is in the position to require the assistance of Member States of the UN, which are not States Parties to the ICC Statute.¹²⁰ Consequently this could even mean that a referral of the SC grants the ICC the power to operate under Chapter VII of the UN Charter in a similar manner as the ICTY and ICTR are empowered to.¹²¹

¹¹⁶ Trial Chamber (2014) Para 134.

¹¹⁷ Trial Chamber (2014) Para 134.

¹¹⁸ Trial Chamber (2014) Para 134.

¹¹⁹ Trial Chamber (2014) Para 134.

¹²⁰ Oosterveld V, Perry M, McManus J 'The Cooperation of States With the International Criminal Court' in *Fordham International Law Journal* Volume 25 Issue 3 Article 14 (2001) 767 788 [hereafter 'Oosterveld V, Perry M, McManus J (2001)'].

¹²¹ Oosterveld V, Perry M, McManus J (2001) 788.

3. Jurisdiction of the SCSL and ICTR on Subpoena Powers

In response to a request by the Prosecutor of the SCSL to the Trial Chamber to subpoena Naomi Campbell in the *Charles Taylor* case, one of the arguments of the defence against this request was ‘the fact that the Special Court lacks the institutional arrangements and so-called Chapter VII powers under the United Nations Charter for enforcement [...]’.¹²² In its decision on that matter, however, the Trial Chamber considered an Appeals Chamber decision, in which the Appeals Chamber found that it was in the Trial Chamber’s discretion to decide on the issuance of a subpoena, and that it would do so ‘if it is “necessary” to bring to court an unwilling, but important, witness’.¹²³ In its view, the crucial question was whether the subpoena’s effect would be necessary to ensure a fair trial.¹²⁴ In that sense, the decision is in line with the jurisdiction of the ICTR. As has been mentioned in Chapter One, the Trial and Appeals Chambers decided against the transfer of a case to a Rwandan court because they found that a fair trial could not be assured due to the lack of subpoena powers of the national courts in respect of foreign witnesses.¹²⁵

The SCSL is not a subsidiary body of the UN. The UN was, like the Government of Sierra Leone, only a party to the agreement that provided the basis for the establishment of the SCSL. The SCSL can, therefore, just like the ICC not infer powers from the SC. However, in its Resolution 1688¹²⁶

¹²² *The Prosecutor v. Charles Ghankay Taylor* Defence response to Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell Case SCSL No.-03-01-T-968 (20 May 2010) Para 17.

¹²³ Decision on Prosecution Motion for the Issuance of a Subpoena to Naomi Campbell SCSL (Trial Chamber) in *Prosecutor v Charles Ghankay TAYLOR* SCSL (Trial Chamber) Case No.-03-1-T (2010), Trial Chamber, decision of 30 June 2010 Para 12; Decision on Interlocutory Appeals against Trial Chamber Decision refusing to Subpoena the President of Sierra Leone SCSL (Appeals Chamber) in *Prosecutor v. Norman, Fofana and Kondewa* SCSL (Appeals Chamber) Case No.-04-14-T-688 (2006), Appeals Chamber, decision of 11 September 2006 Paras 8-9 [hereafter ‘Appeals Chamber SCSL (2006)’].

¹²⁴ Appeals Chamber SCSL (2006) Para 9.

¹²⁵ Trial Chamber ICTR (2008) Paras 80-1 and 104; Appeals Chamber ICTR (2008).

¹²⁶ SC Res. 1688 (2006).

the SC, while '[a]cting under Chapter VII of the Charter of the United Nations'¹²⁷, explicitly encouraged all States to assist the SCSL in the case of former President Taylor by ensuring the prompt availability of witnesses if so requested by the Court.¹²⁸ This is recalled in the above-mentioned decision of the Trial Chamber of the SCSL.¹²⁹ Therefore, one could argue that the ICC only has subpoena powers in cases that were referred to it by the SC or when the SC explicitly ascribed such powers to the ICC. First, however, it has to be considered that the Trial Chamber of the SCSL only *recalled* the encouragement of the SC to make witnesses available to the SCSL and did not base its whole decision on it. Second, since the SC only *encouraged* States to ensure witness availability, no binding effect arises from this. Third, it seems implausible to rely so much on the SC and its granted powers when it comes to the ICC, since the ICC constitutes an independent judicial institution. The ICC Statute only ascribes the SC a crucial role for some matters, which mainly concern non-States Parties. Trial Chamber V (A) of the ICC argues in this sense in its *Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation*. Instead of focusing on the powers that the ICC can or cannot derive from the SC, the Trial Chamber outlined the powers the ICC derives from its legal nature.¹³⁰ It emphasised that the ICC has an international legal personality, as defined in Article 4(1) of the ICC Statute. The Trial Chamber substantiated its finding with the *Reparation Case*,¹³¹ in which the International Court of Justice (ICJ) found that by entrusting certain functions to the UN, its Member States had 'with the attendant duties and responsibilities, [...] clothed it with the

¹²⁷ SC Res. 1688 (2006) 2.

¹²⁸ SC Res. 1688 (2006) 2.

¹²⁹ Trial Chamber SCSL (2010) Para 11.

¹³⁰ Trial Chamber (2014) Para 70.

¹³¹ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* (1949) [ICJ] *ICJ Reports* (1949) 174 [hereafter 'ICJ (1949)'].

competence required to enable those functions to be effectively discharged.¹³² From this finding the Trial Chamber drew the conclusion, that in case an international institution or body cannot effectively discharge the functions entrusted to it by its States Parties without exercising a certain competence or capacity (power), it must be deemed that the body or institution has that power.¹³³ It also mentioned that since Article 4(1) of the ICC Statute explicitly equips the ICC with international legal personality it was easier for it to argue in favour of implied powers of the ICC than it was for the ICJ to argue in favour of implied powers of the UN in the *Reparation* Case. This is due to the missing of a provision that explicitly vests the UN with international legal personality, which required the ICJ to make an analysis of the characteristics and functions of the UN first.¹³⁴



¹³² ICJ (1949) 179.

¹³³ Trial Chamber (2014) Para 73.

¹³⁴ Trial Chamber (2014) Para 70.

