TYPES OF INTERNATIONAL COOPERATION AND LEGAL ASSISTANCE IN THE ICC

Tipos de cooperación internacional y asistencia jurídica en la Corte Penal Internacional[1]

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[1] Recibido: 02-10-2018. Observado: 22.11.2018. Aceptado 29.11.2018

Summary

ABSTRACT

The present research work is focused on the legal analysis of the relevant articles of the International Criminal Court's Statute regarding the obligation of cooperation between States for the punishment of serious crimes against humanity and war. Judicial development, starting with ad hoc Tribunals and arriving at causes at various stages of proceedings still ongoing at the International Criminal Court, opens the doctrinal and comparative national debates, seeking to elaborate on specific topics such as requests for assistance during preliminary investigations, assistance during inquiries, consultations, confidential information, Court assistance to States parties participating in the statute, competing requests, suspending the execution of a request, the role of the Prosecutor and the non-assistance of some States that for political and not only reasons impede the development and operation of international criminal justice.

Keywords: *International cooperation, assistance during inquiries, consultations, confidential information, competing requests, role of Prosecutor, court assistance, ICC, international criminal justice.*

1. Introduction

Since the International Criminal Court (ICC)[2] does not have direct executive powers, or an apparatus for conducting investigations on its own and in exclusive way, investigations of crime as well as the acquisition of evidence usually fall into areas subject to state sovereignty and are based on national law[3]. National legislation, however, is often lacking in punishing certain crimes, particularly as regards the rules of jurisdiction, since it does not always provide for the power to seek and prosecute who is responsible for a crime or for damages of a foreign citizen, and therefore with respect to the phenomenon of internationalization of national jurisdiction. This also happens with offenses falling within the jurisdiction of ICC under the constitutional instrument. The ICC in order to exercise the necessary coercion for the purposes of justice in the territories of the States, ends up to depend on the procedural mechanism of cooperation.

2. Legal analysis of international cooperation under international criminal justice

International cooperation seeks to realize: -an harmonized system of laws by all States, which will place particular emphasis on the general provisions of criminal codes and the definitions of the most serious offenses; -the definition of the area of the offending crimes of mankind so as to realize through international agreements a solid and effective system of criminal prosecution for serious offenses; -regulation of jurisdictional conflicts with the uniform provision of crimes against humanity that are not always "protected" and provided for in national criminal justice systems.

Currently, we can distinguish between four forms of cooperation: extradition, mutual assistance, transfer of criminal proceedings and the enforcement of foreign judgments[4].

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[2]The present work is updated until September 2018. See ex multis: A. BOWER, International Criminal Court, Wolf Legal Publishers, 2011. H. AHLBRECHT, Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert: Unter besonderer Berücksichtigung der völkerrechtlichen Straftatbestände und der Bemühungen um einen Ständigen Internationalen Strafgerichtshof, ed. Nomos, 1999. K. AMBOS, Der neue Internationale Strafgerichtshof-ein Überblick, in Neue Juristische Wochenschrift, 1998, pp. 3743-3746. K. AMBOS, Les fondements juridiques de la Cour penale internationale, in Revue Trimestrielle des Droits de l'Homme, 1999, pp. 739-772. A. ZIMMERMANN, The creation of a permanent International Criminal Court, in Max Planck Yearbook of United Nations Law, 1998, pp. 170ss. D.L. ROTHE, J. MEERNIK, P. INGADÖTTIR, The realities of international criminal justice, ed. Bruylant, 2013. C. SAFFERLING, International criminal procedure, Oxford University Press, 2012. C. VAN DEN HERIK, L. STAHN, Future perspectives on international criminal justice, T.M.C. Asser Press, 2010, pp. 586ss. WERKE, Völkerstrafecht, Mohr Siebeck, 2012. S. BECK, C. BURCHARD, B. FATEH MOGHADAM, Strafrechtsvergleichung als Problem und Lösung, ed. Nomos, 2011. G.M.PIKIS, The Rome Statute, the rules of procedure and evidence, the regulations of the Court and supplementary instruments, Martinus Nijhoff Publishers, 2010. C.J. CLARK, Peace, justice and the International Criminal Court: limitations and possibilities, in Journal of International Criminal Justice, 2011, pp. 537ss. B. KRZAN, Prosecuting international crimes: A multidisciplinary approach, ed. Brill, 2016. L.E. CARTER, M.S. ELLIS, C. CHERNOR, JALLOH, The International Criminal Court justice system, Edward Elgar Publishing, 2016. **

[3]See, G. WERLE, Völkerstrafecht, Mohr Siebeck, Tübingen, 2012. B. KRZAN, Prosecuting international crimes: A multidisciplinary approach, ed. Brill, 2016. E. LUDWIN KING, Big fish, small ponds: International crimes in National Courts, in Indiana Law Journal, 2015. A. DAVIDSON, Human rights protection before the International Criminal Court, in International Community Law Review, 2016, pp. 72ss. F. POLITI, M. GIOIA, The International Criminal Court and national jurisdictions, ed. Routledge, 2016. **

[4]Mutual recognition of judicial decisions does not only imply a further development of the depoliticization movement of judicial cooperation but tends to achieve a genuine copernican revolution of traditional judicial cooperation for the obvious overcoming of some dogmas of national sovereignty, and especially of Member States that have not agreed to take part in the adoption of

The rules governing international cooperation can be found both in international law laying down the rules applicable to inter-ethnic relations and in domestic law defining the measures, conditions and modalities that States perceive as cooperation. The results of regulatory processes developed within state and supranational levels differ in scope and regulatory technique, lacking coherence and specificity. These shortcomings therefore indicate the need for integration of judicial cooperation through mutual assistance aimed at a global codification that will enable states to be cumulative and alternative in order to ensure their effectiveness. Legislative approaches by which States adopt various forms of international judicial cooperation are not yet in a position to guarantee effective, solid and coordinated enforcement of judicial cooperation. The expression "judicial cooperation" refers to and includes activities that the judicial authority of a state carries out in relation to a pending criminal case or already celebrated in a foreign country. In this sense, the formula also appears to be synonymous with the notion of judicial assistance[5], which concerns the execution of acts to facilitate the pursuit of judicial activity in a third party, as well as the transfer of proceedings and the enforcement of foreignpenalties. The jurisdiction of ICC is based on the principle of subsidiarity[6] and/or complementarity[7] in order to adjudicate "the most serious crimes of

binding acts in the criminal field and above all in the community context. The aim is to create within the scope of the object and for the purposes indicated a hard podium under which mutual recognition would be impossible without the states being free to "maintain or introduce a higher level of protection for people". See about the same argument: K. AMBOS, Internationales Strafrecht, C.H. Beck, 2006. SUOMINEN, The principle of mutual recognition in cooperation in criminal matters, ed. Intersentia, 2011. KLIP, European criminal kaw. An integrative approach, Second edition, ed. Intersentia, 2012. M. TOMAŠEK, Human rights as means of europeanization of criminal law, in Czech Yearbook of International Law, 2010, pp. 174ss. C. JANSSENS, The principle of mutual recognition in EU law, Oxford University Press, 2013. H. SLUITTER, S. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÁ, International criminal procedure. Principles and rules, Oxford University Press, 2013. S. KENNER, T. WARD, J. PEERS, A. HERVEY, The EU Charter of fundamental rights: A commentary, ed. Bloomsbury, 2014. C. GOMEZ, J. DIEZ, European federal criminal law, ed. Intersentia, 2015. V. MITSILEGAS, The transformation of criminal law in the Area of freedom, security and justice, in Yearbook of European Law, 2007, pp. 1ss. W. VAN BALLEGOOIJ, P. BÁRD, Mutual recognition and individual rights: Did the Court get it right?, in New Journal of European Criminal Law, 2016, pp. 442ss. R. NIBLOCK, Mutual recognition, mutual trust?: Detention conditions and deferring an EAW, in New Journal of European Criminal Law, 2016, pp. 250ss. M. LORENTE SÁNCHEZ ARJONA, Las garantìas procesales en el espacio europeo de justicia penal, ed. Tirant Editorial, 2014.

[5]On the distinction between judicial assistance and judicial cooperation see: L. FREI, R. WYSS, J.D. SCHOUWEY, L'entraide judiciaire internazionale en matière pénale, Basilea, 1981,: "(...) l'entraide judiciaire peut être considerée comme l'activité déployée par les autorités d'un Etat, à la demande d'autorités étrangères, dans l'interêt de l'administration de la justice étrangère (...)". **

[6]See art. 17 of the Statute of the ICC; BERGSMO, 2010.

[7]In the case of cooperation between States some have characterized complementarity as passive, see: The ICC's Prosecutor, Luis Moreno-Ocampo, stated: "(...)asaconsequenceofcomplementarity,thenumberofcasesthatreachthe Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success (...). My duty is to apply the law without political considerations. I will present evidence to court judges and they will decide on the merits of such evidence (...) for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust the situations on the ground (...)". See, N.N. JURDI, The complementarity regime of the InternationalCriminal Court in practice: Is it truly serving the purpose? Some lessons from Libya, in Leiden Journal of International Law, 2017, pp. 199ss. N.A.J. CROQUET, The role and extent of a proportionality. An analysis in the judicial assessment of human rights limitations within international criminal proceedings, ed. Bruylant, 2015. See for the principle of complementarity the next cases: ICC Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi and ICC Appeals Chamber, Judgment on the Appeal ofMr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case; 25 September 2009, par. 78 with decision of 31 May 2013 and ICC Appeals Chamber, Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2012, entitled: Decision on the admissibility of the case against Saif Al-Islam Gaddafi of 21 May 2014. In particular the case: Katanga Admissibility Judgment (par. 213) ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case of 25 September 2009, para 78, the Chamber held that: "(...) in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the state having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in theaffirmativethatonehastolooktothesecondhalvesofsub-paragraphs(a)and (b) and to examine the question of unwillingness and inability (...) to be considered by the Court, the correct avenue would rather be for it to make an application under article 19 (4) of the Statute, in which circumstances the Pre-Trial Chamber could decide whether to grant Libya to bring a second challenge to the admissibilityofthecase(...)".Adifferentopinionwasheldinthecase:AbdullahAl-Senussi of 27 June

international scope"[8] according to art. 1 of the Statute. The safeguard clause foreseen by art. 10 of the Statute also states that "no provision of this part may be construed as limiting or otherwise prejudicing the rules of international law existing or in formation for purposes other than those of thisStatute"[9].

The possible lack of ad hoc national legislation, which allow for judicial cooperation at international level and especially in the context of international criminal courts, is now debated by both the case law of the

2011. ICC Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi of 31 May 2013, parr, 210, 229-230, the Chamber hold that: "(...) that admissibility is not an inquiry into the fairness of the national proceedings per se does not mean (…) that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness (...) at its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a state is not genuinely investigating or prosecuting at all (...)". See also: ICC-Appeals Chamber: The Prosecutor v. Seif Al-Islam Gaddafi, Abdullah Al- Senussi against the decision of Pre-Trial Chamber of 31 May 2013, entitled: Decision on the admissibility of the case against Sait Al-Islam Gaddafi, of 21 May 2014(ICC-01/11-01711OA4.Seeinargument:AUGSTÍNYOVÁ,Introductorynote to Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Decision on the admissibility of the case against Abdullah Al-Senussi, in International Law Material, 2014, pp. 2. The problem of the caseAl-Senussi and Gheddaffi does not rely so much on the principle of complementarity with the aim of "covering" the impunity of serious crimes to high-risk states by persons in each of these crimes and the minimum of a guarantee of judicial cooperation between Member States; more the restrictive circle of Security Council Resolution no. 1970 for the *ratione tempore* of the crimes committed in Libya and as a result remains open the question of who will judge the crimes committed during the Gaddafi regime that certainly from a legal point of view the Court has non the competence. See in argument: K.J. HELLER, PTC It's Inconsistent Approach to Complementarity and the Right to Counsel, in Opinio Juris, 2013. M. TEDESCHINI, Complementarity in practice: The ICC's inconsistent approach in the Gaddafi and Al-Senussi admissibility decisions, in Amsterdam Law Forum, 2015, pp. 78ss. According to the author we've already mentioned: "(...) for the ICC to make that goal a reality, a number of requirements and considerations come into play, considerations that touch on transitional justice issues and require a broader, proactive approach to complementarity (...)". P. AKHAVAN, Complementarity, conundrums. The ICC clock in transitional times, in Journal of International Criminal Justice, 2016, pp. 1043. M. BO, The situation in Libya and the ICC's understanding of complementarity in the context of UNSC referred cases, in Criminal Law Forum, 2014, pp. 508ss. B. KLOSS, The exercise at the International Criminal Court: Towards a more principled approach, H.V. Verlag, 2017. In the same argument other part of doctrine has a different opinion: "(...) the reference to an "internationally recognized principle of due process" in article 17(2) is perhaps one of the most controversial provisions in the Statute and leaves much room for different interpretations as to the meaning of the reference. The reference to the principle of due process is rather generic; it does not extend to certain principles and guarantees the principle in dubio pro reo and its implications (article 16(2) of the ICCPR). As pointed out in legal doctrine, "(...) though articles 17 and 20 are meant to govern the actions of the (Prosecutor), to some extent, they indicate the existence of limitations on the range of judicial actions that a state may pursue in fulfilling its investigatory and Prosecutorial duties under the Statute (...)". See, K.J. HELLER, A sentence-based theory of complementarity, in Harvard International Law Journal, 2012, pp. 85 ss. C. STAHN, One step forward, two steps back?: Second thoughts on a "sentence-based" theory of complementarity, in Harvard International Law Journal, 2012, pp. 185ss. D. ROBINSON,Threetheoriesofcomplementarity:Isitaboutthecharge,thesentence, or the process?, in Harvard International Law Journal, 2012, pp. 165ss. A.S. HASSANEIN, Self-referral of situations to the International Criminal Court complementarity in practice-complementarity in crisis, in International Criminal Law Review, 2017, pp. 108ss. J.N. ESEED, The International Criminal Court's unjustified jurisdiction claims: Libya as a case study, in Chicago-Kent Law Review, 2013, pp.568ss. **

[8]Under artt. 4 and 6 of the ICC. See, KELLY, 2012, pp. 126ss; DE HERT, SMIS, HOLVOET (eds.), 2018.

[9]In case: Furundžija the Court of Appeal for the ICTY commented art. 10, arguing that: (The ICC Statute) was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. In many areas the Statute may be regarded as indicative of the legal views, that is, opinio juris of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. The Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States (Prosecutor v. Furundžija, ICTY T. Ch., 10 December 1998, para. 227. See, D. ADMIRE, The International Criminal Court: Our differences in jurisprudence, in Court Review: The Journal of the American Judges Association, 2011, pp. 362ss. C. GEGOUT, The International Criminal Court limits, potential and conditions for the promotion of justice and peace, in Third World Quarterly, 2013, pp. 802ss. S. MANLEY, Referencing patterns at the International Criminal Court, in The European Journal of International Law, 2016, pp. 194ss. C. KENNY, Prosecuting crimes of international concern: Islamic State at the International Criminal Court?, in Utrecht Journal of International and European Law, 2017, pp.122ss. **

courts and by the attempt, *rectius* requirement not to subtract the perpetrators of crimes[10] that offend international public order[11]upon delivery to international criminal courts.

According to Stromseth there are three elements of composition that govern cooperation with ICC and States participating in the judicial cooperation system. These elements are: a. understand the local terrain more deeply and fully: "(...) especially whether domestic justice systems enjoy any degree of local legitimacy (or instead are deeply discredited)-and the goals and hopes of the domestic population who endured the atrocities and must now chart a new future-will be enormously significant both in shaping the concrete possibilities for post-conflict criminal justice and in influencing public attitudes and confidence in those efforts (...)"; b. think systematically about tribunal's demonstration effects. In that case: "(...) by holding individual perpetrators accountable for their actions, trials demonstrate that certain conduct is out of bounds, unacceptable and universally condemned. Trials for atrocity crimes also aim to demonstrate and to reassure people that justice can be procedurally fair both in terms of due process and, substantively, in terms of evenhanded treatment of comparable actions regardless of who committed them (...)" and; c. be proactive about capacity-building and look for synergies. This type of synergy thatactually refers to national legislation: "(...) can be the supply side of justice on the ground. International and hybrid criminal tribunals typically enjoy a degree of international support that domestic, post-conflict justice systems can only dream of. These understandably international resources are focused on the challenging task of prosecuting perpetrators of atrocities in fair trials that meet international standards of justice. There are opportunities in international and hybrid tribunals to contribute concretely to domestic legal capacity while doing their own important work to advance justice(...)"[12].

State assistance is aimed at conducting investigations in the preliminary and deliberative phase[13], in the prosecution of criminal proceedings and at the stage of celebration of the process that requires the presence of defendants, since the Statutes of various international courts, art. 20, par. 4, lett. d) of the Statute for the

[10]C.K. HALL, Challenges to the jurisdiction of the Court or the admissibility of a case, in TRIFFTERER, Commentary on the Rome Statute of the International Criminal Court: Observer's notes, article by article, ed. Beck, 2011, pp. 640ss. **

[11]J. WATERLOW, J. SCHUHMACHER, War crimes trials and investigations. A multi-disciplinary introduction, Oxford University Press, 2018.

[12]STROMSETH, 2009, pp. 87ss.

[13]C. BUISMAN, Delegating investigations: Lessons to be learned from Lubanga Judgment, in Journal of International Human Rights, 2013, pp. 34. M. NYSTEDT, C. AXBOE NIELSEN, J.K. KLEFFNER, A Handbook on assisting international criminal investigations, in Folk Bernadotte Academy and Swedish National Defence College, Stockholm, 2011, pp.15.

International Criminal Tribunal for Rwanda (ICTR), art. 21, par. 3, lett. a)[14]for the ad hoc Tribunal for Former Yugoslavia (ICTY) and art. 63 of the Statute for ICC[15]do not provide for the process *inabsentia*[16].

Obviously ICC judges, and especially the Prosecutor, can provide evidence[17], documents, testimonies[18] etc., especially during the investigation of the merits of the guilt and the related accusations, despite the physical absence of the accused persons. Obviously a number of exceptions to the obligation[19] to cooperate

[14]SCHAWARZ, 2016; ELIADIS, 2018.

[15]See for the relevant article: Prosecutor v. Zdravko Mucic et al. (Case No. IT-96- 21), ICTY T. Ch., Transcript of 16 April 1998, p. 11255–56; The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Anatole Nsengiyumva and Aloys Ntabakuze (Case No. ICTR-98-41-I), ICTR T. Ch., Minutes of Proceedings of 2 April 2002, para. 1; Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Case No. SCSL-2004-15), Special Court for Sierra Leone T. Ch., Ruling on the issue of the refusal of the third accused, Augustine Gbao, to attend hearing of the Special Court for Sierra Leone on 7 July 2004 and succeeding days, 12 July 2004, para. 12). Under the ICTYin the case: Zdeavko Mucic et al. held that: "(...) there are also national systems which hold that presence at trial is not only a right, but also a duty of the defendant, from which he or she may only be excused under certain limited circumstances (see Sect. 230and 236 of the German Code of Criminal Procedure). In the Statute, the possibility of a waiver of the right to presence is also explicitly mentioned in article 61(2) on the confirmation hearing (albeit referring to the confirmation hearing as a whole, not to parts of it), but whether the Court will interpret this provision as laying down a general principle also applicable to trial proceedings, or whether it will find the opposite that there may be no such waiver for trial proceedings as it is not explicitly laid down in article 63, remains to be seen (...)". See, E. DECAUX, La responsabilitè des entreprises multinationales en matière des droits de l'homme, ed. Bruylant, 2010. J. FERNANDEZ, La politique juridique extèrieure des Etats-Unis à l'ègard de la Cour pènale internationale, ed. Pedone, 2010. N.N. JURDI, The International Criminal Court and National Courts: A contentious relationship, Ashgate Publishing, 2011. D. LAGOT, Quel droit international humanitaire pour les conflits armès actuels?, ed. L'Harmattan, 2010. W.A. SCHABAS, An Introduction to the International Criminal Court, Cambridge University Press, 2011. C. KNITTEL, Reading between the lines: Charging instruments at the ICTR and the ICC, in Pace Law Review, 2012, pp.514ss.

[16]In the Statute of ICTY, the trial in absentia was not foreseen. Only art. 21 of the Statute provided for the accused's right to be present at the hearing based on art. 14 of the international Covenant on civil and political rights. The outlook for contempt has been taken into account in rule 61 where it has been established that failure to execute the arrest warrant and as a result the absence of the defendant can be filed at the trial Chamber during which the witnesses and their relatives can be escorted evidence previously produced to obtain the confirmation of the indictment and issue the international arrest warrant and transmit it to its respective States. In the Statute of Rome and after a debate on the argument, the par. 63 reports the physical presence of the defendant and the resulting art. 64, par. 8 in paragraph a) speaks: "for the beginning of the debate and the accused understands the nature of the accusations against him" to effectively enforce the guilty plea in the following art. 65.