Chapter Four - The Law of the States Parties to the ICC

1. Three Possibilities of Incorporating Article 93(1)(d) of the ICC Statute into Domestic Law

The approaches taken by the States Parties to the ICC to implement their duty to cooperate with the Court differ. According to the Office of the Prosecutor of the ICC in its *Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses (ICC-01/09-01/11-1120-Conf-Exp)"*, the approaches taken by the States Parties to the ICC to regulate summonses for witness appearance can be divided into three categories.¹³⁵ In order to implement Article 93(1)(d) of the ICC Statute ('[t]he service of documents, including judicial documents') some States Parties adopted provisions that explicitly authorise their national authorities to impose sanctions on witnesses who fail to comply with a summons to appear, issued by the ICC.¹³⁶ Other States Parties have laws providing for service of summonses that include witness appearance, but no provisions regulating the consequences of a witnesses' failure to appear.¹³⁷ They neither explicitly exclude non-voluntary witness appearance before the ICC nor provide for sanctions applicable to enforce a summons.¹³⁸ The Office of the Prosecutor argues that in such a case Article 93(1)(l) of the ICC Statute is engaged.¹³⁹ According to this article, as mentioned in Chapter One, the requested State Party must provide '[a]ny other type of assistance, *which is not prohibited*' (emphasis added) by its domestic law. The laws of a third category of States Parties explicitly exclude the possibility of compelling a witness by drawing a link between Articles

¹³⁵ OTP (2013) Para 77

¹³⁶ OTP (2013) Para 77(1).

¹³⁷ OTP (2013) Para 77(2).

¹³⁸ OTP (2013) Para 77(2).

¹³⁹ OTP (2013) Para 77(2).

93(1)(d) and 93(1)(e) of the ICC Statute.¹⁴⁰ The letter provides for the facilitation of *voluntary* witness appearance (also mentioned in Chapter One). The Office of the Prosecutor came to the conclusion that States Parties whose laws explicitly provide for the compellability of a witness as a possible form of assistance, and States Parties that do not prohibit it, can be requested by the Court to secure the appearance of a witness in case he or she is not cooperative.¹⁴¹ It stressed that Article 93(1)(l) of the ICC Statute 'is drafted in the negative'¹⁴² and does therefore not 'rely on the positive inclusion of an enabling provision in national law'¹⁴³ but only requires the absence of a prohibiting provision to give rise to a form of assistance that cannot be found elsewhere in the Statute.¹⁴⁴ The Office of the Prosecutor, however, clarified that its finding does not mean that when it asks the Court to summon a witness, the State Party in question is obligated to facilitate the physical transport of the witness to The Hague in order to make him or her testify at the seat of the Court, but that the Court can request numerous other measures to secure the appearance of witnesses before the Court.¹⁴⁵ It specified its finding by mentioning the possibility of the Court requesting the requested State Party 'to serve a summons for a witness to appear before the ICC at a suitable venue on'¹⁴⁶ its territory.¹⁴⁷ The Office of the Prosecutor added that video-link technology, *in situ* hearings, or the combination of video link and the presence of counsel in the requested State Party, are possible means for the hearings of such testimonies.¹⁴⁸ The Office of the Prosecutor stated that it was crucial that national authorities 'apply their existing domestic

¹⁴⁰ OTP (2013) Para 77(3).

¹⁴¹ OTP (2013) Para 78.

¹⁴² OTP (2013) Para 83.

¹⁴³ OTP (2013) Para 83.

¹⁴⁴ OTP (2013) Para 83.

¹⁴⁵ OTP (2013) Para 85.

¹⁴⁶ OTP (2013) Para 86.

¹⁴⁷ OTP (2013) Para 86.

¹⁴⁸ OTP (2013) Para 86.

powers to secure the attendance of witnesses¹⁴⁹ in order to secure testimony before the ICC when so requested.¹⁵⁰

States Parties that explicitly provide for the possibility of compelling a witness, if so requested by the ICC, are Australia¹⁵¹, South Africa,¹⁵² Finland (compliance can, however, only be secured by means of a fine, as coercive measures are excluded)¹⁵³, Germany,¹⁵⁴ and Georgia (given that the ICC covers the witnesses transportation expenses).¹⁵⁵ States Parties that neither provide for the compellability of witnesses to testify before the ICC, nor exclude it, are: Kenya;¹⁵⁶ Uruguay;¹⁵⁷ Ireland;¹⁵⁸ Mauritius;¹⁵⁹ Samoa;¹⁶⁰ Trinidad & Tobago;¹⁶¹ New Zealand;¹⁶² the United Kingdom;¹⁶³ Sweden;¹⁶⁴ Uganda;¹⁶⁵ and the Union of the Comoros.¹⁶⁶ States Parties whose laws explicitly exclude the compellability of witnesses are: Austria;¹⁶⁷ Switzerland;¹⁶⁸ Lichtenstein;¹⁶⁹ the Czech Republic;¹⁷⁰ Portugal;¹⁷¹ Bulgaria;¹⁷² Slovakia;¹⁷³ and The Netherlands.¹⁷⁴

¹⁴⁹ OTP (2013) Para 86.

¹⁵⁰ OTP (2013) Para 86.

¹⁵¹ Section 72 of the International Criminal Court Act 2002 No. 41 (2002).

¹⁵² Section 19 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

¹⁵³ Section 5 of the Act on the implementation of the provisions of a legislative nature of the Rome Statute of the International Criminal Court and on the application of the Statute No. 1284/2000 (2002).

¹⁵⁴ Section 53(1) of the Law on Cooperation with the International Criminal Court, Bundesgesetzblatt vol. 2002 part I No. 41, Bonn (of 28. June 2002).

¹⁵⁵ Article 38(2) of the Law of Georgia on Cooperation between the International Criminal Court and Georgia (2003).

¹⁵⁶ Section 86 of the International Crimes Act 2008.

¹⁵⁷ Section 66 of Cooperation con la Corte Penal Internacional en Materia de Lucha contra el Genocidio, los Crimes de Guerra y de Lesa Humanidad (of 4 October 2006).

¹⁵⁸ Section 54 of the International Criminal Court Act 2006 Number 30 of 2006.

¹⁵⁹ Article 28 of the International Criminal Court Act 2011, Act No. 27 of 2011.

¹⁶⁰ Article 61 of the International Criminal Court Act No. 26 of 2007.

¹⁶¹ Section 91 of The International Criminal Court Act 2006.

¹⁶² Section 91 of The International Criminal Court Act 2000.

¹⁶³ Section 31 of the International Criminal Court Act 2001.

¹⁶⁴ Section 18 of the Cooperation with the International Criminal Court Act N. 2002.329 (of 8 May 2002).

¹⁶⁵ Section 48 of the International Criminal Court Act 2010.

¹⁶⁶ Article 20 of Law No. 07-002 Law on cooperation with the ICC.

¹⁶⁷ Section 16 of the Federal Law no 135: Cooperation with the International Criminal Court 2002.