[17]The Prosecutor evaluates the evidence that has a non-predetermined probative value in the sense that the investigative findings are subject to court's appreciation and without a mandatory formal constraint. In fact, the compulsory legal examination institute is missing and reference to the testimony test is required to indicate precisely, in the request for such a measure, the facts on which the head is to be heard and the reasons justifying the hearing. In this sense, the Prosecutor resembles a judge of lawfulness where complex facts not explicitly challenged by the parties are not being investigated by the investigation by giving a certain margin of appreciation in the assessment and evaluation of facts for which a survey would appear from scientific and motivational reasons for the most appropriate decision, since the factual controversies found in judgments do not appear to be peacefully attributable to factual notions of common experience (the so- known fact). A Statute does not recognize a decay of the possibility of requesting investigativemeasuresasnewevidenceinsupportoftheirargumentsbutonlyonthe grounds of delaying the submission of such means. Subsequent inquiries up to the oral procedure may be introduced provided that they relate to facts that the party could not know before that moment and that they are capable of exercising the decisive influence on the outcome of the final sentence.

[18]It is not envisaged in the Statute of the Court to bear witness to the matter, that is, an apparent testimony that the origin of the knowledge of the fact does not come from a sensory perception, but from another third person who has given it the first without be a witness.

[19]Several provisions of the Statute deal with the issue of cooperation exception, such as: art. 90, reserved for the case of requests for a person's delivery, art. 93, par. 9, for "other forms of cooperation"; partially art. 73 on the transmission of information and documents from third countries, communicated to the requested State; art. 98, which prevents the formulation of requests that impose on the state required to act in a manner contrary to the obligations of international law on immunity. See, VAN SCHAACK, 2011.

that do not appear in the Statutes of the ad hoc ICTY[20] and for the ICTR[21] and/or Rome[22] in the area of delivery, extradition, evidence collection, rogatory assistance etc. testify the desire to transpose this form of cooperation from a field marked by equal relations[23] at a level which best express esan instrumental and serving role, of a vertical nature between the ICC and the Member States and of a horizontal nature between Member States concerning the delivery, extradition, revocation, arrest warrant[24], especially for the collection of evidence showing a clearly superior jurisdiction[25].

The effects of this kind of relationship are represented by regulatory compliance obligations by the Member States of the Statute[26]; obligations for the proper interpretation of domestic law; responsibility of

[20]C. JANJAC, A guide to international criminal Tribunals and their basic documents, Wolf Legal Publishers, 2013. C. TOFAN, ICA international criminal law, Wolf Legal Publishers, 2011. W. VAN DER WOLF, The ad hoc Tribunals and the International Criminal Court, Wolf Legal Publishers, 2011.

[21]See for the creation of the Tribunals: T.M. ANTKOWIAK, An emerging mandate for international Courts: Victim-centered remedies and restorative justice, in Stanford Journal of International Law, 2011. L. CATANI, Victims at the International Criminal Court, in Journal of International Criminal Justice, 2012. M. CHERIF BASSIOUNI, The pursuit of international criminal justice: A world study on conflicts, victimization, and post conflict justice, Oxford University Press, 2010. J. DOAK, The therapeutic dimension of transitional justice: Emotional repair and victim satisfaction in international trials and truth Commissions, in International Criminal Law Review, 2011. M.L. FERIOLI, Plea bargaining before the International Criminal Court: Suggestions taken from the experience of the ad hoc Tribunals, in Legal Studies Research Paper, 2013. C. GARBETT, The truth and the trial: Victim participation, restorative justice, and the International Criminal Court, in Contemporary Justice Review, 2013. GRAHAM, Crimes, widgets and plea bargaining: an analysis of charge content, pleas, and trials , in California Law Review, 2012. M. PENA, G. CARAYON, Is ICC making the most of victim participation?, in The International Journal of Transitional Justice, 2013. R.E. RAUXLOH, Plea bargaining: A necessary tool for the International Criminal Court Prosecutor, in Judicature, 2011. R.E. RAUXLOH, Plea bargaining in international criminal justice. Can the International Criminal Court afford to avoid trials?, in The Journal of Criminal Justice, 2011. R.E. RAUXLOH, Plea bargaining in national and international law: A comparative study, ed. Routledge, 2012. C. VAN DEN WYNGAERT, Victims before International Criminal Courts: Some views and concerns of an ICC trial judge, in Case Western Reserve Journal of International Law, 2012. S. STOLK, The victim, the International Criminal Court and the search for truth. On the interdependence and incompatibility of truths about mass atrocity, in Journal of International Criminal Justice, 2015, pp. 974ss.

[22]Unlike the ad hoc Tribunals, it was established through a treaty and, with respect to the field of cooperation, only the states that are part of it can participate, excluding cooperation from other states or forms of cooperation with governmental or non-governmental organizations.

[23]"(...) creating a global system of interconnected domestic courts fundamentally requires that individual domestic legal systems be properly equipped with the requisite competence, sophistication, and commitment to justice that the ICC and international criminal justice community demand. The ICC will thus be required to balance the objective due process standards to which the international community is committed with the subjective, individualized needs of countries in direct need of criminal justice (...) .The only way for the ICC to satisfy both requirements is for it to actively cooperate with domestic legal systems in investigating and prosecuting cases. The ICC cannot and should not transform itself from a Court of international criminal law into a nation-building institution. But the ICC should make it a priority to assist states, in some circumstances, in bringing the world's most serious criminals to justice (...)". See, ALMOVIST, 2008, pp. 335.

[24]The Rome Statute makes no distinction between ordinary and international arrest warrants, since no special procedure has been envisaged in the event of a state failing to deliver an individual and not be processed by individuals *in absentia* before the Court International Penal Code to establish a standard in this sense, through its inclusion in the rules of procedure. See from the ICTY the following cases: Nikolic case, IT-94-2; Mrkšic and others case, IT- 95-13/1; Karadžic and Mladic case, IT- 95-5/18-I; Rajic case, IT-95-12 and from the ICC the first Decision to Unseal the Warant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents", Doc. ICC-01/04-01/06-37, of 23 March 2006 from the first Chamber trial. See, S. ANOUSHIRVANI, The future of the International Criminal Court: The long road to legitimacy begins with the Trial of Thomas Lubanga Dyilo, in Pace International Law Review, 2010, pp. 213ss. P.A. VAN LAAR, The Thomas Lubanga Dyilo case, Wolf Legal Publishers, 2011.

[25]A.A. KAHN, C. BUISMAN, Sitting on evidence? Systemic failings in the ICC's disclosure regime-Ttme for reform, in STAHN (ed.) The law and practice of the International Criminal Court, in Oxford University Press, 2015.

[26]See also the case of non-member States of the Court's Statute but required to cooperate with the Court through the Security Council Resolution: UN Security Council Resolutions 1593 (2005) and 1970 (2011)/SC Res 1970, 26 February 2011, S/RES/1970 (2011). It was the first Resolution based on art. 13, par. b) for the situation of Darfur in Sudan. In particular the resolution referred that: ''(...) the government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution (…)" that means that a Member non State may cooperate with the ICC. The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al- Rahman, informed the Security Council The Prosecutor v. Omar Hassan Ahmad Al Bashir, where in this case the pre-Chamber and not the Prosecutor informed the Security Council about the non-cooperation of Chad and Kenya (Al-Bashir ICC- 02/05-01/09-109, Pre-Trial Chamber

the State in case not only of breach of obligations established by domestic and international law but also in case of lack of active cooperation with ICC. Then, alongside a limited criminal liability (weak link), there is a strong indirect international criminal responsibility linked to the phenomenon of punishment for serious crimes in the broad sense, with the consequence that the criminal effects they produce result from the combination of international jurisprudence with internal national rules within the transnational character which takes on the elements of the cases examined and the concreteness of the cases examined by the ICC where transnational or material elements may concern: the subject, the material object of the offense, the conduct, the event, the effects of theoffense.

In fact, every interpretive activity should meet its intrinsic boundaries as was the case for instance of state's competence in the repression of crimes. In this case, the repressive system was inspired by the principle of international universality imposed and expressed by the principle of *aut dedere aut judicare*[27] that imposes on States that want or not want to judge the alleged perpetrators of the crime of extradition[28]. To this end, the horizontal element stems from the fact that the Statute is based on a consensual basis and this implies that the contracting parties have the power not to assume any obligations that could affect the rights of third States[29] (*pacta tersiis nec nocent necprosunt*).

I, 27 August 2010; Al-Bashir ICC-02/05- 01/09-107, Pre-Trial Chamber I, 27 August 2010). See also: Al-Bashir ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011, 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 OmarHassanAhmadAlBashir;Al-BashirICC-02/05-01/09-129,Pre-TrialChamber I, 12 May 2011, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti; Al-Bashir ICC-02/05-01/09-139, Pre-Trial Chamber I, 12 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 Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir. Al Bashir ICC-02/05-01/09-159, Pre-Trial Chamber II, 5 September 2013, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al Bashir's Arrest and Surrender to the Court; Al-Bashir ICC-02/05-01/09-195, Pre-TrialChamber II, 9 April 2014, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court. See, D. RUIZ VERDUZCO, The relationship between the ICC and the United Nations Security Council, in C. STAHN (ed), The law and practice of the International Criminal Court, Oxford University Press, 2014, pp. 42ss. D. LIAKOPOULOS, International Criminal Court: Impunity status and the situation in Kenya, in International and European Union Legal Matter, 2014. J. LHOTSKỲ, The ICC Arrest Warrant for the Sudanese President Omar al-Bashir in Connection with his Visit to the Republic of South Africa, in Czech Yearbook of Public & Private International Law, 2016. K. MARECHA, P. CHIGORA, The sudanese conflict: War crimes and International Criminal Court. Alternatives, in Turkish Journal of International Relations, 2011, pp.40ss. L.A. CAMARGOS, A responsabilidade penal internacional dos individuos: Estudo do caso Darfur, in Revista de Direito Brasileira, 2013, pp. 199ss.

[27]INTERNATIONAL LAW COMMISSION, The obligation to extradite or prosecute (aut dedere aut judicare), in Yearbook of the International Law Commission, 2014. R. VAN STEENBERGHE, Aut dedere aut judicare, Oxford University Press, 2013. M.A. NEWTON, Terrorist crimes and the aut dedere aut judicare obligation, in Vanderbilt Public Law Research Paper, n. 13-22,2014.

[28]See, S.K. HAYES, Interpreting the new language of the national defense authorization act: A potential barrier to the extradition of high value terror suspects, in Wayne Law Review, 2012, pp. 570ss. D. LIAKOPOULOS, State responsibility and the obligation of aut dedere aut judicare obligation, in International and European Union Legal Matters, 2017. B. MARTINS AMORIUM DUTRA, Criminal responsibility in the crimes committed by organized structures of power: Jurisprudence analysis in the light of international criminal law, in Revista de Faculdade de Direito da UERJ, 2012, pp. 5ss.

[29]In March 2014, the International Criminal Court issued the following: guidelines governing relations between the Court and intermediaries. Cooperation by States and third parties is not the only case in practice in which the Prosecutor may need cooperation from private individuals to obtain relevant evidence. If the Prosecutor is not qualified as judicial authority, in order to ascertain which procedures should be followed in the conduct of this type of investigative activity, it is necessary to verify the relevant internal rules from time to time: where according to the guidelines: "(...) an act of the judicial authority is necessary to base the national law (...)". The Prosecutor will have to get the cooperation first of all with the State, so that he can directly address private individuals and that the circumstances that have already been examined on-site investigations will be necessary. Individuals called upon to provide this kind of information would become a kind of immediate Prosecutor's staff and could not be used to circumvent the rules of the investigative Statute. See, C. BUISMAN, Delegating investigations: Lessons to be learned from the Lubanga judgment, in Nothwestern Journal of International Human Rights, 2013, pp. 30-82. C.M. DE VOS, Investigating from Afar: the ICC's evidence problem, in Leiden Journal of International Law, 2013, pp. 1009-1024.

Other horizontal aspects, of minor importance, are repeated in Part IX of the Statute[30] which recognize and give value to the prerogatives in national law, prefiguring the possibility for States to interfere both in inquiry and in court's proceedings[31]. This interference can be dangerous if the cooperative attitude of States is lacking, so as to facilitate the execution of court's requests.

[30]See from the international law the case of: Arrest Warrant (Democratic Republic of the Congo v. Belgium) of 14 February 2002 and Lotus (France v. Turkey) of 7 September 1927. VERESCHETIN, LE MON, Immunities of individuals under international law in the jurisprudence of the International Court of Justice, in The Global Community. Yearbook of International Law and Jurisprudence, 2004, pp. 78ss.

[31]The relationship-between the national and international jurisdictions characterizing the ICC based on primacy- is different from that of the ad hoc tribunals and it is not conceivable the formal need for devolution of cases of greater importance to national jurisdictions. Excluding the crime of aggression and war crimes, the criminal acts described in the Rome Statute are not "just" crimes and therefore can be committed by anyone regardless of their qualifications, people are accused of having committed international crimes according to the titles of (article 25 (3) (a)), "ordering, soliciting or inducing" (article 25 (3) (b)), or in accordance with the provisions of "indirect co- perpetration" determine the responsibility of the hierarchical superior for acts committedbythesubjects(article28(a)).However,thevalidationhearingmaytake place *in absentia* according to art. 61 par. 2 of the Statute if the accused can not be found or escaped. The Statute and the rules of procedure maintain some silence regarding the powers of the chairman of the college to determine the way in which the trial will be conducted *in absentia* and above all for the order and the conditions for the submission of evidence (rec. 122). For further details see: P. CABAN, The definition of the crime of aggression-Entry into force and the exercise of the Court's jurisdiction over this crime, in Czech Yearbook of Public & Private International Law, 2015. The Prosecutor v. Bosco Ntaganda, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014; The Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-14, 27 June 2011. The Prosecutor v. Bosco Ntaganda, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda; see also: Situation in Uganda, Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-57, 13 October 2005. The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009. The Prosecutor V.Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of MrAbdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled: Decision on the admissibility of the case against Abdullah Al-Senussi, 24 July 2014, ICC-01/11-01/11-565. For the case Al Senussi and Gedaffi argue that: "(...) on the one hand, McDermott has argued that the "reference to "due process" in the complementarity clause is perfectly ambiguous" and "certainly leaves room for the Court to take fair trial considerations into account". However, on the other, Heller, rejects the "due process thesis", which he considers to be "contradicted by the text, context, purpose and history of article 17". Exploring a few of these, textually, he argues that the requirement to "have regard to principles of due process" in article 17(2) is a "sub-ordinate clause", which "simply explains how the Court should determine whether one or more of the paragraphs (the criteria for admissibility in articles 17(2)(a-c)) are satisfied". It is not an independent base on which to challenge admissibility. Furthermore, historically, proposals that due process should be a basis for determining admissibility were rejected by many delegates to the Court. This echoes the words of Prosecutor Moreno-Ocampo several years earlier that "we are not a human rights Court. We are not checking the fairness of the proceedings". On the basis of this interpretation of the statutory provisions, the Court appears not to have erred procedurally (...) it appears that the normative demands on the ICC to respond to flagrant violation of rights to a fair trial can be met on the basis of the Statute, more specifically "unwillingness" under article 17(2). Yet while creativity in interpretation of article 17 in theory enables the Court to act on Libyan violations of the accused's human rights, both defendants continue to remain without access to legal representation (...)". See: A. DIVER, J. MILLER, Justiciability of human rights law in domestic jurisdictions, ed. Springer, 2015. P. DIXON, C. TENOVEY, International criminal justice as a transnational field: Rules, authority and victims, in International Journal of Transitional Justice, 2013. N. GROSSMAN, The normative legitimacy of international Courts, in Temple Law Review, 2013, 62-105. M. KERSTEN, Justice after the war: The ICC and post-Gaddafi Libya, in K. FISHER, R. STEWART (eds) Transitional justice and the Arab Spring, ed. Routledge, 2014, pp. 188–209. C. DE VOS, Between justice and politics: The ICC's intervention in Libya, in C. DE VOS, S. KENDALL, C. STAHN, The politics of International Criminal Court interventions, Cambridge University Press, 2012, pp. 456-478. M. KERSTEN, Justice in conflict: The effects of the International Criminal Court's interventions on ending wars and building peace, Oxford University Press, 2016. F. MEGRÈT, M.G. SAMSON, Holding the line on complementarity in Libya, in Journal of International Criminal Justice, 2013, pp. 585-586. S.M.H. NOUWEN, Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan, Cambridge University Press, 2013. S.M.H. NOUWEN, The International Criminal Court: A peace-builder in Africa?, in C. DEVON, G.A. DZINSEA (eds) Peace-building, power, and politics in Africa, Ohio University Press, 2012, pp. 171-192. C.E. PAVEL, Divided sovereignty: International Institutions and the limits of State authority, Oxford University Press, 2014. H.J. VAN DER MERWE, G. KEMP, International criminal justice in Africa. Issues, challenges and prospects, Konrad Adenaur Stiftung, 2016. C. STAHN, The law and practice of the International Criminal Court, Oxford University Press, 2015. S.VASILIEV, Between international criminal justice and injustice: Theorizing legitimacy, in C.M. BAILLIET, N. HAYASHI (eds), The legitimacy and effectiveness of International Criminal Tribunals, Cambridge University Press, 2016. T.W. WATERS, Libya's home Court advantage: Why the ICC should drop its Qaddafi case, in Foreign Affairs, 2013. D. LIAKOPOULOS, Die Hypothese des Rechts auf ein faires Verfahren internationalen Strafgericht, in International and EuropeanUnion Legal Matters, 2012. C. HENDERSON, Research handbook on international conflict and security, ed. E. Elgar Publishing, 2013, pp. 375-420. L. HOVIL, Challenging International Justice: The initial years of the International Criminal Court's

Equally important is art. 73 of the Statute of ICC, which is in line with the horizontal model of cooperation and demonstrates the prevalence of the obligation arising from an international agreement between a State Party and a Third State on the obligation to cooperate with the ICC, since if the ICC requests a contracting state to produce a document or information disclosed by a third party, if the latter is not a State Party "and refuses to consent to the disclosure, the state has informed the ICC that it is unable to provide the document or information due to an existing obligation of confidentiality compared to that which itholds"[32].

Art. 29 of the Statute of the ICTY[33] similar to art. 28[34] of ICTR provides for an unconditional obligation to cooperate with the states on requests. States must respond without delay referring primarily to violations of humanitarian law[35] and *erga omnes* obligations[36]. The obligation arising from the binding nature of the United Nations Resolution n. 827 and its imposition on all states as an *erga omnes* obligation was clearly defined by the Appeals Chamber of the ICTYin the *Blaškić* case of 29 October 1997[37]. Moreover, par. 4 of

intervention in Uganda", in Stability: International Journal of Security and Development, Vol. 2013, pp. 2ss. L.N. MALU, The International Criminal Court and conflict transformation in Uganda: Views from the field, in African Journal on Conflict Resolution, 2015, pp. 81-103. J. MCKNIGHT, Accountability in Northern Uganda: Understanding the conflict, the parties and the false dichotomies in international criminal law and transitional justice, in Journal of African Law, 2015, pp. 193-219.

[32]A horizontal character is also found in the fourth paragraph of article 90. Therefore, the State Party required only "(...) in a State not Party to this Statute, the requested State, if it is not held, by an international obligation to extradite the person concerned to the requesting state gives priority to the request for delivery of the Court if the latter has held that the case was admissible (...)". In particular see: Gbagbo ICC-02/11-01/11-129-Annx16, Pre-Trial Chamber I, 25 May 2012, Requête en incompétence de la Cour Pénale Internationale fondée sur les articles 12 (3), 19 (2), 21 (3), 55 et 59 du Statut de Rome présentée par la défense du Président Gbagbo, Annexe 16: Déclaration de reconnaissance de la compétence de la CPI datée du 18 avril 2003; article 12(3) of the Statute provides: "(...) If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that state may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting state shall cooperate with the Court without any delay or exception in accordance with Part 9 (...)". See, D. LUBAN, After the honeymoon: Reflections on the current state of international criminal justice, in Journal of International Criminal Justice, 2013, pp. 505ss. S.C. ROACH, Legitimising negotiated justice: The International Criminal Court and flexible governance, in International Journal of Human Rights, 2013, pp. 619ss.

[33]For the case of international cooperation see the cooperation firmed with Serbia in the case: P. Jojiĉ, J. Ostojiĉ, V. Radeta (IT-03-67-R77.5) of 1st August 2016.

[34]With the Rule 7bis (b), Rule 39(iii) and Rule 54bis of the ICTY. The obligation of cooperation was confirmed from the Tribunal in the next case: Prosecutor v. Tihorim Blaskiç, Appeal Chamber, 29 October 1997, IT-95- 14-AR 108 bis, in whose device it is sanctioned: "(...) le Tribunal international peut citer à comparaître des personnes agissant à titre privé ou leur décerner des injonctions ou d'autres ordonnances contraignantes et que, en cas de non-respect de ces citations, injonctions ou ordonnances, soit l'État compétent peut prendre les mesures coercitives prévues par sa législation, soit le Tribunal international peut engager des procédures pour outrage (...)". See, C. CHERNOR JALLOH, A.B.M. MARONG, Promoting accountability under international law fro gross human rights violations in Africa. Essays in honour of Prosecutor Hassan Budacar Jallow, ed. Brill, 2015. K. YOKOHAMA, The failure to control and the failure to prevent, repress and submit. The structure of superior responsibility under art. 28 International Criminal Court statute, in International Criminal Law Review, 2018, pp. 278ss. H. KUCZYŇSKA, The scope of appeal on complementarity issues before the International Criminal Court, in The Law & Practice of International Courts and Tribunals, 2016, pp. 328ss. D. BOSCO, Discretion and State influence at the International Criminal Court: The prosecutor's preliminary examinations, in American Journal of InternationalLaw, 2017, pp. 398ss.

[35]Art. 1 common to the Four Geneva Conventions of 1949 and Art. 1, 88 and 89 of the first additional Protocol of 1977 lead to a limitation/constraint on cooperation resulting from international customary law, given that it is a duty of States to ensure compliance with the rules of international humanitarian law, through any appropriate instrument. A general obligation reflected in the fulfillment of requests for cooperation with the Court, although not following a cooperation agreement or a Resolution of the Security Council. See, F.J. FENRICK, The application of the Geneva Conventions by the international criminal Tribunal for the Former Yugoslavia, in The International Review of Red Cross, 1999, pp. 318ss.

[36]M. CHERIF BASSIOUNI, Former Yugoslavia: Investigative violations of international humanitarian law and establishing criminal Tribunal, in Fordham International Law Journal 1995. C. MACLEOD, Towards a philosophical account of crimes against humanity, in European Journal of International Law, 2010.

[37]In the sentence of 29 October 1997 after the appeal of Croatia the ICTYhas affirmed that: "(...) the international Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign states (...)". In the same case,

the United Nations Resolution n. 827 establishes the obligation to implement the Resolution and the Statute[38]. In international cooperation the Statute dedicates a part to itself: Chapter IX consisting of 17 articles [39] based on interstate judicial assistance and extradition. This statutory body should be supplemented by the provisions contained in the rules of procedure and in addition to the applicable rules of international law (art. 21 of the Statute)[40].

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the Appeals Chamber has taken a position on the criteria for cooperation by the Prosecutor and the Member States of the Statute wishing to cooperate with the Court of First Instance. In particular it was stated that: "(...) the Appeals Chamber identified the following criteria for an order for the production of documents to be met: (i) identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in number. The Appeals Chamber agreed with the submission of counsel for the accused that, where the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefore, and should still be required to identify the specific documents in question in some appropriate manner. The trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89(B) and (D), to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars(ii) set out succinctly the reasons why such documents are deemedrelevanttothetrial;ifthatpartyconsidersthatsettingforththereasonsfor the request might jeopardise its Prosecutorial or defense strategy it should say so and at least indicate the general grounds on which its request rests; (iii) not be unduly onerous. As already referred to above, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial; and (iv) give the requested state sufficient time for compliance; this, of course, would not authorize any unwarranted delays by that State. Reasonable and workable deadlines could be set by the trial Chamber after consulting the requested State. (...)". Criteria that are also adopted in the following cases: ICTR, Prosecutor v. Bagosora et al., Request to the government of Rwanda for Cooperation and Assistance Pursuant to article 28 of the Statute, ICTR-98-41-T, T. Ch. of 10 March 2004, par. 4; ICTR, Prosecutor v. Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to article 28 of the Statute, ICTR-98-41-T, T. Ch. of 31 October 2005,par. 2. ICTR, Prosecutor v. Bizimungu et al., Decision on Nzuwonemeye's Motion Requesting the Cooperation of the government of Ghana Pursuant to article 28 of the Statute, ICTR-99-56-T of 13 February 2006, par. 6; ICTR, Prosecutor v. Bizimungu et al., Decision on Casimir Bizimungu's Request for Disclosure of the Bruguiere Report and the Cooperation of France, ICTR-99-50-T, T. Ch. of 25 September 2006, par. 25; ICTR, Prosecutor v. Nahimana et al., Decision on the motiontostaytheproceedingsinthetrialofFerdinandNahimana,ICTR-99-52-T,T. Ch. of 5 June 2003, par. 11 which refers to: "(...) a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial (...)". See in argument: M.J. FINDLAY, International and comparative criminal justice: A critical introduction, ed. Routledge, 2013. J. SPRACK, A practical approach to criminal procedure, Oxford University Press, 2012. L. BÜNGENER, Disclosure of evidence, in C. SAFFERLING (ed), International criminal procedure, Oxford University Press, 2012. K.A. FINDLEY, Adversarial inquisitions: Rethinking the search for the truth, in New York Law School Law Review, 2011, pp. 12ss. H. FRIMAN, International Criminal Court, Oxford University Press, 2015. S. KENDALL, Donors justice: Recasting international criminal accountability, in Leiden Journal of International Law, 2011, pp. 585ss. S. KENDALL, S. NOUWEN, Representational practices at the International Criminal Court: The gap between juridified and abstract victim-hood, in Law and Contemporary Problems, 2013, pp. 235ss. K.A.A. KHAN, A. SHAH, Defensive practices: Representing clients before the International Criminal Court, in Law and Contemporary Problems, 2013, pp. 191ss. H.M. MATTHEWS, P. MALEK, Disclosure, Sweet & Maxwell, 2012. F. PAKES, Comparative criminal justice, ed. Routledge 2014. C. TAYLOR, Disclosure sanctions review: Another missed opportunity, in International Journal of Evidence & Proof, 2013, pp. 272ss. M.M. DEGUZMAN, Choosing to prosecute: Expressive selection at the International Criminal Court, in Michigan Journal of International Law 2012, pp. 266ss. A. HEINZE, International criminal procedure and disclosure: An attempt to better understand and regulate disclosure and communication at the ICC on the basis of a comprehensive and comparative theory of criminal procedure, Dunker & Humblot, 2014. R. VOGLER, B. HUBER, Criminal procedure in Europe, Dunker & Humblot,2008.

[38]In the same spirit with the case: Kenyatta. See, statement to the United Nations Security Council on the situation in Libya pursuant to UNSCR 1970(2011) of 9 November 2016. C. STAHN, Libya, the International Criminal Court and complementarity: A test for "shared responsibility", in Journal of International Criminal Justice, 2012, pp. 325ss. R. ALOISI, A tale of two Institutions: The United Nations Security Council and the International Criminal Court, in International Criminal Law Review, 2013, pp. 152ss.

[39]See the decision of 10 December 1998: Furundžija case, IT-95-17/1-T, par. 149- 150, in which it is argued: "(...) that, in international law, the responsibility of the States is usually brought about by the adoption and application of legislation which does not comply with international standards (...) and where the Court makes explicit refer to the articles incorporated into its Statutes (...)". See, A. CIAMPI, The Obligation to cooperate, in A. CASSESE, P.GAETA, J.R.W.D. JONES (eds), The Rome Statute of the International Criminal Court: A commentary, Oxford University Press,2002.

[40]"(...) the applicable treaties (...) the principles and rules of international law, including the consolidated principles of international law on armed conflict; (c) failing that, the general principles of law to the domestic law of the legal systems of the world, including,

The opening provision (art. 86) lays down the principle of a general obligation on States Parties to cooperate with the ICC. Obligation and important affirmation of the functioning of the ICC and particularly of the "internationalization" of domestic law (in the sense that repressive devices appear as the carrier of national law to supranational interests, *rectius* instruments for the application of decentralized international and community law) do not exclude the full cooperation of ICC with the European Union Institutions[41].

Art. 87[42] sets out rules for cooperation requests and art. 88 states that States Parties are required to fulfill their obligations, including the introduction of appropriate regulations and the achievement of that

where appropriate, the domestic law of States that would have jurisdiction over crime, provided that such principles are not in conflict with this Statute, international law and international standards and criteria recognized (...)". See, A. CASSESE, The international criminal Tribunal for the Former Yugoslavia and human rights, in European Human Rights Law Review, 1997. S. BAILEY, Article 21 of the Rome Statute: A plea for clarity, in International Criminal law Review, 2014, pp. 513ss.

[41]See, Decision 2002/494/JHA, of 13 June 2002 (OJ L 167, p. 1), setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; Framework Decision 2002/584/JHA, of 13 June 2002 (OJ L 190, p. 1), on the European arrest warrant and the surrender procedures between Member States; and Decision 2003/335/JHA, of 8 May 2003 (OJ L 118, p. 12), concerning the investigation and prosecution of genocide, crimes against humanity and war crimes. The EU was the first Regional Organization to sign with the ICC an agreement on cooperation and assistance on 10 April 2006 (OJ L 115 of 28.04.2006). The European Union law does not allow theadoptionofpunishmentforadhoccrimesanddoesnotexcludecriminaloffenses and punishments for certain offenses in their constitutive Statutes up to Lisbon, leaving them open to cultivation by adopting hard and soft law acts "as we see the last years according to the principles of the Union within a legal space for security and justice". In this spirit, the European Union has adopted a common position no. 2001/443/CFSP since 11 June 2001, stating the need for the universality of the Rome Convention. This is a partial membership that in reality at first sight would have diminished the effectiveness of the Statute. The EU has also ruled that the ratification of the Statute is a necessary condition for the candidate countries to become members of the Union (already ratified the Member States of the Union with the exception of France, Romania), reaffirming the principles set out in the common position no. 2002/474/CFSP. The European Parliament, with its Resolution of 4 July 2002, repeatedly expressed its support for the ICC and criticized the US position with respect to both the American Service Members Protection Act (ASPA) and the exemption agreements The Commission of the European Union, contradicted the obligations arising from participation in the Statute of the Court. Exceptions that allowed the European Parliament to approve, on 30 September 2002, full ambiguity and no concrete points of reference regarding the exception agreements where it is established that such agreements, as negotiated by the United States, are contrary to the Statute of ICC. See also the Council common position 2003/444/CFSP of 16 June 2003 on ICC; Action Plan in support of the Common Position on the International Criminal Court, 15 February 2004. Article 11 of the Cotonou Agreement with the ACP States: "(...) 6. In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to: -share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of ICC; and fight against international crime in accordance with international law, giving due regardtotheRomeStatute.ThePartiesshallseektotakestepstowardsratifyingand implementing the Rome Statute and related instruments". See also, The Africa-EU Strategic Partnership. A Joint Africa-EU Strategy, 9 December 2007: "(...) the partners agree that the establishment and the effective functioning of ICC constitute an important development for peace and international justice (...)". AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009. See in argument: E. AOUN, The European Union and International Criminal Justice: Living up to its normative preferences?, in Journal of Common Market Studies, 2012. G.D. MATEI, M. COPCÃ, L. DRAGNE, States collaboration with the International Criminal Court, in Strategic Universe Journal Year, 2014, pp. 65ss. C. FEHL, The United States, the European Union, and the International Legal Order: A framework for analysis. Or: who supports international law, and why?, in International Journal of Constitutional Law, 2014. D.V. ARTUSY, The evolution of human rights law in Europe: Comparing the European Court of human rights and the EJ, ICJ and ICC, in Inquiries, 2016. G. COLLANTES- CELADOR, The defense at an institution under challenge: The European Union and the International Criminal Court, in I. BERBÉ et al., European Union policy responses to a shifting multilateral system, ed. Springer, 2016. A. WHITING, Dynamic investigative practice at the International Criminal Court, in Law & Contemporary Problems, 2014, pp. 166ss. J. MEERNIK, Justice, power and peace: Conflicting interests and the apprehension of ICC suspects, in International Criminal Law Review, 2013, pp. 172ss. C. LINGAAS, Imagined identities: Defining the racial group in the crime of genocide, in Genocide Studies and Prevention: An International Journal, 2016, pp. 80ss. M. DECHEVA, Recht der Europäischen Union, ed. Nomos, 2018.

[42]According to art. 87 requests for cooperation: "(...) shall be transmitted by diplomatic means or through any other appropriate channel that each State Party may choose at the time of ratification, acceptance or approval of this Statute or accession thereto (...) requests may also be transmitted through the International Criminal Police Organization (INTERPOL) or any competent regional organization (...)thesupportingdocumentsareeitherdrawnupinanofficiallanguageofthe requested state or accompanied by a translation into the said language shall be written in one of the working languages of the Court or accompanied by a translation into that language, depending on the choice made by the requested state at the time of ratification acceptance or approval of this Statute or accession to the same (...) of assistance provided under Chapter IX, in particular as regards the protection of information,

objective. Articles 89 to 92 (delivery of certain persons to the Court, competing requests, content of the arrest and delivery request) and articles 101 to 102 regulate the delivery of persons sought by the ICC and articles 83 to 96 (other forms of cooperation, deferral of the making of a request for ongoing inquiries or ongoing proceedings, deferral of a request for a declaration of inadmissibility, content of a request for other forms of cooperation provided for in art. 93) and 99 (followed by requests under art. 93 and 96) govern other forms of cooperation and assistance[43]. Finally, articles 97 to 98[44] (consultations, cooperation on waiver of immunity and consent for delivery)[45] and 100 (expenses)[46] contain provisions of general nature. The Statute of the ad hoc tribunals allows cooperation with the Member States that are part of the United Nations; instead, the Statute of ICC (art. 87 (5)) provides the possibility for the ICC to invite non-Member States to provide assistance on the basis of an ad hoc agreement[47]. The inspiration for this permission was

the Court may take the necessary steps to ensure the safety and physical or psychological well-being of the victims of potential witnesses and their family members. The Court may request that any information provided under this Chapter be communicated and processed in such a way as to preserve the safety and physical or psychological well-being of victims, potential witnesses and members of their families (...) may invite any state not part of this Statute to assist under this Chapter on the basis of an ad hoc agreement or an agreement concluded with that state or any other appropriate base (...) the State not Party to this Statute does not provide them with any participation which is requested under this agreement or agreement (...) may request information or documents from any intergovernmental organization. It may also call for other forms of cooperation and assistance which it has agreed with that organization and which are in accordance with the competences or mandate of the latter. If a State Party fails to comply with a request for judicial cooperation, contrary to the provisions of this Statute, thereby preventing it from exercising its functions and powers under this Statute, the Court may acknowledge and invest the case the Assembly of States Parties or the Security Council if it has been admitted to it (...)". See in argument: R. GROENHUIJSEN, M. LETSCHERT (eds) Compilation of international victims rights instruments, Wolf Legal Publishers, 2012. R.H. MNOOKIN, Rethinking the tension between peace and justice: The International criminal Prosecutor as a diplomat, in Harvard Negotiation Law Review, 2013, pp. 146ss. M. PENA, G. CARAYON, Is the ICC making the most of victim participation?, in International Journal of Transitional Justice, 2013, pp. 518ss.

[43]The basic principles foreseen for judicial assistance are: the provision of a denial of the request in the event of prejudice to state sovereignty, national security and public interest; the principle of subsidiarity; the principle of *ne bis in idem*; the necessary compatibility of the request with the legal principles of the state order in which the request is to bemade.

[44]Art. 98, in particular in the second paragraph, makes no reference to the impunity agreements and previous and subsequent sanctions for the purpose of taking away the jurisdiction of ICC who has been charged with crimes. The Vienna Convention on the Law of Treaties of 23 May 1969 emphasizes that the textual interpretation of a patrimonial rule must be taken into account also in the context in which the terms of the provision are inserted, bearing in mind the content of the preamble of the Treaty and every further agreement between the parties. Following the textual criterion of the interpretation of par. 2 of article 98 would mean introducing into the mechanism of ICC a serious omission as it is prevented from exercising its judicial function of a complementary nature to that of the States Parties. So we can say that this provision has been included in the Statute as a safeguard clause of the Status of Force Agreements (SOFAs) (proposed by the United States) stipulated before the entry into force of the Statute, and not for any subsequent agreement. Regarding the ratione personae scope, protected by such agreements, is not just military personnel but also individuals who simply travel for private or leisure purposes. This is a limitation clause that allows for judicial assistance once it is opposed to the delivery of its own nationals (in this case American citizens) or foreign employees to ICC or to a Third State and is willing to process them in its territory, the impunity agreements do not seem to be in complete harmony with the American national legislation. See for more details: J. IVERSON, The continuing functions of article 98 of the Rome Statute, in Goettingen Journal of International Law, 2012, pp. 134ss.

[45]See: article. 98, part. 2 which prohibits the Court from requiring the delivery of a person to a state where such act is in breach "(...) with its obligations under international agreements (...)". in this spirit see also the Resolution of the European Parliament of 26 September 2002 which underlined the incompatibility of signing agreements with the Union, which could undermine the effective implementation of the Rome Statute. The issue has also been taken into account by the Council of Foreign Ministers of the EU, which in September 2002 has adopted some guiding principles to be followed in the case of the conclusion of agreements of this kind between EU and US countries, which were confirmed by the EU Council of 16 June 2003.

[46]For the financial resources, expenditure and budget of the Court see the relevant articles of the financial regulation and financial management rules. The contributions come from the Member States, funds after the approval of the General Assembly, voluntary contributions as additional resources establishing a General Fund in which it is set up: "to cover the expenses of the Court" in accordance with Rule 6 of the financial regulation.

[47]A. OLE, K. ASKIN,ThomasLubangawarcrimesconvictionin the first case at the International Criminal Court, in Insights,2012.

also based on the exercise of compulsory and optional universal jurisdiction[48] for only serious violations, i.e. violations made during armed conflicts such as the ICTY in*Tadić* case[49]. Thus, the ICC may transmit a request for delivery of a wanted person to any state in whose territory an international crime wascommitted[50].

We must point out that the lack of a formal nature of the Statute does not exempt States not parties to cooperate with ICC when it comes to crimes arising from the provisions of customary law such as genocidal crimes[51] provided for by the Geneva Convention of 12 August 1949[52]. The ICC may also request the assistance of international organizations as it appears in art. 87, par. 6[53] as well as to constitute a globally wide ranging cooperation network[54] including the United Nations Security Council[55].

[48]N. ROHT-ARRIAZA, M. FERNANDO, Universal jurisdiction, in B.S. BROWN (ed.) Research handbook on international criminal law, Edward Elgar Publishing, 2011.

[49]See, ICTY, Tadić appeal jurisdiction decision (IT-94-1-A) of 15 July 1999, par. 80. In particular: "(...) a necessary limitation on the grave breaches system (…) of the intrusion on state sovereignty that such mandatory universal jurisdiction represents (…)". See, P.R. WILLIAMS, P. TAFT, The role of justice in the Former Yugoslavia: Antidote or placebo for coercive appeasement?, in Case Western Journal of International Law, 2003, pp. 254ss.

[50]K.J. HELLER, What is an international crime?, in Harvard International Law Journal, 2018.

[51]W. VANDER WOLF, D. DE RUITER, Genocide on trial, Wolf Legal Publishers, 2011.

[52]S. PAYLAN, A. KLONOWIECKA-MILART, Examining the origins of crimes against humanity and genocide, in M. BERGSMO, C. CLEAH, R. SONG, T. YI, Historical origins of international criminal law, vol. 3, Torkel Opshal Academic Epublisher, 2015, pp. 560ss. SATZGER, International and european criminal law, Hart Publishing, 2017.

[53]J. DONG, Prosecutorial discretion at the International Criminal Court: A comparative study, in Journal of Politics and Law, 2009.

[54]Nothing excludes the possibility for the ICC to cooperate in cases related to other international courts such as the International Court of Justice and/or courts that a Member State of the Statute requires the cooperation and assistanceoftheCourtinordertoobtaintheevidencealreadycollectedbythe Prosecutor or to conduct joint investigations as provided in the letter of art. 93, par. 10, of the Statute of Rome. The procedure is defined in Rule 194 RPE and it is not easy to accept any requests from the State. The institute of "reverse cooperation" primarily seeks to meet purely probative character ("*inter alia*") which, at the end of the service, leads to the transmission of declarations, documents or other evidence obtained by the Court. See, S. HUFNAGEL, C. MCCARTNEY, Trust in international police and justice cooperation, Hart Publishing, 2017. I. FASSASSI, Le Procureur de la CPI et le jeu d'échecs, in Revue de Droit International et de Droit Comparé,2014.