¹⁶⁸ Article 37 Federal Law on Cooperation with the International Criminal Court of 22 June 2001.

As regards States Parties that neither explicitly provide for the compellability of witnesses to testify before the ICC nor prohibit it, the question arises if the concerned State Party itself or the ICC has the competence to interpret the State Party's national law. The State Party concerned could deny the possibility of compelling its citizens. As mentioned in Chapter One, the affected State Party could assert that its constitution allows it to deprive a citizen of his or her freedom only if it has a national law which explicitly allows it to do so.¹⁷⁵ In its *Public Redacted Version of "Additional Defence submission on the corrected and amended version of Prosecutions request under article 64(6)(b) and article 93 to summon witnesses"* William Samoei Ruto and Mr. Joshua Arap Sang's defence argued that even if the law of a State Party does not explicitly exclude the compellability of witnesses, the state is still free to interpret its own constitution and subsidiary legislation in good faith, and, may come to the conclusion that compelling witnesses to testify before the ICC is (although not explicitly) prohibited under its law.¹⁷⁶ The defence added that '[i]t is not for the Chamber to interpret a State's domestic legislation in the manner most desirable to the Court'¹⁷⁷, but for the relevant government authorities of the requested State Party, and potentially, for the national courts.¹⁷⁸ The defence stated furthermore that this competence of a State Party's institutions 'cannot be overridden by the Chamber.'¹⁷⁹ Additionally, the defence contended that since the ICC Statute deals with the issue of witness appearance by providing for the facilitating of

¹⁶⁹ Article 17 of the Law on cooperation with the ICC and other international tribunals.

¹⁷⁰ Section 433 of the Code of Criminal Procedure (Act No. 141/1961 Coll., as amended).

¹⁷¹ Article 154, Law No. 144/99, of 31 August, on International Judicial Cooperation in Criminal Matters.

¹⁷² Article 473 of the Criminal Procedure Code (of 29 April 2006).

¹⁷³ Section 536 Criminal Procedure Code (Law No. 301 of 2005).

¹⁷⁴ Introduction to the International Criminal Court (Implementation) Act, 3.

¹⁷⁵ Mugai (2014) 49.

¹⁷⁶ Defence (2014) Para 32.

¹⁷⁷ Defence (2014) Para 32.

¹⁷⁸ Defence (2014) Para 32.

¹⁷⁹ Defence (2014) Para 32.

voluntary witness appearance by the States Parties, one cannot come to the conclusion that the Court has the inherent power to issue a summons *compelling* the appearance of witnesses.¹⁸⁰ The defence argued that since the enforcement of a witness summons implies the application of penalties such as fines or/and arrests, the consequence is deprivation of the liberty of the witness concerned, which would require that the principle of legal certainty be considered.¹⁸¹ It pointed out that this principle was a universal human rights standard, citing provisions in human rights instruments that protect individuals against the unlawful deprivation of their liberty.¹⁸² It stressed that a lawful deprivation of liberty must be clearly prescribed by procedural law, the application of which must be foreseeable.¹⁸³ The defence found that the ICC Statute does not meet the mentioned requirements.¹⁸⁴ However, as has been stated in Chapter One, since the ICC complements the jurisdiction of its States Parties, it is unsurprising that it sees regards itself as being vested with the same powers as the national courts of its States Parties. This should be seen neither as intervening in the sovereignty of a state, since the details of the securing of witness summonses are left to the states, nor as a competence that requires an additional legal basis, besides the already existing domestic regulations. An additional legal basis would be required only if the ICC had its own enforcement agents, with their own code of law, as this code could differ from the domestic laws of States Parties regulating the liberty of the individual. The defence itself stressed that unlike the ICC, the ICTY has the power to subpoena individuals directly and could

¹⁸⁰ Defence (2014) Paras 15 and 33.

¹⁸¹ Defence (2014) Para 47.

¹⁸² Defence (2014) Para 47, cited are: Article 5 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (1953) ETS 5, 213 U.N.T.S. 222 and Articles 9. 1. and 9. 5. of the International Covenant of Civil and Political Rights GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

¹⁸³ Defence (2014) Para 47-9.

¹⁸⁴ Defence (2014) Para 50.

even institute contempt proceedings against a non-compliant witness.¹⁸⁵ The defence also expressed the opinion that, ascribing the ICC subpoena powers means imposing retroactive penalties on the witnesses concerned, which is prohibited under widely- recognized international human rights conventions, and the ICC Statute itself.¹⁸⁶ It cited Article 23 of the ICC Statute, which prohibits the imposition of penalties which are incompatible with the Statute, and Article 22(2) of the ICC statute, which dictates that crimes should be construed strictly, the prohibition of drawing analogies, and where the law is ambiguous, an interpretation in favour of the accused.¹⁸⁷ But again, since it is the law of the requested State Party that the Court requests should be enforced, the objections of the defence are inappropriate.



2. Subpoena Powers of Criminal Courts as a General Principle of Law

To interpret the crucial provisions of the ICC Statute in a manner which leads to the conclusion that the Court has subpoena powers could be supported by the national laws of the States Parties to the ICC if an analysis of their laws results in the conclusion that, as a general principle of law, criminal courts are vested with subpoena powers. Article 21(1)(c) of the ICC Statute provides for the application of 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime' where the application of the laws listed in letter a and b of the Article fail to help the Court to come to a conclusion. Here, the existence of such a general principle of law would only be seen as a support of a certain interpretation of the ICC Statute,

¹⁸⁵ Defence (2014) Para 36.

¹⁸⁶ Defence (2014) Para 52.

¹⁸⁷ Defence (2014) Para 52.

which, as has been shown, especially in Chapter One, can, by itself, be interpreted in a manner, which allows the conclusion that the Court is vested with subpoena powers. The general principles of law are dealt with in Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute).¹⁸⁸ According to this provision, the ICJ ‘shall apply [...] the general principles of law recognized by civilized nations’. General principles of law are principles of law that are to be determined through comparison and that apply concordantly in the domestic laws of the civilized nations.¹⁸⁹ The provisions that constitute these principles are originally provisions that are alien to international law and have not been subject to international law making procedures.¹⁹⁰ Only principles of essential importance for the domestic legal systems from which they derive, may be considered as a basis of a general principle of law.¹⁹¹ In order to be considered as being of an essential importance, the principles have to be essential for the functioning of domestic legal orders.¹⁹² The legal principles must also be suited for a transfer into international law.¹⁹³ Thus, they must be compatible with the character of the international legal order.¹⁹⁴

The derivation of the power of the ICTY to compel states or individuals (in particular government officials) to produce evidence by recourse to the source of general principles of law pursuant to Article 38(1)(c) of the ICJ Statute has been analysed by Eser and Ambos in an *amicus curiae* brief for the ICTY on *The Power of National Courts to Compel the Production of Evidence and its*

¹⁸⁸ United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at:

<http://www.refworld.org/docid/3deb4b9c0.html> [accessed 18 October 2014].