[55]See: Declarations that relate to Security Council resolutions or not, and the positions taken by the Prosecutor on judicial or non-judicial assistance to areas that the Court collaborated to bring cases of persons who committed serious crimes. Ex multis: ICC, Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd- Al-Rahman, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber I, 26 May 2010, ICC- 02/05-01/07-57; ICC, Prosecutor v.Omar Hassan Ahmad Al Bashir, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre- Trial Chamber I, 27 August 2010, ICC-02/05-01/09-109; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-107; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre- Trial Chamber I, 12 May 2011, ICC-02/05-01/09-129; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, 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 Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, ICC-02/05-01/09-139; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demand esde coopération délivrées parla Courconcern ant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05-01/09-140.ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to article 87(7) of the Rome Statute on the failure bythe Republic of Malawi to comply with the cooperation requests issued by the Court withrespecttotheArrestandSurrenderofOmarHassanAhmadAlBashir,Pre-Trial Chamber I, 12 December 2011, ICC-02/05-01/09-139; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05- 01/09-140. See in particular: F. BENSOUDA, Looking back, Looking ahead-reflections from the Office of the Deputy Prosecutor of the ICC, International Criminal Court, in Washington University Global Studies Law, 2012, pp. 442ss. J. FASSASSI, Understanding the ICC Prosecutor through the game of chess, in Loyola of Los Angeles International and Comparative Law Review, 2014, pp. 36ss. M.

In particular, art. 102 of the Statute clarifies that surrender means for a state "to hand over a person to the Court under the Statute" [56] and extradition "handing a person to another state under a Treaty, a Convention or its national legislation", based on the principle of mutual legal assistance[57].

The delivery system is governed by the rules of the Statute and it is generally true that extradition is always a co-transfer of a person be cause it is judged by the jurisdiction *ad quem*. Delivery rules are interpreted in the light of the novelty represented by the institutionalization of international criminal jurisdiction, are also in accordance with art. 21 of the Statute[58] and the principles which can be derived from the matter of extradition.

LANGER, K. ROACH, Rights in the criminal process: A case study of convergence and disclosure rights, in M. TUSHNET, T. FLEINER, C. SAUNDERS (ed) Routledge Handbook of Constitutional Law, ed. Routledge, 2013, pp.276ss.

[56]We specify that Part IX of the Statute, unlike the statutory rules of the dd hoc Tribunals, never speaks of "orders" issued by the Court but only of "requests". In reality, these are only terms, what is important is the extension of the obligation assumed by the States and its concrete application. See also: Prosecutor v. Anto Furundžija, Appeal Chamber, 10 December 1998, IT-95-17/1-T, para. 157, which states that the national rules restricting the pursuit of the person sought by the TPIY do not apply to international crimes falling within the jurisdiction of that Tribunal. See in argument: O.C. IMOEDEMHE, The complementarity regime of the International Criminal Court. National implementation in Africa, ed. Springer, 2016. R. VERDMANN-WITTZACK, Immunities before international criminal Courts, in B. KRZAN, Prosecuting international crimes, Brill & Martinus Nijhoff Publishers, 2016, pp. 4ss. DIGGELMANN, International criminal Tribunals and reconciliation reflections on the role of remorse and apology, in Journal of International Criminal Justice, 2016, pp. 107ss.

[57]W. VANDER WOLF, The rights of parties and international criminal law, Wolf Legal Publishers, 2011.

[58]See, K. ZEEGERS, International Criminal Tribunals and human rights law: Adherence and contextualization, ed. Springer, 2016, which the ultimate author has declared that: "(...) internationally recognized human rights are applicable fully, and thus need not be "reinterpreted" in light of the unique mandate and context of the ICC (...) the mandatory and specific content of article 21(3) of the Statute appears to prevent court judges from adjusting the content of human rights law to the unique ICC-context. The Prosecution argued that the Pre-Trial Chamber had overstepped its powers. It is submitted that the interplay between Pre-TrialChamber and Prosecution is a sensitive matter that lies at the heart of the compromises reached in Rome between different legal traditions and values, and must be approached with the utmost caution. In relation to the investigative activities undertaken by the ICC, this compromise between different legal cultures is represented by two main features of the Statute: the independence and autonomy of the Prosecutor in conducting investigations, always under strict application of the principle of objectivity enshrined in article 54 (1)(a), and the specific supervisory powers of the Pre-Trial Chamber. The system enshrined in the Statute is one where the investigation is not performed or shared with a judicial body, but rather entrusted to the Prosecution, as expressly provided for in article 42 (1) of the Statute: the Office of the Prosecutor shall be responsible for conducting investigations (...) before the Court (...)". At the same time, the system also includes a closed number of provisions empowering the Pre-Trial Chamber to engage in specific instances of judicial supervision over the Prosecution's investigative activities. The Prosecution submits that this delicate balance between both organs must be preserved at all times in order to honour the Statute, and to enable the Court to function in a fair and efficient manner (Situation in the DRC, Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, ICC-01/04, 8 March 2005, 4). In its recent Draft Policy Paper on Case Selection and Prioritization, the OTP clarified that: "(...) following the decision to open an investigation into a situation or a judicial authorization to that effect: (t)he Office will develop a Case Selection Plan which identifies in broad terms the potential cases within the situation. Initially, the Plan will be based on the conclusions from the preliminary examination stage, including the potential cases identified therein. As investigations within a situation proceed, the Office will gradually develop one or more provisional case hypotheses that meet the criteria set out in this policy paper (...)". OTP, Draft Policy Paper on Case Selection and Prioritization (2016) 7. Lubanga case, the Appeals Chamber has noted the sui generis character of jurisdictional challenges based on human rights grounds: abuse of process or gross violations of fundamental rights of the suspect of the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction (…). Notwithstanding the label attached to it, the application of Mr. Lubanga Dyilo does not challenge the jurisdiction of the Court (…) what the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo. Prosecutor v. Thomas Lubanga, AC Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, Prosecutor v. Lubanga ICC-01/04-01-06 (OA4), 14 December 2006, 24. Also see: A. CENGIC, Commentary, in A. KLIP, G. SLUITER (eds), Annotated leading cases of International Criminal Tribunals, Vol. XXIII, ed. Intersentia, 2010, pp. 182-184.In particular: "(...) Katanga's Defence tried to show the limitations of this narrow view: In the time preceding the issuing of an arrest warrant by the ICC there was an increaseininterestintheaccusedbytheICC.Thisisnotablackandwhitesituation. The successful application for a warrant of arrest would be an artificial point to measure the beginning of participation by the ICC in the situation of the accused. At some point during the preceding period of growing interest in the accused there was a formulation of intention on the part of

The reference to the specialty rule (art. 101 of the Statute) is the confirmation that the new rules do not intervene on a pure ground even though there is no rule of general international law requiring compliance with the specialty rule in the field of judicial assistance. Examination of this principle refers to conventional practice and internal rules[59]. Equally important is (in multilateral treaties governing judicial assistance) the fact that the principle of specialty is generally not directly envisaged. Its operation emerges from reserves to treaties formulated by States. Thanks to international instruments, there is a clear tendency to achieve a progressive restriction on the scope of the principle with the aim of promoting judicial cooperation and repressive action[60].

This aspect emerges with some evidence only in relation to bilateral agreements, while multilateral instruments do not follow an innovative approach. The provisions of international judicial cooperation shall apply only on condition that they do not prejudice the obligations of other bilateral or multilateral treaties governing or regulating in whole or in part mutual judicial assistance between the contracting States. Conventions and treaties generally provide mutual assistance or specific actions while practice tends to reduce the margin of "unnamed assistance" (*sine nomine firmamentum*)[61].

The different nature of cooperation with ICC allows for the support of the forefront case contained in lett. 1, par. 1, art. 93 of the Statute[62]. Reference is made to those actions called "fishing expeditions" (claims that

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the OTP to treat the accused as a principal suspect in the case concerning Bogoro. It is at that point that the prosecutor assumes a duty of care towards the accused, whatever his status in the DRC (...) the Prosecutor ought to have been in possession of sufficient information, in this particular case, to be aware that the accused's detention in the DRC was inconsistent with international human rights standards (...) the activities of the DRC for admissibility, and on the basis of documents and information received from the DRC with respect to proceedings within the DRC (...) the DRC proceedings against, among others, Thomas Lubanga Dyilo are the subject of serious and increasing criticism. The arrest of TLD by the DRC authorities took place in the context of international pressure, arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005 (the so called Ndoki incident) (…) to the extent that information is available to the Prosecution, neither at the time of his arrest nor later has evidence emerged that clearly links TLD to the Ndoki incident (…) this situation has resulted in increased criticism from international NGOs, alleging that the detention of TLD and the other leaders of the political e/o military groups may be irregular (...)", Prosecutor v. Germain Katanga (n. 44) 90 and Prosecutor v. Thomas Lubanga (n. 47)8-11.

[59]For the principle of specialty see the opinion of the American judge Miller in the case: US Supreme Court in United States v. Rauscher, 119 U.S. 407 (1886) where he said: "(...) after having carefully examined the terms and history of the Webster Ashburton Treaty of 1842; the practice of nations in regards to extradition treaties; the law from the states; and the writings of commentators, and reached the following conclusion: (A) person who has been brought within the jurisdiction of the Court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings (...)". Of the same spirit are the following judgments: United States v. Rauscher at 430 and United States v. Alvarez-Machain, 504 U.S. 655 (1992). See also the Court of Appeal of the ICTYin the case of Kovacević that stated in relation to the principle of specialty: "(...) if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal (Prosecutor v. Kovačević (Case No. IT-01-42) ICTY A. Ch., Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para, 37). See, R. CRYER, at. al., An introduction to international criminal law and procedure, 3rd ed., Cambridge University Press, 2014, pp. 95ss. G. DANCY, F. MONTAL, Unintended positive complementarity: Why International Criminal Court investigations may increase domestic human rights prosecutions, in American Journal of International Law, 2017, pp. 690ss.

[60]In this sense: The Prosecutor v. Uhuru Muigai Kenyatta, Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005, 13 March 2015.

[61]Term used in European Union law for the exchange of conventional information through the EU and the Council of Europe. The term has also been used on various articles of the Statutes of International Criminal Courts, such as Art. 93 of the Statute of the International Criminal Court.

[62]According to the article just mentioned: "(...) in regulating forms of cooperation in the field of evidence, it merely establishes that States must facilitate voluntary appearance before the cattle of persons such as witnesses and technical consultants (...)". In such a case, the state must cooperate for the quotation of a person and also allow for the possibility of non-collaboration as a person, *rectius* a witness may request transfer to another state where his authorities may be opposed not only to the collaboration

are usually rejected in the practice of normal ICC assistance)[63]; of the material in order to initiate an internal procedure, but it also seems to extend, broader requests for coordination in investigative activities or those actions which, according to certain jurisdictions, could be attributed to forms of police cooperation and not procedural-judicial.

States party to the Statute do not have the power to refuse such forms of cooperation, but they should be allowed to introduce rules to their own accord. It must be assumed that the assistance to which the Statute relates to is of general nature. There are no cases falling within the categories of internationaljudicial cooperation cases as for example are the on-site investigations of the Court's Prosecutor in an inquisitorial/accusatory system[64]: possibilities provided by art. 54 (duties and powers of the Prosecutor in

but also unavailable to make the head appear. See in argument: J. BEDERMAN, International Criminal Court pretrial Chamber decision on the standard for the Prosecutor to initiate investigations under the Rome Statute, in American Journal of International Law, 2011, pp. 540ss. J.J. LIOLOS, Justice for tyrants: International Criminal Court warrants for Gaddafi regime crimes, in Boston College International and Comparative Law Review, 2012. R. CRYER, et. al., An introduction to international criminal law and procedure, 2nd ed., Cambridge University Press, 2010, pp. 509-530. C. KRESS, K. PROST, Article 93-Other forms of cooperation, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by article, 2nd ed., C.H. Beck/Hart/Nomos, 2008, pp. 1569-1588. G. GYU KIM, C. HWANG, New initiatives on international cooperation in criminal justice, Seoul National University Press, 2012. M. KLAMBERG, Evidence in international criminal trials, Martinus Nijhoff Publishers, 2013, pp. 235, 242, 244-246, 253, 257, 276 and 462. W.A. SCHABAS, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, 2010, pp. 1015-1025.

[63] Article 93, par. 1 of the Statute contains a non-exhaustive list of "any other type of assistance" that can facilitate the "investigation and prosecution of crimes within the jurisdiction of the Court" and find execution by means of requests addressed to States Parties. See: K. PROST, A. SCHLUNK, Art. 93, in O. TRIFFTERER (ed.), Commentary, op. cit., pp. 1101

[64] See, M. DAMAŠKA, Evidentiary barriers to conviction and two models of criminal procedure: A comparative study, in University of Pennsylvania Law Review, 1973, pp. 506ss. According to the author: "(...) the following elements can constitute the essential and natural base of the adversarial system: party-controlled proceedings (the two-cases approach); -a reactive/passive judge with no prior knowledge of the evidence (tabula rasa); -partisan proceedings: parties are present and can challenge their versions of the events; -parties have the power and means to lead the proceedings, collect, present and challenge evidence, examine and cross-examine their witnesses and experts; -confrontational presentation of evidence; -the focus is on the trial stage where in principle all the evidence has to be presented; -bifurcation of trial: establishing guilt, determining the sanction (…). The following elements can be considered to constitute the essentialia and the naturalia of the inquisitorial system: judge-controlled proceedings (the one-case approach): active judge in the collection and presentation of evidence, questioning of the witnesses and experts; -the sequence follows: the investigation by the Prosecutor; then, if appropriate the judicial investigation; then, if enough evidence: examination at trial; -investigating judge (Rechter-commissaris/juge d'instruction) objective, unbiased, impartial investigation, all the necessary materials in case file (dossier); -focus on the pre-trial stage: when the dossier is made which forms the basis for the trial and the decision- making of the judge. Essentialia of inquisitorial style: an official and thorough inquiry with the goal of establishing true facts. The Court-controlled pursuit of facts cannot be limited by the mutual consent of the participants; the Court, once having received the case takes its own responsibility in establishing the truth; -historical preference for documented evidence and decision making by a professional judge are the naturalia of the inquisitorial style (...)".

the matter of investigations) of the Statute[65], other than of art. 99 par. 1, to attend the execution of the request for assistance as a form of cooperation[66].

The Prosecutor's procedural forms and powers prevent Court's awareness from being relevant to the conviction of guilt that must be *secundum acta et probed* as well as the possibility of acquittal even when there is evidence but not enough to incriminate a person. In any case, the evidence binds the right to strict legality because they give the force of the reasoning that judicial decisions are elected and legitimate by assertions as verifiable and falsifiable, even if approximate. The validity is conditioned on the truth, although relative to their arguments that jurisdictional power is not the inhuman power purely potentially of justice, but is based on knowledge also plausible and probable but precisely for this being rebuttable and controllable both by the defendant and his defense than by internationalsociety[67].

The reasoning allows for the establishment and control of decisions both in law for breach of law or for defects in interpretation or superstitiousness and in fact due to lack or insufficiency of evidence or inadequate explanation of the connection between conviction and evidence. We refer to the investigations that the Prosecutor carries out in the territory of a State Party (pyramidal investigation strategy)[68] on the basis of an inability of the latter to assist[69]. Investigations and especially confidential agreements that take

[65]See in particular the next cases: ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, 01/04-01/07-T-81, 25 November 2009, pp. 16–17, 34; Prosecutor v. Mbarushimana, ICC PT. Ch. II, Decision on the Confirmation of Charges, ICC- 01/04-01/10-465-Red, 16 December 2011, para. 51; Prosecutor v. Lubanga, ICC T. Ch. I, ICC-01/04-01/06-2842, 14 March 2012, para. 367; Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, 01/04-01/07-T-81, 25 November 2009, para. 72); Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-568 (OA 3), 13 October 2006, para. 52; Prosecutor v. Uhuru Muigai Kenyatta, ICC T. Ch. V, ICC-01/09-02/11-728, 26 April 2013, para. 119; Prosecutor v. Mbarushimana, ICC A. Ch., ICC-01/04- 01/10-514 (OA 4), 30 May 2012, para. 44; Prosecutor v. Lubanga, ICC A. Ch., ICC- 01/04-01/06-568 (OA 3), 13 October 2006, para. 54, which states that: "(...) it would be desirable for the investigation to be complete by the time of the confirmation hearing (...)". Prosecutor v. Uhuru Muigai Kenyatta, ICC T. Ch. V, ICC-01/09-02/11- 728, 26 April 2013, para. 121; Prosecutor v. Abakaer Nourain and Jerbo Jamus, ICCT. Ch. IV, ICC-02/05-03/09-158, 6 June 2011, para. 13; Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC, PT. Ch. II, ICC-01/09-02/11-382-Red, 23 January 2012, with dissenting opinion by Judge Hans-Peter Kaul, para. 56; Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC PT. Ch. II, ICC-01/09-01/11-373, 23 January 2012, with dissenting opinion by Judge Hans-Peter Kaul, para. 51; Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch. I, ICC-01/04-01/07-717, 30 September 2008, paras. 144–48; Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09- 02/11-728, T. Ch. V, 26 April 2013, para. 123; Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-1486 (OA 13), 21 October 2008, paras. 42–43; Prosecutor v. Kordić and Čerkez, ICTY T. Ch. III, 25 June 1999, p. 6; Prosecutor v. Kordić and Čerkez (Case No. IT-95-14/2), ICTY T. Ch. III, Transcript, 31 May 1999, pp. 2975- 3045; Prosecutor Naletilić and Martinović, ICTY A. Ch., 3 May 2006, para. 238; Prosecutor v. Ntaganda, ICC PT. Ch. II, ICC-01/04-02/06-247, 6 February 2014, paras. 14–15; Prosecutor v. Abakaer Nourain and Jerbo Jamus, ICC T. Ch. IV, ICC- 02/05-03/09-442-Red2, 21 June 2013, para. 12. See, M. BERGSMO, P. KRUGER, Article 54, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by article, 2nd ed., C.H. Beck/Hart/Nomos, 2008, pp. 1077ss. C. STAHN, Justice delivered or justice denied? The legacy of the Katanga judgment, in Journal of International Criminal Justice, 2014. F. GUARIGLIA, G. HOCHMAYR, Article 57, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers. Notes, Article by article, 2nd ed., C.H. Beck/Hart/Nomos, 2008, pp. 1128ss.

[66]D. GUILFOYLE, International criminal law, Oxford University Press, 2016. O. KUCHER, A. PETRENKO, International criminal responsibility after Katanga: Old challenges, new solutions, in Russian Law Journal, 2015, pp.144ss.

[67]C. SCHWÖBEL, Critical approaches to international criminal law: An introduction, ed. Routledge, 2014.

[68]See the ICTY Manual on developed process of 1999, par. 15: "(...) in the early stages of an investigation, Prosecutors and investigators should keep an open mind about the responsibility of individuals, and should be prepared to consider conflicting evidence, alter the direction of an investigation, and avoid focusing on simply trying to build a selective case against a particular individual because of early discovery of some evidence that appears to inculpate that individual(...)".

[69]At this moments are open 10 cases of investigations asked from the Prosecutor: Georgia (27 January 2016); Central Africa II (May 2014); Mali (January 2013);Ivory Coast (from 2011 to 15 February of 2013); Libya (March 2011); Kenya (March 2010); Darfur-Sudan (March 2005); Central Africa (May 2007); Uganda (July 2004); Democratic Republic of Congo (April 2004). See, J.J. LIOLOS, Justice for tyrants: International Criminal Court warrants for Gaddafi regime crimes, op. cit. L. NKANSHAH, International Criminal Court in the trenches of Africa, in Africa Journal of International Criminal Justice, 2014. A. COLE, Africa's relationship with the International Criminal Court: More political than legal, in Melbounne Journal of International Law, 2013. S. MANISULI, The rise

place in areas of former armed conflict are linked to the concept of "homes", defined as "(...) the specific incidents in which the crimes were committed by identified perpetrators (...)"[70]. The Prosecutor has adopted the strategy of proceeding only against the major perpetrators of international crimes, leaving national courts to assess the criminal liability of the "lower -ranked" and "intermediate-rank" accused[71].

Such cooperation is irreducible as it is based on unambiguous unavailability[72] but does not mean that on-site investigation is not a form of cooperation with ICC but simply a different cooperation characterized the fact that the State Party does not actively engage but leaves the organs of supranational justice to act in its territory[73] as a form of passive cooperation[74]. According to art. 99, par. b) the Prosecutor will be required to consult with the requested state, for which he will never be able to leave, irrespective of the impossibility or excessive delays by the national authorities[75]. If the requested state decides to omit to cooperate with the ICC with a view to accessing the territory the Prosecutor for the purpose of carrying out an autonomous activity, the latter may not proceed with the transaction but would still be in a position to initiate proceedings provided for by art. 87 of the Statute for the case of non cooperation[76].

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of the African Union opposition to the International Criminal Court's investigation and prosecutions of African leaders, in International Law Review, 2012, pp. 388ss.

[70] H. FUJIWARA, S. PARMANTIER, Investigations, in L. REYDAMS, J. WOUTERS, C. RYNGAERT (eds), International prosecutors, Oxford University Press, 2012, pp. 575ss.

[71] See, Decision on the Prosecutor's request for authorization of a investigation in Georgia (27 January 2016).

[72] See, The Code of Professional Conduct for Prosecution and Defense (SCSL) "(...) shall conduct investigations and analysis with the central aim of providing the factual and evidentiary basis for an accurate assessment of criminal responsibility (...) conduct fair and firm prosecutions of crimes within the jurisdiction of the Special Court, when well-founded upon evidence reasonably believed to be reliable and admissible (...)". See also: Article 23 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, adopted on 14 May 2005, amended on 13 May 2006.

[73] C. BUISMAN, Delegating investigations: lessons to be learned from the Lubanga judgment, in Nothwestern Journal of International Human Rights, 2013.

[74] R. MUTYABA, An analysis of the cooperation regime of the International Criminal Court and its effectiveness in the Court's objective in securing suspects in its ongoing investigations and prosecutions, in Journal of International Criminal Law, 2012.

[75] M.R. BRUCHACHER, Prosecutorial discretion within the International Criminal Court, in Journal of International Criminal Justice, 2004, pp. 72ss.

[76] In particular art. 7 of the aforementioned article provides that in the event that a State Party has prevented, under its powers, the exercise of the Court of Justice may refer the matter to the Assembly of States Parties to take measures/decisions. Motivated investigations are submitted at the request of the UN Security Council pursuant to art. 13, became (b) where the Court may inform and request its intervention officially to continue to pursue political sanctions. In the same spirit we recall the article 18 of the Vienna Convention on the law of treaties provides that: "a state shall refrain from taking any act capable of depriving a treaty of its object and purpose" which in our case requires the Member States of the Statute to avoid political shortcomings collaborate and violate international jurisdictions for their own interests. Article 87 resembles article. 54, par. 3 which states that the Prosecutor: "(...) may seek the cooperation of any (...) intergovernmental organization or arrangement in accordance with its respective competence and/or mandate". See also: Prosecutor v. Lubanga, ICC PT. Ch. I, Decision on Defense Requests for Disclosure of Materials, 17 November 2006, PTC I ordered the Registrar to immediately send a cooperation request to the United Nations in order to obtain notes of interviews of MONUC officials. ASP Report of the Court on the status of on-going cooperation between the International Criminal Court and the United Nations, including in the field, ICC-ASP/12/42, 14 October 2013, 20. The MoU between the ICC and UNOCI was concluded on 12 June 2013. IASP, Report on the activities of the International Criminal Court, ICC-ASP/13/37, 19 November 2014, 73.Moreover: [it] authoris[ed] MONUSCO, through its military component […] to take all necessary measures to (...) [s]upport and work with the government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with (...) the ICC (…). Support[ing] and work[ing] with the transnational authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the [CAR], including through cooperation with States of the region and the ICC (...)". See also: UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/ 2098, 12. This mandate was extended until 31 March 2015 by UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147. In case: Prosecutor v. Bashir, ICC PT. Ch. I, Decision Pursuant to article 87(7) of the ICC Statute on the

According to the same article (par. 4), the Prosecutor may undertake investigations that fall within the scope of: "(...) examination without modification of a public site or other public place (...)"[77]. The provision is extremely restrictive because the Prosecutor will never go to private property locations, to collect evidence items. There is no judicial cooperation in the strict sense in the hypothesis envisaged by art. 57, par. 3, lett. d of the Statute according to which the Prosecutor may take investigative measures in the territory of a State Party without having assured the cooperation of this state in accordance with Chapter IX of the Statute. The cooperation whose obligation is enshrined in the Statute not only includes active cooperation (art. 86) but also what can be defined as passive cooperation (art. 57)[78].

The foreseeing cooperation of the ICC with States Parties is an ineluctable possibility in the context of a relationship between jurisdictions[79]. There may be a case that a state is committed to prosecuting an offense of ICC's jurisdiction, which requires the Court's cooperation to fulfill its own ends of justice. This is the situation provided by art. 93, par. 10 of the Statute: a form of cooperation on the contrary, that is, reciprocal or inverse of the one provided for by States Parties to the ICC. This prediction is the natural corollary of the principle of complementarity[80]: in the face of a state Court proceeding to the repression of core crimes against humanity[81], war crimes for which ICC would be competent, the ICC can not escape the obligation to provide the requestedcooperation.

3. Requests for assistance during inquiries

The ICC may seek, in connection with ongoing investigations or criminal proceedings to States Parties that are required to provide the assistance requested in accordance with the national Statute and national procedures for providing assistance (art. 93, par. 1) for: -the identification of persons or places;-the taking of evidence, direct or delegated in particular collection of testimonies under a solemn oath and other evidence such as technical advice, expert opinions, reports and reports required by the ICC[82]; -

Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir including Annexes and Corrigenda, 12 December 2011, Malawi, relied on article 98(1) of the Statute to justify its refusal to comply with the cooperation requests with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir. In the aforementioned case, the Court of Appeals observes that: "(...) an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary internationallaw; therefore, article 98(1) of the Statute does not apply (...) in accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the cooperation requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties (...)". See, M. KLAMBERG, Evidence in international criminal trials: Confronting legal gaps and the reconstruction of disputed events, Martinus Nijhoff Publishers, 2013, pp. 235ss.

[77]See: The policy paper on preliminary examinations of Prosecutor, November 2013. D.J. BEDERMAN, International Criminal Court pretrial Chamber decision on the standard for the Prosecutor to initiate investigations under the Rome Statute, op. cit. J.J. LIOLOS, Justice for tyrants: International Criminal Court warrants for Gaddafi regime crimes, op. cit.

[78]See the Public redacted version of joint defense request under art. 54 from The Prosecutor v. William Samoei Ruto and Joshua Arap Sang of 3 November 2014 (ICC-01/09-01/11-1627).

[79]J. NICE, N. TROMP, International criminal Tribunals and cooperation with States, in M. DEGUZMAN, D.A. AMANN, Arcs of global justice. Essays in honour of William A. Schabas, Oxford University Press, 2018.

[80]H. HOBBS, The Security Council and the complementary regime of the International Criminal Court: Eyes on the ICC, Academic Search Complete, 2012

[81]R. DUBLER SC, M. KALYK, Crimes against humanity in the 21stcentury, ed. Brill, 2018.

[82]See also the Report ICC-02/04-218, Fourteenth periodic report of the registry on the applicants received by the victims participation and reparations section in the situation of Uganda on 11 January 2017.

interrogators of persons under investigation and accused;-sending documents including judicial files; -facilitation of the voluntary appearance of witnesses or experts before the ICC. In this case, with regard to witnesses, the ICC cites the instructions relating to self incriminating statements in a language that the witness understands and speaks fully; -transportation of persons or temporary travel disciplined by the following par. 7; -inspections, that is, examination of places and sites, where appropriate for the purpose of exhumation of corpses and examination of common pits; -search of records, official documents, files; -protection of victims and witnesses[83]as well as evidence; -confiscation operationthat includes identification, tracing, freezing of assets, the sequestration of proceeds of crime property, assets and tools used for offenses save the rights of third parties in good faith; any other form of assistance not prohibited by the

[83]The victim protection in some European countries enjoys certain guaranteed rights, such as: "-to be present during proceedings; -to claim compensation; -to contesttheimpositionofajudgeoranexpertwitness;-toputquestionstowitnesses;-to contest the permissibility of questions to witnesses; -to introduce evidence during proceedings;-toobjecttodecisionsofthepresidingjudge;-tomakestatements(...)". According to French law: "(...) a victim (…) will have rights to be informed about the evidence gathered and to address the Court regarding the facts of the case, as well as on the issue of sentencing: Code de procèdure pènale, artt. 2–9. In particular theabovearticledeclares: "l'actioncivileenrıparationdudommagecausıparuncrime, un dılit, ou une contravention appartient à tous ceux qui ont personnellement souffert du dommage directement causè par l'infraction' (...)". In Austria: "(...) if the victim joins proceedings as a civil claimant, they may, inter alia: present evidence that can be relied upon to determine the guilt or innocence of the accused; put questions to the accused and other witnesses; make remarks during the proceedings; and, at the close of evidence, put forward arguments relating to the main verdict. They may take over Prosecutorial proceedings if the public Prosecutor decides not to proceed with the prosecution. If the victim's claim for civil damages in the criminal trial is referred to the civil courts they may appeal that there was sufficient evidence to decide the civil claim. For certain offenses, victims may also launch private prosecutions, examples being medical treatment without permission and privacy offenses (...)". In Germany: "(...) a victim may join a procedure as a civil claimant and, for certain serious offenses, may act as an auxiliary Prosecutor wherein they may, inter alia: present evidence that can be relied upon to determine the guilt or innocence of the accused; put questions to the accused and other witnesses; and make remarks during the proceedings. The auxiliary Prosecutor has the right to legal aid and may appeal against a judgment. For certain less serious crimes, the victim may initiate a private prosecution if the public Prosecutor declines to do so (...)". In Liechtenstein: "(...)a victim may join proceedings (...)as claimant. In that case, the victim may present evidence and make statements, but not as to the ultimate guilt or innocence of the accused. A victim may act as a subsidiary Prosecutor if the public Prosecutor discontinues the case (...)". In Scandinavian jurisdiction is noted that: "(...) although victims can act as auxiliary Prosecutors in Denmark, they receive no participatory rights in proceedings. (...) In Norway, the victim's role as a party to the case is limited to their civil claim, except for where private prosecutions are undertaken or in rare cases of acting as an auxiliary Prosecutor (...)". In Portugal: "(...) Victims have extensive powers as auxiliary Prosecutors (...)". Under the case of the ICC: Prosecutor v. Lubanga (Decision on Victims' Participation) (Trial Chamber I, Case No ICC-01/04 01/06, 18 January 2008) "(...) a victim may suffer, either individually or collectively, from harm in a variety of different ways, such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her rights (...)" and under the opinion of the judge Blattmann in case Lubanga: "(...) the participation and compensation of victims in the Rome Statute as the promise of a "new step forward' in victims" rights (...) victims' participation is a "right" provided by the Rome Statute, signaled by article 68(3) (...)". The opinion of the judge was used in the past from the ex general Secretary of UN, Kofi Annan during the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998: "(...) the overriding interest must be that of the victims, and of the international community as a whole (…). It must be an instrument of justice, not expediency. It must be able to protect the weak from the strong (...)". In Lubanga Appeals Chamber decision the judge Song with dissenting opinion has declared that: "(...) victims interests fell under two heads-their interests in reparations and their interests in justice (...) with regard to article 68(3), the Chamber considers that it imposes an obligation on the Court vis-à-vis victims (…). The victims guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them (...)". See also: Prosecutor v. Lubanga (Judgment on Appeals of the Prosecutor and the Defense against Trial Chamber I's Decision on Victims Participation of 18 January 2008- Appeals Chamber, Case No ICC-01/04-01/06-1432, 11 July 2008) (Lubanga Appeals Chamber decision). See also: The Uganda Decision on VictimsApplications for Participation and Lubanga (Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6) (Pre-Trial Chamber I, Case No ICC-01/04-01/06-172-t, of 29 June 2006); The DRC Decision on the Applications for Participation in the Proceedings. Prosecutor v. Sesay, Kallon, and Gbao (Judgment) (Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009); Prosecutor v. Kayishema and Ruzindana (Judgment) (Trial Chamber II,Case No ICTR-95-1-T, 21 May 1999). See in argument: C. TISSERANT, Victims participation at the International Criminal Court (ICC): The growing role of their legal representatives, in International Justice Project, 2013. C. BUISMAN, Delegating investigations: Lessons to be learned from the Lubanga judgment, in Northwestern Journal of International Human Rights, 2013, pp. 30-82.

law of the requested state, assistance which must be made with the express purpose of facilitating inquiries and proceedings for offenses falling within the jurisdiction of ICC[84].

The ICC has the opportunity to provide witnesses and experts called upon to lodge before it a guarantee that they will not be prosecuted, arrested or subjected to other restrictions on personal liberty by the ICC for acts or omissions prior to the departure and in any case from the state required (art. 93, par. 2 and Rule 111 RPE) and in any case the right to confrontation[85] must be respected in accordance with art. 67, par. 1(e) without exception to the taking of evidence at trial[86] and anonymous testimonies. The guarantee in

[84]J. FERNANDEZ, X. PACREAU (eds), Statut de Rome de la Cour Pénale Internationale, Commentaire article par article, ed. Pedone, 2012.

[85]K. VANDERPUYE, Traditions in conflict: The internationalization of confrontation, in Cornell International Law Journal, 2010, pp. 514ss.

[86]For the rights of accused see: Prosecutor v. Lubanga, ICC PT. Ch. I, Decision to Unseal and Reclassify Certain Documents in the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-42, 20 March 2006; Prosecutor v. Bemba, ICC T. Ch. III, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, ICC-01/05-01/08-1904-Red, 15 November 2011, para. 18; Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch. II, Ordonnance portant instructions en vue de favouriser la publicité de la procédure, ICC-01/04-01/07-3226, 31 January 2012, para. 1; Prosecutor v. Bemba, ICC PT. Ch. III, Decision on the Second Defense's Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal, ICC-01/05-01/08-249, 14 November 2008, paras. 27–29; Prosecutor v. Bemba, ICC A. Ch., Order on the reclassification as public of documents ICC-01/05-01/08-498-Conf and ICC-01/05-01/08-503-Conf, ICC-01/05- 01/08-701, 24 February 2010; Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence), ICC-01/04-01/07-1667-Red-T, 9 December 2009, para. 4; Prosecutor v. Lubanga, ICC T. Ch. I, Transcripts, ICC-01/04-01/06-T-104, 16 January 2009, pp. 3–4; Prosecutor v. Lubanga, ICC T. Ch. I, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, ICC-01/04-01/06-1603, 15 January 2009, para. 17; Prosecutor v. Lubanga, ICC T. Ch. I, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, ICC-01/04-01/06-1603, 15 January 2009, para. 17; Prosecutor v. Katanga and Ngudjolo Chui, ICCT. Ch.II, Decision on the application for the institution of protective measures for Witnesses a/0381/09, a/0018/09, a/0191/08, pan/0363/09 and Victim a/0363/09, issued on 27 January 2011, ICC-01/04-01/07-2663-Red, 22 February 2011, para. 15; Prosecutor v. Lubanga, ICC T. Ch. I, Decision on various issues related to witnesses' testimony during trial, ICC-01/04-01/06-1140, 29 January 2008, paras. 25 and 35; Prosecutor v. Lubanga, ICC T. Ch. I, Judgment Pursuant to article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 110; Prosecutor v. Ngudjolo Chui, Judgment pursuant to article 74 of the Statute, ICC-01/04-02/12-3-T, 18 December 2012, para. 64; Prosecutor v. Kony et al., ICC PT. Ch. II, Decision on the Prosecutor's Applications for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, ICC-02/04-01/15-64, 10 July 2006, para. 24; Prosecutor v. Lubanga, ICC PT. Ch. I, Decision on the defense Request for Unrestricted Access to the Entire File of the Situation in the Democratic Republic of the Congo, ICC-01/04-01/06-103, 17 May 2006; Prosecutor v. Katanga, ICC PT. Ch. I, Decision on Defense Request concerning languages, ICC-01/04-01/07-127, 21 December 2007, para. 30; Prosecutor v. Katanga and Ngudjolo Chui, ICC A. Ch., Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the defense Request Concerning Languages", ICC- 01/04-01/07-522, 27 May 2008, para. 61; Prosecutor v. Banda and Jerbo, ICC T. Ch. IV, Decision on the defense request for a temporary stay of proceedings (Concurring Separate Opinion of Judge Eboe-Osuji), ICC-02/05-03/09-410, 26 October 2012, paras. 130–135; Prosecutor v. Katanga, ICC T. Ch. II, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-T, 7 March 2014, para. 1486; Prosecutor v. Lubanga, ICC A. Ch., Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2205, 8 December 2009, para. 85; Prosecutor v. Banda and Jerbo, ICC T. Ch. IV, Decision on the defense request for a temporary stay of proceedings (Concurring Separate Opinion of judge Eboe-Osuji), ICC-02/05-03/09-410, 26 October 2012, para. 12; Prosecutor v. Lubanga, ICC T. Ch. I, Decision on the "Prosecution's application to take testimony while proceedings are stayed pending decision of the Appeals Chamber", ICC-01/04-01/06-2574, 24 September 2010, para. 21). In particular, the Trial Chamber in this last case noted that: "(...) the trial of the accused is conducted with full respect for his rights, and to guarantee the rule of law, the Prosecutor has to accept the Chamber's authority, which is an irremovable and fundamental ingredient of a fair criminal trial (...)". Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319-T, 21 November 2012, para. 43; Prosecutor v. Kenyatta, ICC T. Ch. V(B), Decision on Prosecution's applications for a finding of non-compliance pursuant to article 87(7) and for an adjournmentoftheprovisionaltrialdate,ICC-01/09-02/11-908,31March2014, para. 77; Prosecutor v. Ruto and Sang, ICC T. Ch. V(a), Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ICC-01/09/01/11-777, 18 June 2013; Prosecutor v. Kenyatta, ICC T. Ch. V(B), Decision on Defense Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09- 02/11-830, 18 October 2013; Prosecutor v. Ruto

question is deliberated by the competent department for dealing with the case, either at the office or at the request of the prosecutor or the interested party and having heard theiropinion.

Among the forms of assistance requested by the ICC, translation of persons or temporary custody can be obtained for identification purposes or to collect testimony or other declarations. The terms for translation are:- free and informed consent of the person to be transferred to the translation;-the agreement of the State Party to the temporary travel, possibly subject to specific additional conditions agreed between the requesting Court and the requested State Party.

The transferred person remains in custody, and exhausted the purposes for which the transfer was made, it is again sent to the requested state without delay (art. 93, subsection 7)[87].

The cases of evidence collection assistance requests pursuant to art. 56, par. 2 consists of: "issuing recommendations or making arrangements for the procedure to be followed" in relation to the need to ensure an effective and integrity of the procedure. The rule does not identify the case of the exclusionary rule[88], that is, whether the evidence obtained is in breach of the Statute, holding the Statute a non common law line where a trial obtained illegally and does not violate universally recognized human rights[89], even if not included in the Statute of the ICC may be used for the determination of the truth.

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and Sang, ICC T. Ch. V(A), Decision on 'Prosecution's application for leave to appeal the decision on excusal from presence at trial under Rule I34quarter, ICC-01/09-01/11-1246, 2 April 2014; Prosecutor v. Katanga and Ngudjolo Chui, ICC A. Ch., Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defense for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07- 2259, 12 July 2010; Prosecutor v. Bemba, ICC A. Ch., Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', ICC-01/05-01/08-1386, 3 May 2011, para. 79; Prosecutor v. Bemba, ICC T. Ch. III, Decision on the Defense's Request Related to Language Issues in the Proceedings, ICC-01/04-01/08-307, 4 December 2008, para. 11; Prosecutor v. Mbarushimana, ICC PT. Ch. I, Decision on issues relating to disclosure, ICC-01/04-01/10-87, 30 March 2011, para. 16; Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, Decision on the request of the Defense for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination; Prosecutor v. Banda and Jerbo, ICC T. Ch. IV, Decision on the defense request for a temporary stay of proceedings, ICC-02/05-03/09-410, 26 October. See: D. MCDERMOTT, General duty to ensure the right to a fair and expeditious trial, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÁ (eds), International criminal procedure: Principles and rules, Oxford University Press, 2013, pp. 771ss. W.A. SCHABAS, Article 63–Trial in the presence of the accused, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observer's notes, article by article, ed. Beck, 2011, pp. 804ss. W.A. SCHABAS, Article 66- Presumption of innocence, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by article, op. cit., pp. 834ss. W.A. SCHABAS, Article 67-Rights of the accused, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by article, op. cit., pp. 846ss. W.A. SCHABAS, Article 63-Trial in the presence of the accused, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers'Notes,Articleby article,op.cit.,pp.1192ss. W.A. SCHABAS,Article66-Presumption of innocence, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by article, op. cit., pp. 1234ss. G. SLUITER, Human rights protection in the ICC Pre-Trial phase, in C. STAHN, G. SLUITER (eds), The emerging practice of the International Criminal Court, op. cit., pp. 460ss. D. TOCHILOVSKY, Defense access to the prosecution material, in G. SLUITER, H. FRIMAN, S. LINTON, S. VASILIEV, S. ZAPPALÁ (eds), International criminal procedure: Principles and rules, op. cit., pp. 1084ss. S. ZAPPALÁ, The Rights of victims v.the rights of the accused, in Journal of International Criminal Justice, 2010, pp. 138ss. M. CAIANIELLO, Disclosure, before the ICC: The emergence of a new form of policies implementation system in international criminal justice?, in International Criminal Law Review, 2010, pp. 24ss.