¹⁸⁹ Maikowski T *Staatliche Kooperationspflichten gegenüber dem Internationalen Strafgerichtshof* (2002) 68 [hereafter ‘Maikowski T (2002)’].

¹⁹⁰ Maikowski T (2002) 68.

¹⁹¹ Maikowski T (2002) 68.

¹⁹² Maikowski T (2002) 68.

¹⁹³ Maikowski T (2002) 68-9.

¹⁹⁴ Maikowski T (2002) 69.

Limits.¹⁹⁵ The questions examined were whether ‘national courts have the power to compel the production of evidence by [...] forcing a witness to appear and testify’¹⁹⁶, whether any and what kinds of sanctions ‘exist to enforce such orders’¹⁹⁷, whether the power to do so is limited, having regard to particular interests of national security, and what official function is ascribed to witnesses.¹⁹⁸ The brief looked at the law in both civil and common-law jurisdictions. The civil law systems analysed are those of France, Germany, Italy, Spain, The Netherlands, Belgium, Denmark, Poland, Turkey and Argentina¹⁹⁹ (besides Turkey, all of these states are States Parties to the ICC). Eser and Ambos conclude that the powers of civil law courts regarding the compellability of testimonial evidence are far-reaching.²⁰⁰ The common law systems analysed are those of the USA, England and Wales and Nigeria²⁰¹ (England and Wales and Nigeria are States Parties to the ICC). Eser and Ambos conclude that these systems ‘provide for similar compulsory mechanism as the civil law system[s].’²⁰² In their opinion whatever differences there are, this is due to the different ways in which common law and civil law systems are structured.²⁰³ Since the common law is characterised by adversarial court proceedings, it is up to the parties themselves to collect and to adduce the relevant evidence.²⁰⁴ In common law systems, therefore, it is the court that turns to the parties for the evidence, as churning up the evidence itself, as is the norm in civil law systems,

¹⁹⁵ Eser A & Ambos K *The Power of National Courts to Compel the Production of Evidences and its Limits* An “amicus curiae” brief to the International Criminal Tribunal for the former Yugoslavia in *European journal of crime, criminal law and criminal justice* 6 (1998) 3-20 [hereafter ‘Eser A & Ambos (1998)’].

¹⁹⁶ Eser A & Ambos K (1998) 4.

¹⁹⁷ Eser A & Ambos K (1998) 4.

¹⁹⁸ Eser A & Ambos K (1998) 5.

¹⁹⁹ Eser A & Ambos K (1998) 5-8; with regard to France, Germany and Spain see also Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum* ICTY (Trial Chamber) in *Prosecutor v Tihomir Blaskic* ICTY (Trial Chamber) Case No. IT-95-14 (1997), ICTY Trial Chamber, decision of 18 July 1997 Para 39 [hereafter ‘Trial Chamber ICTY (1997)’].

²⁰⁰ Eser A & Ambos K (1998) 8.

²⁰¹ Eser A & Ambos K (1998) 8-9; with regard to the US and England see also Trial Chamber ICTY (1997) Para 36.

²⁰² Eser A & Ambos K (1998) 9; see also Zahar A & Sluiter G (2008) 368.

²⁰³ Eser A & Ambos K (1998) 9.

²⁰⁴ Eser A & Ambos K (1998) 9.

would run counter to the nature and the purpose of the accusatorial criminal proceedings.²⁰⁵

Judges pressurise a non-cooperative witness only if the parties rely on the witness's active participation.²⁰⁶ The amicus brief states that the common feature of the two systems with regard to the necessity 'of using compulsory measures to obtain all relevant evidence'²⁰⁷ does not change because of the different approaches.²⁰⁸

Eser and Ambos conclude that national courts have wide powers to compel witnesses to appear and testify.²⁰⁹ They finally conclude that 'as a *general principle of law* an international criminal court must have compulsory powers to produce evidence'²¹⁰. Eser and Ambos also find that their analysis clearly showed that for national courts to function effectively and to impose appropriate penalties, they need to be equipped with 'compulsory powers with regard to the gathering of evidence'²¹¹ and that the same applies to international criminal tribunals.²¹² Eser and Ambos agree with a statement made by Trial Chamber II of the ICTY on the necessity of a Trial Chamber to have 'all the relevant evidence before it'²¹³ in order to make an ultimate finding of an individual's guilt or innocence and in order to impose an appropriate sentence.²¹⁴ They then continue by stating that for this purpose, the tribunal depends on the cooperation of states, and that in case 'these states, contrary to their obligations under the UN-Charter (Art. 25), the Statute of the ICTY and the

²⁰⁵ Eser A & Ambos K (1998) 9.

²⁰⁶ Eser A & Ambos K (1998) 9.

²⁰⁷ Eser A & Ambos K (1998) 9.

²⁰⁸ Eser A & Ambos K (1998) 9.

²⁰⁹ Eser A & Ambos K (1998) 10.

²¹⁰ Eser A & Ambos K (1998) 19.

²¹¹ Eser A & Ambos K (1998) 19.

²¹² Eser A & Ambos K (1998) 19.

²¹³ Trial Chamber ICTY (1997) Para 31.

²¹⁴ Trial Chamber ICTY (1997) Para 31.

Dayton Agreement²¹⁵ do not cooperate, powers of compulsion are required.²¹⁶ Since reference is made to the UN-Charter and the ICTY Statute, which, as has been shown in Chapter Three, is more open in its wording with regard to forms of cooperation which are not explicitly mentioned in the Statute, than the ICC Statute, it is questionable whether Eser and Ambos's findings are applicable to the ICC, or if their whole analysis is based on the contents of the UN-Charter, ICTY Statute and Dayton agreement and was not meant to be transplantable to an international court of a different nature, such as the ICC. But these instruments are referenced only with respect to the Trial Chamber II decision, to which the Eser and Ambos findings are limited.