[87] W.A. SCHABAS, The International Criminal Court: a Commentary on the Rome Statute, Oxford University Press, 2010.

[88] See: ICC Appeals Chamber to deliver its judgment on the Prosecutor's appeal regarding Kenya's cooperation on 19 August 2015. L.S. SUNGA, Has the ICC unfairly targeted Africa or has Africa unfairly targeted the ICC?, in T. MARINIELLO (ed.) The International Criminal Court in search of its purpose and identity, ed. Routledge, 2015.

[89] D. SVARC, The contribution to the promotion and protection of human rights, in A. FOLLESDAL, G. ULFSTEIN, The judicialization of international law: A mixed blessing?, Oxford University Press, 2018.

Also, due to the integrity of the procedure, wide margin of discretion is allowed once the threshold of obvious violations has been exceeded, as in the case of recruitment and testimony and evidence of violence or threats or torture. The same art. 69, par. 8 provides that the ICC must decide on the application of national law when deciding on the relevance and the admissibility of evidence collected by a state[90]. Full and complete application of detailed evidence collection mechanisms should not only regulate evidence collection based on state cooperation, but also ensure that assessments are always under Prosecutor's coordination, based on a systematic interpretation of the rules of the Statute and all adoption of PRR 115, par. 3 which legitimizes, *rectius* reinforces the legitimate accomplishment of in-situ investigations and within the circle of control carried out by the preliminary chamber that consolidates the determination of the prosecution to pursue the criminalaction.

The outcome of the investigations opens the way for the Prosecutor to express a realistic prognosis of guilt and "(...) to a given crime and its perpetrators (...)"[91]. The margin of appraisal of the investigative evidence[92]represents a strong representative capacity since the jurisdiction of the ICC is characterized by a degree of seriousness which makes it difficult to obtain a graduation in the light of the facts of the case and the Court's jurisdiction; and end up coinciding with the exercise of the action, including the request for restrictive measures of personal liberty by ensuring the presence of the accused before the Chamber of Pre-trial and obtaining an arrest warrant or a summons order against the alleged offender of the offense subject to the investigation and/or the impugnability of the case pursuant to art. 17.

The exercise of the action falls short of the interest of justice, since the Statute is bound by the Prosecutor, whose exercise is subject to the evidence collected before the preliminary chamber (art. 53(3)) and must be "in a reasonable manner"[93]. It is evident that the evidence is never fully representative of the fact that it

[90]F. TERRIER, The procedure before the trial Chamber, in A. CASSESE, P. GAETA, G.R.W.D. JONES, The Rome Statute of International Criminal Court: A commentary, Oxford University Press, 2002, pp. 1292ss. H.J. BEHRENS, D. PIRAGOFF, Article 69-Evidence, in O. TRIFTERER, Commentary on the Rome Statute of the International Criminal Court, op. cit., pp. 890ss. The above cited authors agree that the outcome of the entire probative procedure that the judge may establish a weight attributable to some information. The relevance parameter is synonymous with the concept of pertinence.

[91]G. TURONE, Powers and duties of the Prosecutor, in A. CASSESE, P. GAETA, G.R.W.D. JONES (eds), The Rome Statute of the International Criminal Court, op. cit., pp. 1172ss.

[92]The assessment of the evidence is based on the assessment of the material truth which affirms the procedural mechanisms permitted by previous investigations and inquiries. Material truth is not limited to the determination of test topics or the choice of means of acquisition. Nothing prevents the affirmation or non-affirmation of the existence of the fact, although one thing is the fact that the assumptions of the proponent data prove to another. The problem is not in international justice the evaluation process of the test but the amount of correlation between the process and the formation and acquisition of the test, beginning with the probative initiative involving a hierarchy of evidence and evidence collected as evidence of national legislation and the same Statute of the Court. The ultimate goal of test evaluation is the guarantee of correspondence between trial and judgment. This is not an identical mechanism for which it can not go beyond what is meant by Court jurisdiction by using probative initiatives.

[93]In particular, the Prosecutor may apply to the Pre-Trial Chamber for the issuance of a warrant which has the suspect or the person against whom reasonable grounds have been found to believe that he has committed a criminal offense under the jurisdiction of the Court and the precautionary requirements of art. 58, paragraph 1, lett. b). The alternative of the arrest warrant is the order of appearances, that is, the summons to appear always to be evaluated as a sufficient and adequate instrument to support the presence of the defendant in the trial according to art. 58, par. 7 of the Statute of the Court. Such presence is essential for the conduct of the proceedings, as the Statute does not allow the controversial debate in accordance with art. 63 of the Statute. The first summons to appear was made in the proceedings of Bahar Idriss Abu Garda (The Prosecutor v. Bahar idriss Abu Garda, Case No ICC-01/05-02/09). See also: P.G. TELES, The International Criminal Court and the evolution of the idea of combating impunity. An assessment 15 years after the Rome Conference, in Janus.net e-Journal of International Relations, 2015, pp. 65ss. E.S. PODGOR, R.S. CLARK, Understanding international criminal law, ed. LexisNexis, 2013. R. O'KEEFE, International criminal law, Oxford University Press, 2015. M. VARAKI, Introducing a fairness-based theory of prosecutorial legitimacy before the international criminal Court, in European Journal of International Law, 2016, pp. 772ss.

refers but it can only make the present case known as a result of inferential reasoning that needs to be put in place after completion of the investigation. The accuracy of this statement is obvious in some instances and especially in the case of what is called critical evidence. If the result of an investigation can not be reduced to a pure and complete data, the factual material used is not the consequence of a passive receipt of the emergencies of probation supranational ICC assistance but the outcome of their inclusion in the judicial context, as defined in its various profiles including conceptual andlinguistic.

The complicated steps of the evidence collection system are to be seen in the light of the finding that the presupposition of a judgment is made not of evidence but of the application, that is, of the request for trialwhose premise is an hypothesis concerning a particular offense. The evidence of the fact/subject matter goes through the evidence of other facts that if the decision does not refer to facts that existed or did not exist, but allegations of their existence only through passages of probation presuppose that the existence of certain passages are examined, explored, tried to see whether what has been said through simple statements or by previous work done by the United Nations[94] in the area and/or through NGO's, peace missions, etc.[95] has actually happened and one can come to the assessment of the truthfulness or not of the question to get to the formation of "the process of fixing thefact".

If the evidence relates to assertions, they are always the facts of the case and not just the facts constituting the typical conduct of the incriminating norm, *rectius* of offenses provided by the Statute, which is assumed to be supplemented by that defined in the imputation but all pertinent and relevant to the debriefing of the reconstructive hypotheses formulated by the parties and others that may influence the conduct of the procedure during the preliminary chamber up to the debating stage and always leaving open the risk that a positive or negative fact to be tested or the need for new collection of elements to test such fact are constituent elements, *rectius c*ataloging the fact (*quaestio facti*) for the *probandum thema* and necessary for the determination of thetruth.

The collected facts construct *thema probandum:* a function of the determination of the subject matter of decision in a logical and ontological way, pertinence and relevance for the plausible affirmation of the test objects characterized by the relation between the single object of trial and *regiudicanda.* The relevance of the evidence and its usefulness for the reconstruction not only of the admissibility of the evidence but also

[94]See some positions from the Security Council of UN for the zone of crisis which they tried to collaborate with the ICC: UN Security Council, Report of the International Commission of Inquiry on Darfur to the Secretary-General, 1 February 2005, UN Doc S/2005/60; UN Human Rights Council, Situation of Human Rights in the Libyan Arab Jamahiriya, 25 February 2011, UN Doc A/HRC/RES/S-15/1. Adopted without a vote. The Commission's first report was submitted to the Human Rights Council on 15 June 2011 (UN Doc A/HRC/17/44) and after its mandate was extended, it submitted its second report on 8 March 2012 (A/HRC/19/68); UN Security Council, Middle East Situation–Syria, 4 February 2012, UN Doc S/2012/77. Not adopted, 13 votes in favor of the resolution, 2 vetoes by China and Russia; UN Human Rights Council, Debate on the follow up to the 17th Special Session–Report of the International Commission of Inquiry on the Syrian Arab Republic, 12 March 2012, Joint statement by Austria on behalf of 13 States (Belgium, Botswana, Republic of Costa Rica, Croatia, France, Ireland, Liechtenstein, Maldives, New Zealand, Norway, Slovenia, Switzerland, Austria); UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc A/HRC/19/69 UN Security Council, The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security, 6705th Meeting of the Security Council, 19 January 2012, S/PV.6705 and S/PV.6705 (Resumption 1). UN Security Council, Statement by the President of the Security Council, 19 January 2012, S/PRST/2012/1; UN Security Council, Statement by the President of the Security Council, 29 June 2010, S/PRST/2010/11. For the United Nations report to the International Criminal Court see: W.A. SCHABAS, An introduction to the International Criminal Court, op. cit., pp. 172ss. S. ZAPPALÁ, The reaction of the US to the entry into force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and article 98 agreements, in European Journal of International Law, 2003, pp.115ss.

[95]R. AHLBRECHT, H. BÖHM, K.M. ESSER, Internationales Strafrecht, C.F. Müller, 2018.

of the probative nature of the decision must be proven and can not be accepted given the nature of the ICC which if it *causes causae est causa causati* every cause is a fact on this assumption, it must be stated that the definition of the concept of fact requires only a moment to develop and define the actual situation of the crimes committed, any event, material or immaterial (psychic facts) a time spent in the interior of the *hominum* and presenting itself in reality as it expresses a close relationship considered by international and national law and always including that any evidence open to any outcome (expertise, personal reconnaissance, collection of anonymous testimonies, etc.)[96] falls within the scope of the Court's Statute and the nature of the crimes that should bepunished.

The difference between a natural event and human behavior does not lose weight (contrary to national law) and the concept of legal fact can be legitimately extended to include the legal effect. There is a cause of attachment and not so much of an abstract causal relationship between the political, military, territorial situation at the place where war crimes are committed[97] and in the concrete the collected evidence will be nothing but the projection of temporal phenomena, natural events and human behaviors that acquire qualified juridical significance and assessed according to the Statute in order to link certain legal effects.

According to the writer's opinion, the problem is not so much the collection of any type of evidence, except those involving sexual crimes[98] and serious fundamental violations guaranteed by the international criminal panorama, but the actual overall assessment, its simple reduction in terms of chronological, dynamic and causal relation to the definition of simple facts to reduce decompensation, is often inadequate and opens at the same time the road of the procedural decoding techniques to overcome the reasonable doubt for testing for samples in the area and for lack of the opposite by completing the reconstructive process, the existence of unimaginable data since in these crimes most of the facts are based on collective and less individualfacts[99]. The *factum historicum* is the concretization of the abstract fact that constitutes imputation as an essential nucleus that defines the event in its historical identity or propriety as a *principium individuationis* structured on the files as a constituent element to sustain the progressive formation of a concrete charge. From this stage it is finally probable to grasp the connection between *facti and quaestio iuris* between factual judgment and legal judgment which is the *punctum dolens* of all the problems of the logic of the international judge.

Many times the interpretation of facts, actions and events prevents the subject from being processed. In such a case, the judgment of the reliability of the source and/or the means of proof as a hypothesis leading from the element to the test result is not sufficiently reproductive of the situation under investigation but is always directed to assess only the reliability of the means of trial evidence, since it is often the content of the evidence to direct judgment. In this case the international court judges within the limits set by law that

[96]Not only a probative activity of evaluation of data but also an unrelenting nature carrying out the investigation or the formation of the proponent as the ultimate purpose of determining the fact. The work of the expertise is related to the production process of truth to an act integrating data and immediate to a true fact.

[97]K.J. HELLER, G. SIMPSO (eds), The hidden histories of war crimes trials, Oxford University Press, 2013.

[98]See in argument: H. HAIDER, T. WELCH, The use of protective measures for victims and witnesses and the balance of competing interests under international law: The special case of war crimes trials, in L'Observateur des Nations Unies Special Edition on The Place of the Victim in International Law, 2010, pp. 37-62. T. WELCH, H. HAIDER, M. MEENAGH, J. M'BOGE, Witness anonymity at the International Criminal Court: Due process for defendants witnesses or both?, in The Denning Law Journal, 2011, pp.29-46.

[99]S. DE SMET, The International Criminal Standard of Proof at the ICC–Beyond Reasonable Doubt or Beyond Reason?, in STAHN (ed.) The law and practice of the International Criminal Court, Oxford University Press, 2015.

in the case of ICC are not explicit but refer to the general and national culture of national law that guarantees the protection of the accuser's rights at all stages of the proceedings[100]. The lack of a suitable epistemological input by the instrumentation used, but only a large list of evidence collection permits, through supranational ICC assistance, surely allows the use of extra jurisdictional knowledge which certainly does not authorize the judicial authority to give the members of the scientific community the decision on the merits of the ICC.

4. Consultations

The questions and issues between ICC and States Parties concerning the execution of requests for assistance must be resolved first by consultation (art. 93, par. 3 of the Statute). Where the execution of a particular assistance measure as specified in the request sent by ICC conflicts with fundamental legal principles of general application in force in the requested state for the execution of the request in the forms provided by the ICC in such a case in the course of consultations in a timely manner initiated by the requested state with the ICC, the latter may assess whether the assistance may be made through different formalities or procedures or may be subject to conditions.

The State Party's negative response is justified in whole or in part only of the request concerns the production of documents or the request for evidence of national security as governed by art. 7 of the Statute on the protection of national security information (art. 93, par. 4). Before refusing a request for assistance relating to one of the measures described in par. 1 of art. 93 the State Party must assess whether the assistance may be provided under certain conditions or a later date other than that indicated in the request or alternatively. If the ICC or the Prosecutor's Office agrees that the assistance is subject[101] to conditions determined by the requested State, they are bound to observe them (art. 93, par. 5).

In fact the consultations satisfy a general character of subordination from the point of view of the facts but at the same time they are also the principal ones of subsidiary nature of the procedural facts in the configuration of investigations, the finding of the criteria governing the verification and collection of the main facts that lead to concrete facts punishable by the quantity of the subjects and the quality of social phenomena, *rectius* particular realities of States that are committed international crimes. And this is also the role of ICC to try not to limit the insurmountability of evidence contrary to those of specific punishment according to the Statute.

5. Confidential information

[100]N.H.B. JØRGENSEN, Domestic incorporation of international criminal procedure, in Proceedings of the Annual meeting of American Society of International Law, 2015, pp. 2733.

[101]See the cases from the office of Prosecutor: -situation in the Democratic Republic of the Congo ICC-01/04-01/06, case of the Prosecutor Luanga Dyilo; -situation in Uganda ICC-02/04-01/05, case of the Prosecutor v. Joseph Kony, Vin Cent Otti, Rask Lukwiya, Okot Ddhiambo et Dominic Ongwen; -situation in the Central African Republic ICC-01/01/05-01. See also: J. WERLE, L. FERNANDEZ, M. VORMBAUM, (eds) Africa and the International Criminal Court, ed. Springer, 2014. K.M. CLARKE, A.S. KNOTTNERUS, E. DE VOLDER, Africa and the ICC, Cambridge University Press,2016.

ICC operates in a confidentiality regime of information transmitted outside the scope of the investigations and the proceedings under the request for assistance. The requested state may transmit documents or information to the Prosecutor on a confidential basis. In such a case, the Prosecutor may use confidential information only to collect new evidence. The requested state may, on its own initiative or at the request of the Prosecutor, permit the declassification of documents and information that may be used as evidence in accordance with the Statutes and the rules of procedure and evidence (art. 93, par. 8 of theStatute).

Many times confidential information, delicate because of the nature of the crimes, is the *regiudicanda* that is substantial as it represents the whole *res in iudicium* in its hypothetical reconstruction of facts which are inextricably linked to procedural ends[102]. It is evident that everything that has originated in venture and personal assessment in the process in such in terms of investigations concerning (all or some) the procedural situations[103]. In this sense, the principle of complementarity is also enshrined in the same Statute as a relation between similar procedures that allows atomization of any necessary procedure for establishing a procedural situation and international cooperation. In the case of confidential information, it is always not only true but the eligibility of the test, the verification of the conditions under which a test can be taken, the checking of the suitability of the means to be representative of the medium (case of confidential information and the ability to testify). In this sense, the incidental nature of the evidence gathered through supranational assistance is always the means of introducing a matter related to any procedure. Incidentality represents the junction through which the complementarity relationship is defined and realized and sets the basis for further distinction in terms of the relationship between what is being discussed and what is to be discussed in order to proceed.

6. Competing requests

In case of competing requests, other than those of delivery or extradition received by a State Party form both the ICC and another state "(...) under a security obligation arising out of an international treaty or agreement is envisaged in firstly, a consultation procedure between the requested state, the Court and the other State to deal with both requests, possibly by submitting a request to the other or by providing conditions for the necessary response to either request (art. 93, par. 9 of the Statute) (...)".

If this is not possible, are applied the rules of art. 90 of the Statute, in the matter of "competing requests for the delivery of a detained person"[104]. If the request of the ICC according to the Statute involves a Third State or an international organization, the request is addressed to that state or international organization. The range of different testing procedures, *rectius* of the procedural facts, puts as the only fundamental

[102]It follows from the ways and criteria by which the fact is perceived and appreciated by those who make the representation. The proposition gives the test element and can not be imprecated as if it were a reproduction mechanic but must be examined to capture all the components that have contributed to its formulation and to verify its correctness on the logical and axiological plan.

[103]The autonomy of each procedure for the determination of the procedural situations determines that all procedural proceedings are incidental to the one in which the decision states: autonomy and incidentality that do not realize a detour that constructs a procedural model, albeit international, "typical and "concrete" with respect to which any other form of assessment can only be accessed by determining the development of the order to be followed when it is recognized that every finding presupposes a process that develops relationships with others but which does not derive or depend on fine defaults.

[104]C. KRESS, K. PROST, Article 90-Competing Requests, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by article, op. cit., pp. 1550ss.

theme the observance of the probationary method of recourse according to the only possible constraint, the one drawn from the provision of international jurisdiction, which only the reference to it allows to identify a uniformity of discipline to which, wherever possible, a number of divergences or references to detect shortcomings.

The comparison between different laws and competitors does not diminish the pattern of proceeding as well as for the assessment of procedural facts, in some ways respects the terms of the judgment of the European Court of Human Rights in respect of the minimum conditions for participation and contradiction[105] before a third and independent court judge must be guaranteed even in the variety of the various formal structures that the proceedings can take at all stages. Any procedure to be used to refer to the contradictory before the impartial court judge[106] it can not imply for each of the parties: "(...) the right to know the observations and evidence produced by the counter party, and to discuss them even if a procedural form does not involve the parties' own participation(...)"[107].

One can speak of an impartial body in the measure and interest of the parties involved. What we call operational impartiality meant as detachment from the prosecution's positions. It invests the Court's attitude towards the accused by forbidding attitudes and behaviors that presuppose an *a priori* decision on the public prosecutor's thesis. Impartiality in the essence of jurisdiction becomes the structural premise for a dialectical process based on a contradiction between accuser and accused.

Independence, that is, its strangeness on the political system and, in general, on every system of powers, instead of naturalness, the extraneousness of its designation and of its powers to choices following the commission of the fact submitted to itsjudgment.

All these profiles of the impartiality of court judge require the use of standard guarantees consisting of as many separations. Naturalness requires its separation from contracting authorities or agents of any kind and the exclusively legal predetermination of its competences. Then the court judge's figure is formed by two parallel processes. The progressive differentiation, through the phenomenon of the delegation of judicial functions, between *gubernaculum and iurisdictio* and the correlative autonomy of functions delegated by the delegating authorities as their own functions.