Although Eser and Ambos did their analysis for the ICTY, they refer to international criminal courts in a generalised manner and make reference to the special role of the ICTY as an establishment of the SC only once. They also do so only because they refer to the relevant decision of Trial Chamber II of the ICTY. Their findings should, thus, be seen as applicable to all international criminal courts. Therefore, with regard to the States Parties to the ICC, which, in their domestic law, do not explicitly allow nor exclude the compellability of witnesses before the ICC, there is no reason why it should not be possible to resort to general principles of law in order to support an interpretation of the ICC Statute and the laws of the concerned states which gives the Court the power to request States Parties to compel witness appearance before it.

²¹⁵ Eser A & Ambos K (1998) 19.

²¹⁶ Eser A & Ambos K (1998) 19.

3. Limits to Subpoena Powers

Trial Chamber II of the ICTY examined a subpoena directed to the Defence Minister and High Government Officials of the Republic of Croatia. Eser and Ambos took this decision as an opportunity to analyse if, due to their status or the information in their possession, such persons are granted privileged treatment when required as witnesses in a national criminal trial. Besides the possibility of such limits, Trial chamber II of the ICTY, however, found that, in general, compulsion powers of courts are limited to 'relevant, necessary, or in some cases, desirable'²¹⁷ evidence.²¹⁸

Eser and Ambos, having again analysed civil-and common law systems,²¹⁹ concluded that although ministers and high government officials are exceptionally privileged when it comes to their duties as witnesses they 'are not completely exempted from producing evidence in criminal trials'.²²⁰

Thus, even though they may be given 'the option of making a written instead of an oral declaration'²²¹, they are still required to 'produce evidence *in one way or another*'.²²² Crucial is, however, what privileges official witnesses have regarding the content of the evidence they are required to provide.²²³ The so-called limits *ratio materiae* have already been dealt with by Trial Chamber II of the ICTY, which, after having reviewed national laws, found that 'national security interests may constitute a legitimate limitation [...] to disclose or produce information before

²¹⁷ Trial Chamber ICTY (1997) Para 100.

²¹⁸ Trial Chamber ICTY (1997) Para 100.

²¹⁹ Eser A & Ambos K (1998) 11-18.

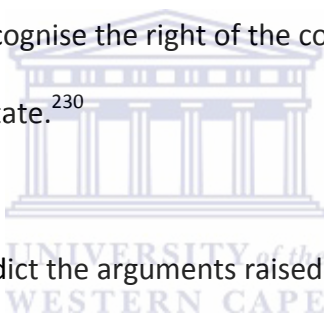
²²⁰ Eser A & Ambos (1998) 18.

²²¹ Eser A & Ambos (1998) 18.

²²² Eser A & Ambos (1998) 18.

²²³ Eser A & Ambos (1998) 18.

municipal courts of law.²²⁴ It also found, however, that '[a] unilateral right of a State to withhold information necessary for the proceedings on national security grounds would prejudice the capacity of the International Tribunal to ensure a fair trial'.²²⁵ Eser and Ambos conclude that their analysis showed that even under national legal systems, a witness is not automatically excused from the production of evidence on grounds of 'such a national security privilege',²²⁶ but that 'some form of *judicial control*'²²⁷ is required by both civil-and common law systems.²²⁸ In their final conclusion Eser and Ambos therefore find that if a state that is asked by an international criminal court to produce evidence, objects for reasons of national security, the objection must be substantiated and the state must recognise the right of the court 'to conduct a judicial evaluation of'²²⁹ the reasons furnished by the state.²³⁰



The Eser and Ambos findings contradict the arguments raised by the defence counsel of William Samoei Ruto and Joshua arap Sang, namely that it is up to the States Parties themselves to interpret their domestic law.²³¹ Although the defence counsel outlined the differences between the *ad hoc* tribunals and the ICC with regard to their vertical and horizontal system of cooperation,²³² the Eser and Ambos brief refers generally to *international criminal courts* without considering and distinguishing the legal basis on which they were founded. What needs to be said

²²⁴ Trial Chamber ICTY (1997) Para 126.

²²⁵ Trial Chamber ICTY (1997) Para 131.

²²⁶ Eser A & Ambos K (1998) 18.

²²⁷ Eser A & Ambos K (1998) 18.

²²⁸ Eser A & Ambos K (1998) 18.

²²⁹ Eser A & Ambos K (1998) 19.

²³⁰ Eser A & Ambos K (1998) 19.

²³¹ Defence (2014) Para 32.

²³² Defence for Mr. Sang (2014) Para 43.

here is that the Eser and Ambos brief became public before the ICC Statute came into effect although its adoption was foreseeable.

In her book *State co-operation duties in respect of the International Criminal Court*, Maikowski differs from the Eser and Ambos findings, stressing the difficulty of determining the extent of the powers of an international criminal court by scrutinizing the extent of the power of national courts, pointing to the sovereignty that states enjoy.²³³ She argues that subpoena powers of national courts *vis-à-vis* states are attributed to the coherence of states and the fact that even organs of the state are subordinate to the law.²³⁴ In national legal systems even the state and its agents are bound by law and derive their competence from the laws.²³⁵ Immunities are granted only to ensure that the legal system functions, and that is why even state organs must endure controls by courts, which are the 'watchdogs' of the system.²³⁶ She stresses that the situation in international law is totally different, given that states face each other as equals.²³⁷ She further states that international law is founded on the will of sovereign states and that every competence attributed to an international or supranational organisation derives from the power given to it by states.²³⁸ Maikowski argues that while the member states of the UN have vested the SC with coercive powers, the coercive powers of other international institutions have not yet been

²³³ Maikowski T (2002) 69.

²³⁴ Maikowski T (2002) 69.

²³⁵ Maikowski T (2002) 69.

²³⁶ Maikowski T (2002) 69.

²³⁷ Maikowski T (2002) 69.

²³⁸ Maikowski T (2002) 69-70.

accepted.²³⁹ She warns that the lack of such an authorization cannot just be overridden by deducing competences from national laws.²⁴⁰

In contrast to the ICTY, however, the ICC deduces its competences directly from its States Parties and not indirectly through an intermediary entity. The Member States to the UN established the SC and vested it with certain powers; the SC has, however, discretion, with regard to the application of those powers, which is, therefore, not exactly foreseeable for the UN Member States. The States Parties to the ICC, on the contrary, established and vested the ICC with competences themselves. They had a purpose in mind when they did so and since this purpose was to stop impunity, it seems legitimate to draw parallels between the competences of national courts and the ICC. While it was not foreseeable for the member states of the UN that vesting the SC with the competence to apply peacekeeping mechanisms would include the establishment of international criminal tribunals, the States Parties to the ICC exactly intended the establishment of an international criminal court. As Eser and Ambos finally concluded, with regard to *public* international law, the general principle is that such law is created by sovereign states and those states did not intend that international organs interpret it in a way that allows these organs to exercise compulsion powers and undermine the sovereignty of states. However, this general principle does not apply to international *criminal* law.²⁴¹ International law, especially international *criminal* law is constantly developing, and since international criminal law is, by its nature, coercive, it must be interpreted according to new realities to prevent it from losing its meaning.²⁴²

²³⁹ Maikowski T (2002) 70.

²⁴⁰ Maikowski T (2002) 70.

²⁴¹ Eser A & Ambos K (1998) 20.

²⁴² Eser A & Ambos K (1998) 20.

States cannot be allowed to escape the necessary application of compulsory mechanisms, which is, as is universally recognized, provided for by criminal justice.²⁴³



²⁴³ Eser A & Ambos K (1998) 20.

Chapter Five - The Enforcement of a Witness Summons

If one accepts the competence of the ICC to request its States Parties to compel witnesses, the question is how to enforce such an order in case the requested state is not willing to do so. As mentioned in Chapter One, while the principle of complementarity, which determines the jurisdiction of the ICC, speaks in favour of a far-reaching obligation of the States Parties to the ICC to cooperate with the Court, it is most likely that the very same States Parties that are unwilling (probably not so much States Parties that are unable) to carry out investigations or prosecutions are the ones who tend to refuse to cooperate with the Court.



1. Subpoena Powers of the ICC *vis-à-vis* its States Parties

The ICTY has dealt with the question regarding the possibility of issuing subpoenas to states. In its *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, the Appeals Chamber of the ICTY defined the term ‘subpoena’ as an ‘injunction accompanied by threat of penalty’²⁴⁴ and negated such a competence of the Tribunal *vis-à-vis* states.²⁴⁵ It argued that the ICTY is not equipped with the means necessary to enforce subpoenas *vis-à-vis* States.²⁴⁶ It further stated that the drafters of the ICTY Statute would have expressly vested the ICTY with such subpoena powers if this were their intention.²⁴⁷ Furthermore, it stressed that such a competence cannot be regarded as constituting an inherent power.²⁴⁸ The same

²⁴⁴ Appeals Chamber ICTY (1997) Para 25.

²⁴⁵ Appeals Chamber ICTY (1997) Para 25.

²⁴⁶ Appeals Chamber ICTY (1997) Para 25.

²⁴⁷ Appeals Chamber ICTY (1997) Para 25.

²⁴⁸ Appeals Chamber ICTY (1997) Para 25.

arguments apply to the ICC.²⁴⁹ Furthermore, Article 87(7) of the ICC Statute, which provides for the referral of a matter to the Assembly of States Parties or the SC in case of a failure of a State Party to comply with its request, had no relevance if the ICC had such a competence.

2. The Competence of the ICC to issue Binding Orders to States Parties

In the above-mentioned decision, the Appeals Chamber of the ICTY ascribed the Tribunal the competence of issuing binding orders to States. It clarified that the assumption that because its jurisdiction is limited to individuals (which is also true for the ICC²⁵⁰), the ICTY is not in a position to issue binding orders to states, constitutes a misconception.²⁵¹ The Appeals Chamber stressed that since the ICTY lacks its own enforcement powers, it is self-evident that it must rely on the cooperation of states in order to try persons who live 'under the jurisdiction of sovereign States'²⁵² and for that purpose investigate and proceed effectively.²⁵³ The arguments of the Appeals Chamber of the ICTY also apply to the ICC (see Chapter Three).²⁵⁴ Furthermore, the ICC Statute provides for requests, orders and requirements *vis-à-vis* States Parties in several provisions.²⁵⁵ The drafters would not have chosen this kind of terminology if all these terms were supposed to mean are non-binding inquiries. As discussed in Chapter One, the term 'require' (used in relation to the attendance of witnesses²⁵⁶) does not make a request less binding.

²⁴⁹ Frulli M 'Jurisdiction *ratione personae*' in Cassese A, Gaeta P & Jones J *The Rome Statute of the International Criminal Court A Commentary* vol 1 (2002) 538 [hereafter 'Frulli M (2002)'].

²⁵⁰ Article 1 of the ICC Statute.

²⁵¹ Appeals Chamber ICTY (1997) Para 26.

²⁵² Appeals Chamber ICTY (1997) Para 26.

²⁵³ Appeals Chamber ICTY (1997) Para 26.

²⁵⁴ Frulli M (2002) 537.

²⁵⁵ See Article 87, 91, 95 and 96 of the ICC Statute.

²⁵⁶ Article 64(6)(b) of the ICC Statute.

3. Availability of Remedies in the Case of Non-Compliance

Since the ICC does not have its own enforcement powers, the ICC Statute provides for a referral to the Assembly of States Parties (in the case of a State referral) or SC (in the case of a referral by the SC) if a State Party, 'contrary to the provisions of this Statute', is not compliant with a request by the Court to cooperate and thereby prevents 'the Court from exercising its functions and powers under this Statute'.²⁵⁷ The Court may inform the Assembly of States Parties or the SC (again depending on which organ referred the matter to the ICC) if a State which is not a Party to the ICC Statute but 'has entered into an *ad hoc* arrangement or agreement with the Court [...] fails to cooperate with requests pursuant to the arrangement or agreement'.²⁵⁸ While in the case of a State Party's failure to cooperate, the Court is given the competence to make a respective *finding*, in the case of a non-State Party that has entered into an *ad hoc* agreement, the Statute only provides for *informing* the Assembly or the SC. The distinction between States and non-States Parties is due to the will of some delegations at the Rome Conference to use weaker language with respect to non-States Parties.²⁵⁹ It is, however, difficult to justify this, since an obligation is violated in both cases.²⁶⁰ It is, therefore, thinkable to ascribe the Court the inherent judicial power to make a finding also with regard to non-State Parties that have a cooperation obligation on an *ad hoc* basis.²⁶¹ According to Article 112(2)(f) of the ICC Statute, the Assembly shall, 'pursuant to Article 87, Paragraphs 5 and 7', consider 'any question relating to non-cooperation'.

²⁵⁷ Article 87(7) of the ICC Statute.

²⁵⁸ Article 87(5) of the ICC Statute.

²⁵⁹ Ciampi A (2002) 1633.

²⁶⁰ Ciampi A (2002) 1633.

²⁶¹ Ciampi A (2002) 1633.

When it comes to the measures applicable to the two organs in order to enforce a request by the ICC, the SC can resort to the competences ascribed to it under the UN Charter.²⁶² It may, for example, consider if the adoption of measures against the responsible State is appropriate.²⁶³ With regard to the General Assembly, it is, however, uncertain as to what measures it would resort in order to make a State Party carry out its duties.