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[105]Nothing is foreseen in the International Criminal Court's Statute for the case that a witness in the course of the examination makes contradictory statements that are incompatible with the evidence already acquired, incomplete or conflicting statements with the evidence already obtained and/or indirect evidence (de relato or de audito). The question arises that in the presence of testimonies in this case reticent it is permissible for the judge or the prosecutor not to use unreliable evidence for the particular reconstruction of the facts. In this case, international judges are based on the non-eligibility of evidence by order of acceptance or rejection of the request fortrial

[106]Lepard stated that: "(...) transparency naturally helps to build and sustain political trust of the Court and enhance its legitimacy (...)". See, B.D. LEPARD, How should the ICC Prosecutor exercise his or her discretion? The role of fundamental ethical principles, in John Marshall Law Review, 2010, pp. 553ss; continuing also Webb in argument: "(...) the adoption of public criteria for Prosecutorial selection decisions would improve the ICC Prosecutor's relations with the outside world and a failure to follow public criteria will damage the Prosecutor's credibility (...)". See, P. WEBB, The ICC Prosecutor's discretion not to proceed in the "interests of justice", in Criminal Law Quarterly, 2005, pp. 306ss. The Prosecutor: Fatou Bensouda said that: "(...) the Office of the Prosecutor cannot yield to political considerations or adapt its work according to the peace negotiations timetable. It must always conduct its work on the basis of the law and of the evidence it has collected, and act accordingly, in an independent manner (...)". See, F. BENSOUDA, Reflections from the International Criminal Court Prosecutor, in Case Western Journal of International Law, 2012, pp. 506ss.

[107]In this sense see also the cases from the European Court of Human Rights: Brandstetter v. Austria of 28 August 1991; Bulut v. Austria of 22 February 1996; Papageorgiou v. Greece of 22 October 1997, Fitt v. United Kingdom of 16 February 2000; Bortesi and others v. Italy of 10 June2008.

Only a court judge capable of assessing the case that is subjected to it independently, impartial and correct from external influences and free from political or other pressures can truly guarantee at the accused person a fair and justprocess[108].

In particular, art. 68 of the Statute (protection of victims and witnesses and their participation in the process)[109] par. 1 governs the right to a public hearing conducted in accordance with the rules of the Statute in a fair and impartial manner and inspired by the guarantees defined as minimum mentioned in the following article in an equal position with the other parties.

[108]See, ex multis: D. DAMAŠKA, Reflections on fairness in international criminal justice, in Journal of International Criminal Justice, 2012, pp. 612ss. S. VASILIEV, Proofing the ban on witness proofing: did the ICC get it right?, in Criminal Law Forum, 2009, pp. 194ss. K. ZEEGERS, International criminal Tribunals and human rights law. Adherence and contextualization, ed. Springer, 2016. C. DEPREZ, Extent of applicability of human rights standards to proceeding before the ICC: On possible reductive factors, in International Criminal Law Review, 2012, pp. 722ss. G. SLUITER et al., International criminal procedure principles and rules, Oxford University Press, 2013. Y. MCDERMOTT, Fairness in international criminal trials, Oxford University Press, 2016.

[109]See, Prosecutor v. Lubanga (Decision on Victims' Participation) (Trial Chamber I, Case No ICC-01/04 01/06, 18 January 2008) a person is: "(...) a victim may suffer, either individually or collectively, from harm in a variety of different ways, such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her rights (...)" and according to the opinion of the judge Blattmann in case Lubanga referred to the victims: "(...) the participation and compensation of victims in the Rome Statute as the promise of a 'new step forward' in victims' rights (...) victims' participation is a "right" provided by the Rome Statute, signalled by article 68(3) (...)". Expression which is used from the ex General Secretary of UN Kofi Annan during his declaration in: the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998: "(...) the overriding interest must be that of the victims, and of the international community as a whole (…). It must be an instrument of justice, not expediency. It must be able to protect the weak from the strong (...)". In case: Lubanga Appeals Chamber decision see the dissenting opinion of judge Song: "(...) that victims interests fell under two heads-their interests in reparations and their interests in justice (...) with regard to article 68(3), the Chamber considers that it imposes an obligation on the Court vis-à- vis victims (…). The victims guaranteed right of access to the Court entails a positive obligation for the Court to enable them to exercise that right concretely and effectively. It follows that the Chamber has a dual obligation: on the one hand, to allow victims to present their views and concerns, and, on the other, to examine them (...)". See also: Prosecutor v. Lubanga (Judgment on Appeals of the Prosecutor and the Defense against Trial Chamber I's Decision on Victims Participation of 18 January 2008-Appeals Chamber, Case No ICC-01/04-01/06-1432, 11 July 2008) (Lubanga Appeals Chamber decision). In the same spirit: The Uganda Decision on Victims Applications for Participation and Lubanga (Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6) (Pre-Trial Chamber I, Case No ICC-01/04-01/06-172-t, of 29 June 2006); The DRC Decision on the Applications for Participation in the Proceedings. Prosecutor v. Sesay, Kallon, and Gbao (Judgment) (Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009); Prosecutor v. Kayishema and Ruzindana (Judgment) (Trial Chamber II, Case No ICTR-95-1-T, 21 May 1999). See, E. DWERTMANN, The reparation system of the International Criminal Court: its implementation, possibilities and limitations, Martinus Nijhoff Publishers, 2010, pp. 32ss. D. JOYCE, The historical function of international criminal trials: Rethinking international criminal law, in Nordic Journal of International Law, 2011, pp. 462ss. B.J. APPEL, In the shadow of the International Criminal Court. Does the International Criminal Court defer human rights violations?, in Journal of Conflict Resolution, 2016, pp. 6ss.

The reference to fair and impartial hearing[110] it is certainly intended as a safeguard for the accused by discriminatory treatment[111]. If fair hearing means: "the judgment including the essential findings, evidence and legal reasoning must be made public (...) the interest of children may entail a requirement to not announce even the judgment publicly(...)"[112].

The proceedings before ICC must be capable of prosecuting all those who have committed a crime falling within the jurisdiction of the ICC without any pressure from any kind of conduct being able to lead to discriminatory treatment of the persons convicted. The right to an impartial trial is not just right[113]. The basic principle of the impartial conduct of the process must not be considered only as a political directive for the ICC. It also be understood as a technical and procedural norm operating within the process and to regulate the conduct of the hearing so that the criminal investigation is carried out impartially even in relation to the other parts of thetrial.

[110]The principle of impartiality of judgment and judges as established for a fair trial was reported ex multis in: -the Act of Settlement of 1701 among the first steps of legislation that established the impartiality and security of judges; -the Constitutional Reform Act of 2005 e the Tribunals, Courts and Enforcement Act 2007, see in argument: US v. Will 449 US 200 (1980). See also the Court of Appeal (Lack of Jurisdiction) Judgment in the Prosecutor v. Sam Hinga Norman SCSL NO: 2004-14-PT-034-I Paragraph 15; -the Sections 96 to 100 of the Constitution Act of 1867 of Canadian Constitution; -the Canadian Charter of Rights and Freedoms guaranteejudicialindependenceassetoutinitsSection11; inthe Indiansystemsee:-the article 124 provides for the appointment of the judges, security of tenure and removal of judges. The article 125 and the Supreme Court Judges (Conditions of Service) Act 1958. Of the same spirit is the Indian Supreme Court in S. v.Advocates-on-Record v. Union of India A.I.R 1994 S.C.268. Continuing with: -the article 111 of the US Constitution Canon 1 of the Code of Conduct for federal judges which declared that: "(...) uphold the integrity and independence of the judiciary on the judges. The importance of judicial independence is emphasized in the Code of Conduct which states that (...) an independent and honorable judiciary is indispensable to justice in our society (...) ";-the Section 165 of the Constitution of the Republic of Sud Africa-section 108 of 1998. In particular the Section 174: "(...) deals with the appointment and qualifications of judges, such appointments, promotions, transfers and dismissals to be made (...) without favor or prejudice (...)";-the articles 121 to 131A of Malyesian Constitution; the article 128 of Colombian Constitution which declared that: "(...) states that the judiciary shall be independent and is entrusted to guarantee and uphold impartiality and protect the rights and freedomsof citizens (...)". In case: Jean-Bosco Barayagwiza v. the Prosecutor, the ICC has recognized through the opinion of judge Nieto-Navia that: "(...) the concept of "the separation of powers" plays a central role in national jurisdictions. This concept ensures that a clear division is maintained between the functions of the legislature, judiciary and executive and provides that "one branch is not permitted to encroach on the domain or exercise the powers of another branch (…). It ensures that the judiciary maintains a role apart from political considerations and safeguards its independence (...)". This opinion was also based on Declaration of the Special Rapporteur for Independence of the Judiciary of 1994. In the same spirit see the Resolution1994/41 dated 4th March 1994, which the Commission has declared: "(...) the increasing frequency of attacks on the independence of judges, lawyers and Court officials (...) the weakening of safeguards for the judiciary and lawyers (...) and the gravity and frequency of violations of human rights (...)". See also: The decision in the Prosecutor v. Joseph Kanyabashi Case No. ICTR-96-15-T(Trial Chamber, Decision on the Defense Motion on Jurisdiction) is relevant vis-à-vis the issue of the institutional independence of the International Tribunals. See, A. WILLIAMS, The completion strategy of the ICTY and the ICTR in international criminal justice-A critical analysis of institutions and procedure, ed. Cameron May, 2007.

[111]See, The UN Model Extradition Treaty lists the risk of unfair trial in the requesting state under "mandatory grounds" to bar extradition. The provision refers to "the minimum guarantees in criminal proceedings (...) an extraordinary or ad hoc Court or Tribunal" can be an optional ground to refuse extradition requests. See: R. MUSKAT, Fair trial as a precondition to rendition: An international legal perspective, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Occasional Paper No. 5,2002.

[112]According to the opinion of UNHRC, GC 32, para. 29. Y. ŞAHİNKAYA, Extraterritorial effect of right to a fair trial: How to test the flagrant denial of a fair trial in extradition cases under international human rights law?, in Human Rights Review, 2013.

[113]N. CHAZAL, The International Criminal Court and global social control: International criminal justice in late modernity, ed. Routledge, 2015.

The right to a fair hearing conducted impartially[114] guarantees the accused by an unbalanced process in favor of one of the other parties acting as a regulatory norm of the hearing. The clarifying contribution provided by the case law of the European Court of Human Rights is also relevant to the meaning of impartial conduct of the process which has been the source of some guaranteed and internationally protected rights. In practice, ICC also reiterated that the concept should be understood as a lack of prejudice or preference with respect to one of the parties and that the right to an impartial trial must be understood both from a subjective point of view ensuring that a certain court judge does not have a personal injury to a particular case and that the ICC as a whole does not give rise to a legitimate suspicion of its impartiality[115].

The grounds for non impartiality of the court judge at a fair trial include the following points: "(...) -the complexity of the case; -the conduct of the authorities; -the conduct of the accused; -the prejudice suffered by the accused. The burden of proof lies with the accused to show that delay was undue (...)"[116].

According to rule 15 of the rules of procedure and evidence of ad hoc criminal Tribunals: "(...) a court judge may not sit on a trial or appeal in which the court judge has a personal interest or concerning which the court judge has or has had any association which might affect his or her impartiality. The court judge shall in any such circumstance withdraw, and the President shall assign another court judge to the case (...)".

[114]F. MÉGRET, The sources of international criminal procedure, in G. SLUITER et al., International criminal procedure-principles and rules, Oxford University Press, 2013.

[115]The next documents they spoke explicitly for the impartial rule of judge in the next cases: Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1-A of 21 July 2000, par. 182; Prosecutor v. Rutaganda, Judgment, Case No. ICTR-96-3-A of 26 May 2003, para 39 et seq.; Prosecutor v. Sesay, Decision on defense Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, Case No. SCSL-2004-15-AR15 of 13 March 2004, par. 15; Prosecutor v. Norman, Decision on the Motion to Recuse judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, Case No. SCSL-2004-14-PT of 28 May 2004.

[116]Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Case No. ICTR-99-50-AR73 of 27 February 2004; Prosecutor v. Perišić, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, Case No. IT-04-81-PT of 23 November 2007, par. 12; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza's application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, Case No. ICTR-99-50-T of 3 November 2004, par.26; Prosecutor v. Bizimungu et al., Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), Case No. ICTR-99-50-I of 8 November 2002, par. 36; Situation in the CAR: Prosecutor v. Bemba Gombo, Decision on application for interim release, Case No. ICC-01/05-01/08 of 16 December 2008, parr. 46-47; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza's application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay (n 3) paras 31-32; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay, Case No. ICTR–99–50–T of 29 May 2007, parr. 32-36; Prosecutor v. Barayagwiza, Appeal against the Trial Chamber II's 'Decision on the extremely urgent motion by the defense for orders to review and/or nullify the arrest and provisional detention of the suspect' of 17 November 1998, Case No. ICTR-97- 19-AR72 of 3 November 1999, parr. 75-77; Prosecutor v. Bizimungu et al., Decision on Jérôme-Clément Bicamumpaka's Motion Seeking Permanent Stay of Proceedings, Case No. ICTR-99-50-AR73 of 27 February 2009, par.18; Prosecutor v. Bizimungu et al., Decision on Prosper Mugiraneza's application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay (n 3) par. 33; Prosecutor v. Kvočka et al. & Prosecutor v. Kolundžija, DecisiononProsecutor'sMotionforJoinder,CaseNos.IT-98-30/1-T&IT-95-8-Tof October 1999, par. 13. in particular Rule 82 attributes the subject who has provided information on a confidential basis the power to cease the secret of it. The agreement concluded with the Prosecutor could contemplate the shipment of the information in the process but preclude further verification or further investigation of it. It would not be so much the disclosure to be limited since the information to be produced in the process should be previously disclosed to the counter party as to the investigative power in relation to the fact mentioned asconfidential. **

Judge Orie in the *Krajisnik* case[117] was "accused" of not being impartial about the case due to his participation in various NGOs in the area who had been in contact with the case examined[118]. Judge Liu stated that: "(...) it would be erroneous to assume from the outset that every possible association, however remote, between the court judge and the accused or for that matter a witness or the facts relating to another case automatically qualifies as "an association" within the meaning of Rule 15. For there to exist a relevant association, in my view, the party challenging the court judge's impartiality must demonstrate that the court judge entertains a personal interest in or a particular concern for any of the Parties, the witnesses or the facts of the case. Such personal interest or particular concern is certainly different from any lawyer's professional interest in the subject-matter of the case(...)"[119].

Par. 1 of art. 67 provides for the accused of a set of minimum defined warranties, specifying that they must be recognized in absolute equality[120]. The provision now invoked gives the accused another important right known as the principle of equality of arms (*Waffengleichheit*)[121] which constitutes an extrinsic right to an impartial trial[122].

[117]See, The prosecutor v. Momcilo Krajisnik, case n. IT-00-39, Decision on prosecution motions for judicial notice of adjudicated facts and for the admission of written statements of witnesses pursuant to Rule 92 bis, 28 February 2003, par. 15. See also the following judgments on the subject: Prosecutor v. Vidoje Blagojević, Dragan Jokić, case n. IT-01-47-T, Decision on Prosecution's motion for judicial notice of adjudicated facts and documentary evidence, 19 December 2003, parr. 15 and on; Prosecutor v. Enver Hadzihasanovic, case n. IT-01-47-T, Decision on judicial notice of adjudicated facts following the motion sumbitted by counsel for the accused Hadzihasanovic and Kubura on 20 January 2005, of 14 April 2005; Prosecutor v. Hadzihasanović and Kubura, case n. IT-01-47-T, Notice of adjudicated facts following the motion submitted by counsel for the accused Hadzihasanović and Kubura of 14 April 2005; Prosecutor v. Bizimungu and others, case n. ICTR-99-50- T, Decision on the prosecution motion and notice of adjudicated facts. Rule 94 of the rules of procedure and evidence, 10 December 2004, par. 9. What seems interesting here is that the possibility of applying an agreement between the contenders is subordinated, which does not call into question the fact that the sentence has become irrevocable. An element of consensuality justifies the renunciation of a new historical reconstruction by the Court and with which the subjects of the controversy acknowledge the correctness of the conclusions reached in other trials. See in argument: GON KWON, 2007, pp. 370ss.

[118]A. ORIE, Accusatorial v. inquisitorial approach in international criminal proceedings prior to the establishment of the ICC and in the proceedings before the ICC, in A. CASSESE, P. GAETA, J.R.W.D. JONES, The Rome Statute of the International Criminal Court. A commentary, op. cit., 2002, pp. 1444ss. **

[119]See: The separate statements of judge Shahabuddeen in the case: Furundzija: Prosecutor v. Anto Furundzija Case No: IT-95-17/I-T Judgment dated 10thDecember 1998 is relevant insofar as the judgment relates to the reasonable fair-minded observer in assessing judicial impartiality. The observer was givenpreferenceovertheCourtastheassessorofimpartialityas:"(...)Thelitmus test of what is acceptable and what is not is the need to maintain public confidence in the integrity of the system under which justice is administered(...)".

[120]Prosecutor v. Kordić and Čerkez, No. IT-65-14/2-A, Judgment of 17 December 2004 at paras 175-176; Prosecutor v. Milutinović et al, No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds of 13 November 2003, para. 23; Tadić Appeal Judgment (n 52) parr. 48 and 50 (discussing human rights principles from the jurisprudence of the ECtHR and by the Human Rights Committee); Prosecutor v. Perišić, No. IT-04-81-PT, Decision on Motion to Appoint Amicus Curiae to Investigate Equality of Arms of 18 June 2007, par. 9; Prosecutor v. Kayishema and Ruzindana, No.ICTR-95-1-T, Judgment of 21 May 1999, par. 60; Prosecutor v Kayishema and Ruzindana, No.ICTR-95-1-T, Order on the Motion by the defense Counsel for Application of article 20(2) and (4)(b) of the Statute of the International Criminal Tribunal for Rwanda of 5 May 1997, par. 3; P rosecutor v. Kayishema & Ruzindana, No. ICTR-95-1-A, Judgment of 1stJune 2001, parr. 63-71. **

[121]The expression is used for first time from the European Court of Human Rights in the case: Ofner and Hopfinger v. Austria of 23 November 1962.

[122]See in particular: Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, (ICC-01/04-01/07); ICC, Pre-Trial Chamber I, Decision on the confirmation of charges of 30 September 2008; ICC Pre-Trial Chamber I, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under article 67(2) of the Statute and Rule 77 of the Rules of 21 April 2008; ICC Trial Chamber II, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140 of 20

The Appeals Chamber of the ICTYhas clarified the principle of de facto in view of the difficulties encountered by the parties to the proceedings in the territory of the ICTY especially because of the low availability of the local States to cooperate with the Tribunal merit in front of international Tribunals an interpretation that is broader enough to allow the court judge to provide the party seeking assistance in order to prepare for the trial any legitimate facilitation which the Statute and the Regulationprovide.

Considering the right to equality of arms only as recognition of equal dignity[123] of the parties to the proceedings before the ICC would be extremely reductive of the concept expressed by the principle under consideration. The important guarantee that is discussed does not only affect the Court's conduct in order to preserve the charge against any discriminatory treatment against it, but also to the procedural rules that the Prosecutor has to prosecute against the accused. For it to be possible to speak of the real respect of the principle of equality of arms to the Prosecutor the right to conceal evidence or documentation relevant to the defense or to the latter is not granted. It is no coincidence that the Rules of the ICTYin accordance with that of ICTR stipulate that the Prosecutor should disclose as soon as possible the defense elements in his possession or disposition that he considers to be favorable to the accused.

What is now being said is the right size for the right to equal arms before ICC, as confirmed by the wording of the second par. of art. 67 of the Statute, which provides that in addition to any other revelation provided for by this, the Prosecutor will as soon as possible reveal to the defense the evidence in his own possession or at his own disposition that he believes and shows the innocence of the accused or tend to prove the innocence of the accused or to reduce their accountability or compromise the reliability of theevidence.

In the event of doubt as to the application of the provisions of this paragraph competent to decide is the ICC. The Statute charges the prosecution a real obligation to advise the defense of the elements that might be decisive in order to dismiss the accused or to mitigate its criminal liability. Art. 67 discipline as a general rule the celebration of the proceedings before ICC through a public hearing constituting an independent

November 2009; ICC Trial Chamber I, Decision on the Bar Table Motion of the defense of Germain Katanga of 21 October 2011. See: JACOBS, 2010, pp. 331ss.