Discussions about possible consequences to non-compliance with cooperation requests by the ICC took place during the negotiations in Rome.²⁶⁴ With regard to a refusal of a requested State Party to cooperate with the Court 'without a justifiable reason'²⁶⁵, the question of a possible 'effect of the Court's exercise of inherent jurisdiction'²⁶⁶ was raised.²⁶⁷ It was stated that in case a state showed non-compliance with its obligations under the Statute, it would, 'under the existing norms of international law [...] be held in violation of international law, which would impose State responsibility upon that State'.²⁶⁸ Furthermore, the view has been expressed that the refusal of a state to cooperate with the ICC in an investigation in order to protect 'an individual from criminal responsibility'²⁶⁹ or the inability of providing such assistance due 'to the lack of an effective, functioning judicial or legal system'²⁷⁰ should be considered.²⁷¹ The possibility of arranging 'a role

²⁶² Ciampi A (2002) 1635.

²⁶³ Ciampi A (2002) 1635.

²⁶⁴ Hafner G, Boon K, Rübesame A & Huston J 'A Response to the American View as Presented by Ruth Wedgwood' *EJIL* 10 (1999) 108, 122 [hereafter 'Hafner G, Boon K, Rübesame A & Huston J (1999)'].

²⁶⁵ *Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I A/51/22* (1996) Para 319 [hereafter '*Report vol I* (1996)'].

²⁶⁶ *Report vol I* (1996) Para 319.

²⁶⁷ *Report vol I* (1996) Para 319.

²⁶⁸ *Report vol I* (1996) Para 319.

²⁶⁹ *Report vol I* (1996) Para 345.

²⁷⁰ *Report vol I* (1996) Para 345.

²⁷¹ *Report vol I* (1996) Para 345.

for the Security Council in certain situations²⁷² or a special chamber with the function of considering failures or refusals 'to comply with requests for assistance'²⁷³ and rendering appropriate decisions was also suggested.²⁷⁴ In the end, however, there was not enough time left to deal with this issue in detail.²⁷⁵

Therefore, since what was finally included in the ICC Statute is the possibility of making a finding about the non-compliance of a State and referring it to the Assembly of States Parties or the SC, without further reference to the measures applicable to these organs in order to enforce referred requests, the kind or amount of measures used, is left to their discretion²⁷⁶ Especially with regard to the Assembly of States Parties, reference must, therefore, 'be made to the general rules on state responsibility.'²⁷⁷ This includes the entitlement of the Assembly to call 'for the immediate cessation of the international wrongful act',²⁷⁸ public condemnation and the consideration of appropriate collective countermeasures, 'such as economic sanctions, against the non-cooperating State.'²⁷⁹ Thinkable is also the loss of the vote of the requested State Party 'in the Assembly and in the Bureau'²⁸⁰ as is the case when a State Party does not meet its financial obligations *vis-à-vis* the Court.²⁸¹

²⁷² *Report vol I* (1996) Para 345.

²⁷³ *Report vol I* (1996) Para 345.

²⁷⁴ *Report vol I* (1996) Para 345.

²⁷⁵ Hafner G, Boon K, Rübesame A & Huston J (1999) 122.

²⁷⁶ Hafner G, Boon K, Rübesame A & Huston J (1999) 122.

²⁷⁷ Ciampi A (2002) 1635.

²⁷⁸ Ciampi A (2002) 1635.

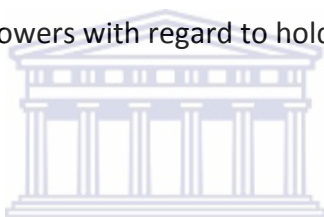
²⁷⁹ Ciampi A (2002) 1635; See also Cryer R, Friman H, Robinson D & Wilmshurst E (2010) 518.

²⁸⁰ Article 112(7)(b) of the ICC statute.

²⁸¹ Article 112(7)(b) of the ICC statute; Zahar A & Sluiter G (2008) 475.

It is also possible that the SC takes actions under Chapter VII of the UN Charter in a matter concerning a case that was not referred to the Court by it but where the failure to cooperate amounts 'to a threat to international peace or security or a breach thereof'.²⁸²

In case the addressed state fails to comply with the action or recommendation of the Assembly or SC, it is possible to turn to these organs or States Parties to the ICC or even to Member States of the UN for remedies generally provided under international law, in order to ensure compliance with the request of the Court.²⁸³ It does not appear that the ICC Statute ascribes the Assembly of States Parties and the SC exclusive powers with regard to holding non-compliant states to account.²⁸⁴



However, the ICC seems powerless when either the SC or the Assembly of States Parties fail to implement any punitive measures against the state which has been referred to them. In the situation in Sudan there have been a few referrals concerning the arrest warrant of Hassan Ahmad Al-Bashir.²⁸⁵ In 2011 the Pre-Trial Chamber of the ICC released two decisions in this regard. In both decisions the matter referred to the SC concerned the failure or refusal of states to comply with a request for cooperation issued by the ICC 'with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir'.²⁸⁶ In 2014, Pre-Trial Chamber II issued a *Decision on the Cooperation of*

²⁸² Ciampi A (2002) 1635.

²⁸³ Ciampi A (2002) 1635.

²⁸⁴ Ciampi A (2002) 1635.

²⁸⁵ See SC Res. 1593 (2005).

²⁸⁶ Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir ICC (Pre-Trial Chamber) in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC (Pre-Trial Chamber) Case-No.-02/05-01/09-140 (2011), Pre-Trial Chamber, decision of 13 December 2011; Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with

the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court. In the same decision the Chamber called 'upon the SC and the Assembly of States Parties to take the necessary measures they deemed appropriate.'²⁸⁷ The Chamber also reiterated that, in contrast to domestic courts, it does not have a 'direct enforcement mechanism in the sense that it lacks a police force'²⁸⁸ and that it therefore relies mainly on the cooperation by states to 'fulfil its mandate.'²⁸⁹ It addressed the SC, saying that when the Council, 'acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security'²⁹⁰, and States Parties to the ICC or the concerned State itself fail to cooperate with the Court and therewith fail to fulfil 'the Court's mandate as entrusted to them by the Council'²⁹¹, 'it must be expected that the Council'²⁹² will respond by taking appropriate measures.²⁹³ It went on to say that if the SC, after having referred a situation to the ICC, while acting under Chapter VII of the UN Charter, does not take follow-up actions, the achievement of the ultimate goal of the referral, putting an end to impunity, would never be reached and '[a]ccordingly, any such referral would become futile.'²⁹⁴ The Chamber then recalled Article 87(7) of the ICC Statute and stated that by failing to arrest and surrender Omar Al Bashir, 'the DRC has failed to cooperate with the

respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir ICC (Pre-Trial Chamber) in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC (Pre-Trial Chamber) Case-No.-02/05-01/09-139 (2011), Pre-Trial Chamber, decision of 12 December 2011.

²⁸⁷ Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court ICC (Pre-Trial Chamber) in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC (Pre-Trial Chamber) Case-No.-02/05-01/09-195 (2014), Pre-Trial Chamber, decision of 9 April 2014 Para 32 [hereafter 'Pre-Trial Chamber (2014)'].

²⁸⁸ Pre-Trial Chamber (2014) Para 32.

²⁸⁹ Pre-Trial Chamber (2014) Para 33.

²⁹⁰ Pre-Trial Chamber (2014) Para 33.

²⁹¹ Pre-Trial Chamber (2014) Para 33.

²⁹² Pre-Trial Chamber (2014) Para 33.

²⁹³ Pre-Trial Chamber (2014) Para 33.

²⁹⁴ Pre-Trial Chamber (2014) Para 33.

Court²⁹⁵ and prevented the Court 'from exercising its functions and powers under the Statute'²⁹⁶ and, therefore, it 'cannot but refer the matter to the Assembly of States Parties and the SC.'²⁹⁷



²⁹⁵ Pre-Trial Chamber (2014) Para 34.

²⁹⁶ Pre-Trial Chamber (2014) Para 34.

²⁹⁷ Pre-Trial Chamber (2014) Para 34.

Concluding Remarks

With regard to the possibility and scope of witness compellability the ICC Statute can be interpreted in many different ways. Firstly, the ICC Statute can be interpreted in a way suggesting that it does not provide for compelling witnesses. The two main arguments in favour of this interpretation are that the Statute provides for the facilitating of *voluntary* witness appearance by the States Parties and that the ICC Statute requires the consent of potential witnesses who are already in custody in the requested state, before they can be transferred to the Court. The provision regulating the *voluntary* appearance of witnesses may be seen as *lex specialis* with regard to other, broadly phrased, provisions that could serve as a basis for witness compellability. The provision dealing with witnesses who are in custody may be seen as being applicable for witnesses not in custody *a fortiori*. However, *voluntary* witness appearance can also be seen as a form of State Party assistance that must *at least* be provided, allowing further-reaching assistance, where it is not 'prohibited by the law of the requested State'²⁹⁸ and that a witness in custody has to consent to a *transfer* to the ICC does not necessarily exclude that he or she (or a witness not in custody) be compelled to a place in the territory of the state of his or her residence. The arguments mentioned against witness compellability before the ICC do not exclude the compellability of witnesses where this is explicitly provided in the law of a State Party, since in that case their deprivation of liberty is not unlawful. Furthermore, 'prohibited by the law of the requested State' can be interpreted in different ways. It can be interpreted as requiring an explicit provision in the law of the requested State that excludes the compellability of witnesses before the ICC, or letting it suffice that the constitution of the requested state prohibits the deprivation of

²⁹⁸ Article 93(1)(l) of the ICC Statute.

an individual's liberty where not explicitly provided for by law. The letter interpretation may be seen as too narrow since, as has been shown in Chapter Four, subpoena powers are a common feature of criminal courts and therefore also of the ICC. This is convincing since, by giving the ICC complementary jurisdiction, the States Parties to the ICC Statute, transferred the power of their criminal courts to the ICC, in case they fail investigating or prosecuting a case that concerns one of the core crimes that the ICC has jurisdiction over. Being of the opinion that compelling witness appearance before the Court is possible under the ICC Statute, the opinions regarding the legal basis for it also differ. The Office of the Prosecutor and Trial Chamber V (A) found that witness summonses and their enforcement is to be based on Articles 93(1)(d) and 93(1)(l) of the ICC Statute, whereat the former ('service of [...] judicial documents') serves as basis for the issuing of a summons and the latter ('[a]ny other type of assistance which is not prohibited by the law of the requested State') as basis for compelling non-compliant witnesses. The Appeals Chamber, however, giving effect to 'the principle *lex specialis derogate legi generali*',²⁹⁹ based the Court's power to compel witnesses on Article 93(b) of the ICC Statute which provides for State Party assistance in the form of 'taking evidence, including testimony under oath'. It came to the conclusion, that the provision not only covers assistance through the taking of evidence by the State Party itself, but also 'by the Court sitting *in situ* or by way of video-link'.³⁰⁰ Basing the competence of the ICC to compel witnesses on this provision means that States Parties do not have the possibility to exclude their assistance under their national law. However, the question then remains, why the same Article, in which the provision that the Appeals Chamber based the Court's power to compel witness appearance on, provides for the facilitating of *voluntary* witness

²⁹⁹ Appeals Chamber (2014) Para 128.

³⁰⁰ Appeals Chamber (2014) Para 130.

appearance. One could argue that 'appearance [...] before the Court' in Article 93(1)(e) of the Statute refers to appearance before the Court *in The Hague*. But then, again, it is unclear why Article 93(7)(a) of the ICC Statute speaks about the *transfer* of witnesses and Article 93(1)(e) of the ICC Statute does not. Another possible explanation for the separate mentioning of *voluntary* witness appearance in Article 93 of the ICC Statute is, that the drafters of the ICC Statute found it necessary to separately mention the duty of the States Parties to also facilitate the appearance of witnesses who *volunteered* to testify and not leave the management of their appearance to the ICC.

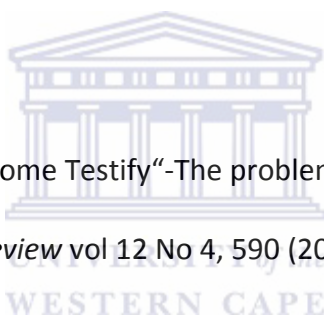
With regard to the enforcement of Court orders *vis-à-vis* states the Court highly relies on the Assembly of States Parties and the SC and this will not change as long as it does not have its own police force.



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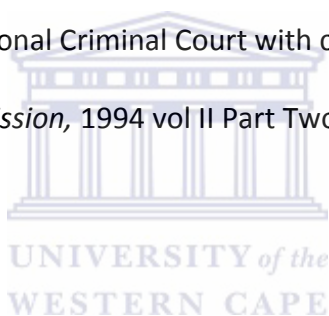
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