[123] As explained by Gallant (K.S. GALLANT, The International Criminal Court in the system of States and international organizations, in Leiden Journal of International Law, 2003, pp. 553ss): "(...) several persons, some with conflicting defences, may have evidence given against them during a single "unique investigative opportunity". Where the targets of the investigation are clear, separate counsel may be appointed for each potential accused. The court, however, may not know in advance the identity of those against whom evidence will be given. For this reason, "defence" counsel may be placed in the position of attempting to protect the interests of more than one potential accused, who at later stages may try to blame each other for the alleged crimes (...)". In the same spirit: the matter was settled by the Appeals Chamber on 16 September 2009: "(...) it held that the mandate of the latter is of a sui generis nature (...) in circumstances where the suspects are at large and counsel is appointed to represent their interests generally in proceedings, such counsel cannot speak on their behalf. A client and counsel relationship does not exist between them, and counsel does not act for or as agent of the suspects. Counsel's mandate is limited to merely assuming the defence perspective, with a view to safeguarding the interests of the suspects in so far as counsel can, in the circumstances, identify them. The provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel (...)". See also in argument: Prosecutor v. Joseph Kony et al., AC Judgment on the Appeal of the Defence against the Decision on the admissibility of the case under article 19(1) of the Statute' of 10 March 2009, ICC- 02/04-01/05-408, 16 September 2009. This judgment upheld the PTC II Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05- 377,10 March 2009. Prosecutor v. Germian Katanga and Mathieu Ngudjolo, Partly dissenting opinion of judge Anita Usacka to the PTC I Decision on the Defense Application pursuant to article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)', ICC-01/04-01/07, 25 April 2008. According to judge Anita Usacka filed an interesting dissenting opinion: "(...) the specific information requested could be obtained from another source is not only not supported by the record, but also sets the threshold too high for granting a cooperation request, and appears to create an unnecessary additional requirement for article 57(3)(b) requests. The conclusion of the majority seems to be that if there is any other source of the information besides the State, the Defence is not entitled to seek cooperation from a state (...)". D. LIAKOPOULOS, Parità di armi nella giustizia penale internazionale", vol. 1, ed. Libellula University Press,2018. **

right of the accused as a rule that can not be subject to exceptions, except in certain cases provided for in the Statute or rules of procedure and as confirmed by par. 7 of art. 64[124] that the debate is public. Art. 64 of the Statute of ICC similar to the provisions of art. 13 par. 7 of the International Covenant regulates the advertising of the process that may be excluded or limited. The Chamber of First Instance may in special circumstances have jurisdiction to order, that certain steps of the measure are carried out in closed doors both in pursuit of the purposes set forth in art. 68 of the same as for the protection of the victims of crime and witnesses to protect confidential sensitive information that may be disseminated during the taking of evidence.

In the *Tadić* judgment (par. 62 to 66), the ICTYaffirmed certain criteria for the case of anonymity of the witnesses. In particular: "(...) there must be real fear for the safety of the witness or her or his family (…). The testimony of the particular witness must be important to the Prosecutor's case (…). The Trial Chamber must be satisfied that there is *no prima facie* evidence that the witness is untrustworthy (…). The ineffectiveness or non-existence of a witness protection program is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case (…) any measures taken should be strictly necessary (...)"[125]. Reading and trying to make an analytical and in depth comparison through the Statutes of the ad hoc criminal tribunals and the Statute of ICC and its rules we can conclude that the anonymity of the victims lies in the protection of mass media, photographs, videos as provided for in Rule 87, par. 3 of the protective measures: comparison with the accused according to Rule n. 87, par. 3 where: "allows for testimony to be presented by electronic or other special means; and Rule 87(3)(d) allows the use of a pseudonym"; anonymity when it was not mediated by the same rules and articles 64 ,par. 6 and art. 68 par. 1 of the Statute, which generally speak for the protection of victims[126]; repair of victims according to art. 75 of the state and in order to protect victims of sexual crimes which are covered by art. 68, par. 1 and 2, art. 43 par. 6: "(...) to advise and to help in any other appropriate way the witnesses who appear before the Court and other persons who may be endangered by the testimony of such witnesses and to provide for the measures and provisions to be taken to ensure their protection and security of the staff of the division includes aid specialists for victims of traumas, in particular traumas following sexual assaults(...)"[127].

Guardianships that are complementary to rules, in particular the number 88 which allows the Chamber to order urgent measures if the victim is a minor[128], an elderly person, a victim of sexual violence or simply

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[124]"The proceedings are public", however, the Chamber of First Instance may find that, under certain circumstances, certain hearings are carried out in camera for the purposes referred to in article 68, or to protect confidential or delicate information provided in the depositions.

[125]MAY, 1990, pp. 275 y ss.

[126]PUES, 2015, pp. 952ss.

[127]SHELTON/INGADOTTIR, 1999. **

[128]See in argument in particular: ICC Press Release, ICC-CPU-20121121-PR856 of 21 November 2012, Katanga and Ngudjolo Chui case: ICC Trial Chamber II Severs Charges announces that the verdict in the case against Mathieu Ngudjolo will be issued on December 18, 2012. In particular is noted that: "(...) if he is found guilty of the crimes with which he is charged, there will be the possibility of reparation proceedings for purposes of addressing the harm caused to victims of his crimes. Decision establishing the principles and procedures to be applied to reparations in the case of the Prosecutor v. Thomas Lubanga Dyilo, 7 August 2012, ICC-01/04-01/6. The Chamber established the following principles: a) Principle of Dignity, non-discrimination and non-stigmatisation-all victims regardless of their participation in the trial proceedings or not, will be treated fairly and equally. This principle may have the desired effect of curbing the increasing volumes of applications from victims to participate in proceedings

a traumatized person. Art. 67 identifies a series of guarantees for defendants who are defined as "minima" by the same standard.

7. Court assistance to States Parties participating in the Statute

The ICC may cooperate with and provide assistance to a State Party which requires it "in relation to an investigation or trial involving conduct constituting a crime falling within the Court's complementary jurisdiction or constituting a serious criminal offense under national law of the State calming Party" (Art. 93, par. 10 of the Statute). The assistance provided by the ICC to the States Parties of the Statute may in accordance with the above mentioned article, include, *inter alia,* the transmission of declarations, documents and other evidence gathered during an investigation or trial held before ICC or in the interrogation of any person detained by ICC order.

The state which has provided the ICC with the documents or evidence in question must be concerned, which must give its consent; these are declarations, documents or other evidence collected by a witness or expert who needs adequate and necessary protection in accordance with the rules of protection of

at the Court discussed in an earlier section. This is the case where the principles are publicized effectively to victims and affected communities that reparations will take a non-discriminatory application; b) Principles on Beneficiaries-the beneficiaries of reparations are both direct and indirect victims pursuant to Rule 85 RPE. As a direct victim may be clear, an indirect victim status may not be as clear. The Chamber will determine an indirect victim as for example the parents of a child soldier. Legal entities may also benefit as victims but priority may be given to certain victims in vulnerable situations such as victims of sexual and gender-based violence; c) Principle on Accessibility and consultation with victims-the Chamber endorsed a gender-inclusive approach to all principles with sufficient consultations with victims in situ paying particular attention to their priorities; d) Principle on Victims of sexual violence-victims include women and girls, and boys and men alike. Reparations awards for this group of victims require a specialist, integrated and multidisciplinary approach particularly to meet obstacles faced by women and girls when seeking access to justice; e) Principle on Child victims-reparations decisions will be guided by the fundamental principle of the "best interests of the child" enshrined in the Convention on the Rights of the Child. Where child soldiers are victims, reparations programs must include their re-integration into society and rehabilitation to promote reconciliation within society; f) Principle on the Scope of reparations-the Chamber recognized the uncertainty in the number of victims in the case and despite the volumes of applications from victims, these numbers are not representatives of the totality of victims. The Chamber endorsed the use of both individual and collective reparations noting that the two are not mutually exclusive and may be awarded concurrently (...)". In the same spirit see also Appeals Chamber Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36. When collective reparations are awarded, they should address the harm suffered by victims on an individual and collective basis; "(...) g) Principle on the Modalities of reparations-a comprehensive approach to reparations was adopted, including restitution, compensation (requires broad application consistent with international human rights law assessments of harm and damage), rehabilitation. The Chamber reserved a non- exhaustive list of the forms of reparations not excluding those with symbolic, preventative and transformative value; h) Principle on Proportional and adequate reparations-reparations should support programmes that are self-sustaining and benefits paid by periodic instalments rather than by way of lump-sum; i) Principle on Causation-the Court should not be limited to "direct" harm or the "immediate effects"of the crime, particularly in this case involving child soldiers, but instead the Court should apply the standard of "proximate cause". The Court must be satisfied that there exists a "but/for" relationship between the crime and the harm; j) Principle on the Standard and Burden of Proof- as the trial stage is concluded when an order of reparations is considered, the appropriate standard of a balance of probabilitiesis sufficient. Where the reparations award emanates from the TFV a more flexible approach is to be taken. These kinds of awards are akin to what has become known as the second mandate operations and assistance of the TFV in situation countries of the Court outside of a judicial determination of guilt or innocence of an accused person (...)". **

witnesses and victims outlined in art. 68 of the Statute (protection of victims and witnesses and their participation in the process)[129].

Such assistance may also be provided to a state which is not part of the normal Statute[130]. When cooperation is requested by the ICC, requests are sent to the Chancery which sends them to the Prosecutor or to the competent ICC section. If the request for cooperation is accepted by the ICC, the procedures set out by the requesting state shall be followed. We can understand that the reference landscape is wide and varied in this case as it can not stop focusing on what is just around the judgment on the accused/accused's liability, so as not to fall within the same mistake as to exclude from the context of the finding of the facts in question, that wide range of proceedings, which presuppose the existence of a judgment which is either *regiudicanda* or *regiudicata.*

The system moves in many ways unevenly and resiliently, given the intentional silence by the ICC's Statute, favoring the respect of a hybrid model, where the most obvious is the impact of subjective situations independently guaranteed by provisions not only of an international nature but also national, constitutional, or in cases where the correlation of investigations and evidence collection within the scope of judicial cooperation is in terms of immediate conditioning from the merits of each or the other (international or national) as the basic structure of each collection process and the use of the assessment tests. In this regard, we can speak of a deficit of guarantees also in matters often evoked as being more protected as a subject of specific forecast at national level.

The arguments sometimes raised to support the simplifications and differences found in various supranational judicial assistance procedures, albeit relevant and significant in view of the purposes for which each is predicated, obstruct the very meaning of the finding of the facts in question, which is insufficient, so much to consider the structural reasons of a form for which a procedure is more secured than another, to identify the justification for the degree of greater or lesser guarantee on the basis of the substantive object of the finding and its relationship with the compromise of some of the universally guaranteed fundamental rights. All this leads up to consider the infinite nature of the reasoning that it has in the margins of a correct, prudent and justified discretion, a connotation of indefinability and completeness. The principle of the right of essential peculiarities of factual evaluation or merit of the concept of intrinsic trust regarding a reconsideration of the way of being of peoples and the reconstruction

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[129]See the case: Nahimana and others, (ICTR, Prosecutor v. Nahimana et al., ICTR- 99-52-A, AC, Judgment of 28 November 2007), the appeal Chamber has designed a non exaustive list with indications for the proves and the testimonials. The list included: "-the witness's demeanour in Court; -his (or her) role in the events in question; -the plausibility and clarity of his testimony; -whether there are contradictions or inconsistencies in his [or her] successive statements or between his (or her) testimony and other evidence; -any prior examples of false testimony; -any motivation to lie; -and the witness's responses during cross-examination". See: KIRSCH, 2011, pp. 166-169; VOGLER, 2011, pp. 105ss; KUHNE**, 2010, pp. 1ss; WIDDER, 2014, pp. 1084ss; BACHVAROVA, op. cit. **

[130]See, also: Rule 185(1) of the Rules of Procedure and Evidence provides, in relevant part, as follows: "(...) Where a person surrendered to the Court is released from the custody of the Court because (...) the person has been acquitted at trial or on appeal (...) the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a state which is obliged to receive him or her, to another State which agrees to receive him or her, or to a state which has requested his or her extradition with the consent of the original surrendering state (...)". See also the protection of victims in case of cooperation with the Court: Ngudjolo ICC-01/04-02/12-22-, Appeals Chamber, 8 February 2013, Second Addendum to "defense request that the Appeals Chamber order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber I of the International Criminal Court"; Ngudjolo ICC-01/04-02/12-74-Red, Appeals Chamber, 12 June 2013, Decision on Mr Ngudjolo's request to order the Victims and Witnesses Unit to execute and the Host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court.

of the political, diplomatic and legal past of any democratic country establishing the inner cognition that inspired the representation that corresponds to the international reality that was meant to represent each state as an object of internationallaw.

The request of assistance from ICC to a State Party may also be proposed as to its immediate execution interferes with ongoing investigations or criminal proceedings for charges other than those referred to. The time limit for the suspension of the execution of the request must not exceed what is necessary to complete the investigations and must always be agreed with the competent bodies of the ICC and after evaluating the possibility of avoiding assistance subject to certain conditions. "If the decision to temporarily suspend the assistance procedure is taken, the Prosecutor may apply for appropriate measures to safeguard and protect the evidence" (art. 94 of the Statute-deduction of the submission of a request by means of inquiries or ongoinglegal proceedings).

A request for assistance submitted by the ICC to a State Party may also be filed on a straightforwards basis to the Resolution of a preliminary question of eligibility proposed pursuant to art. 18 and 19 of the Statute unless the ICC orders the Prosecutor to proceed with the collection of evidence in advance in accordance with the rules set out in art. 18 and 19 (art. 95 of the Statute-Deviation of the execution of a request for a declaration ofinadmissibility)[131].

The lack of a model defined and precise by the Statute represents an absolute knowledge deficit[132], imposing an obligation on the international judge to hear the parties according to the requests of the

[131]Prosecutor v. Gaddafi, ICC PT Ch. I, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, 1 June 2012, para. 18, the OPCD asserted that "(...) [t]he reference in article 95 to the collection of such evidence qualifies the type of request, which may be postponed, to requests concerning evidentiary issues (...)". The Preliminary Chamber noted that"(...) article 95 encompasses all requests for cooperation under Part IX, including requests for arrest and surrender made before or after the admissibility challenge (...)" (para. 32). Situation in the Libyan Arab Jamahiriya,PTCI,DecisionontheProsecutor'sApplicationpursuantto article58 as to Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi, ICC- 01/11-12, 27 June 2011. On 22 November 2011, PTC I decided to terminate the case against Muammar Gaddafi following his death on 20 October 2011 by hands of the NTC forces in the battle of Sirte, see Prosecutor v. Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, PTC I, Decision to Terminate the Case Against Muammar Gaddafi, ICC-01/11-01/11-28, 22 November 2011. Prosecutor v. Saif Gaddafi and Abdullah Al-Senussi, Application on behalf of the government of Libya pursuant to article 19 of the ICC Statute, ICC-01/11-01/11, 1 May 2012, and Application on behalf of the government of Libya relating to Abdullah Al-Senussi pursuant to article 19 of the ICC Statute, ICC-01/11-01/11, 2 April 2013. Prosecutor v. Abdullah Al-Senussi, Defence Appeal on behalf of Mr Al- Senussi against the "Decision on Libya's postponement of the execution of the request pursuant to article 95 and related Defence request to refer Libya to the UN Security Council', 9 September 2013, 15: "(...) in its Application of 1 May 2012, Libya stated that at that time its" national judicial system is actively investigating Mr Gaddafi and Mr Al-Senussi for their alleged (…) crimes against humanity (...)". Libya explained in its filing of 1 May 2012 that the investigation had been going on for many months, that the two men were to be tried together and it was in a position to challenge the admissibility of Mr. Al-Senussi's case as well as Mr Gaddafi's. Prosecutor v. Saif Gaddafi, PTC I Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Statute, ICC-01/11-01/11, 1 June 2012, 37; Prosecutor v. Abdullah Al-Senussi, PTC I, Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Statute and related Defence request to refer Libya to the UN Security Council, ICC- 01/11-01/11, 14 June 2013, 34. Prosecutor v. Abdullah Al-Senussi, AC Decision on the Appeal of Mr Al-Senussi against the Pre-Trial Chamber's "Decision on Libya's postponement of the execution of the request for arrest and surrender of Abdullah Al-Senussi pursuant to article 95 of the Statute and related Defence request to refer Libya to the UN Security Council", ICC-0l/11-01/11 OA5, 11 September 2014, 13. See, C. KRESS, K. PROST, Article 95-Postponement of execution of a request in respect of an admissibility challenge, in O. TRIFFTERER (ed.), Commentary on the Rome Statute of the International Criminal Court:Observers' Notes, Article by article, op. cit., pp. 1594ss. A. ZIMMERMANN, K. TOMUSCHAT, C. OELLERS-FRAHM, C.J. TAMS (eds), The International Court of Justice: a Commentary, Oxford University Press, 2012. J. DIECKMANN, C. KERLL, Representing the "general interests of the defence": Boon or bane?-A stocktakingof the system of ad hoc Counsel at the ICC, in International Criminal Law Review, 2011, pp. 105ss. **

[132]Because of the lack of a Court of execution, only a preliminary Chamber that includes "how the things are" not in an enforcement proceeding but in the facts first gathered by an international organization that builds the history of the criminal situation based on appropriate information that corresponds to forms of acquisition now oriented to evidence for the very

prosecutor without the additional possibility/power of verifying their actual correspondence to the realityraised.

The difficulty of collecting evidence of a fact, the complexity of the investigations and the fear of the "prosecution" of the ICC for inertia many times end up justifying the *a priori* continuation of deprivation of personal freedom of the accused as well as the report between the investigation and the detention of custody[133] which must be indispensably in relation to each other. Even in the case of lack of active collaboration at the supranational level of care, a minimum evidence to support the assumption must be provided not only in terms of assertion, but of concrete, verifiable element on which to say and contradict. The situation in such a case is so paradoxical that it is even inconceivable that a search for a discovery is anticipated and that it is highly unlikely that the accused will know the state and nature of the investigations and be able to talk about the possibility of granting or not the required delay. The problems associated with finding the facts according to the model of supranational and state cooperation would not be resolved at all, reopening in full all the vast issues already highlighted regarding the official activity (not foreseen by the Statute) at the point ofevidence.

8. Concluding remarks

The need for an international penalty would continue through the judgments of international criminal courts to be legitimized following a rationalization of the social and political reality of various countries that are part of the Statutes of this kind of courts. In this sense, international criminal law also protects national interests through the system of judicial assistance and cooperation. Above a thin and difficult balance line that does not lose state law sovereignty in criminal matters.

The open debate on cooperation with EU Institutions, which will surely be an open and difficult challenge for the coming years, according to the writer's opinion regarding the dialogue between the Court of Justice of the European Union and international criminal courts, with other courts of international nature and on the other hand between international criminal courts and Constitutional courts. We would be confronted with a conflict of rules and exception clauses which we believe is a conflict between principles that will be

structuring of the facts, the tests and the continuation of specific investigations and further investigations compared to those provided for by the nature of the procedure.

[133]Foreseen by art. 58 of the Statute of ICC (for the purpose of point b) of the above article: the need for the presence of the person arrested in the trial; to prevent the person from endangering the investigation and the conduct of the proceedings; to prevent the person from continuing to execute crimes committed under the jurisdiction of the Court) as well as by art. 20, par. 2 of the Statute for the ICC for ICTY and art. 65 of the Statute of the International Tribunal for Rwanda. As far as ad hoc criminal Tribunals are concerned, the precautionary measures know a certain automatism and correspondence between the assumption of the accused and the issuance of the custody order. The same ICTY confirmed by case IT-96-20-TP Prosecutor v. Djukic of 24 April 1996 and Case IT-95- 14-T, Prosecutor v. Blaškić of 25 April 1996 on the exceptionality of the provisional release ("(...) the arrested person may impose such conditions on the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions (...)") in relation to the arrest rule by identifying the reasons for the issuance of a detention order and the legitimacy for the adoption of the precautionary measure. The main reason for custody is the specific reference to the crimes pertaining to the Court, as well as the concise disclosure of the facts that the Prosecutor points out by asking for the preliminary Chamber to be confirmed and always after the confirmation of the accusations. The Preliminary Chamber also has the right to modify the arrest warrant and/or custody but after the Prosecutor's proposal, by examining the suspect of reasonable grounds for restricting the freedom of the person. **

based on some fundamental rules that every democratic system includes in its legislation: the protection ofhuman rights, the degree of satisfaction of justice, the reliability of international institutions, the satisfaction of the punishment of international crimes as a guarantee of a *super partes* system that collaborates through the system of judicial assistance and cooperation with all its strength in order not to leave unpunished a list of crimes that for decades people have suffered while waiting that the entire international Community through its international justice centers will make effective justice for the punishment of particular crimes and difficult the evaluation of evidence gathered in a globalized society which no longer requires assurance of certainty but the guarantee of balance for the organization, methods and means of an ever evolving international justice and at the same time as a guarantor of balance and greater protection of humanrights.

Among the aims of judicial cooperation proposed and established by ICC is that the collection of evidence and the guilt of a person charged with crimes under the Statute are part of the trial in a circumscribed field of evidence based on a collection difficult and often overcome by national and international laws. Facts in a process are never though and expressed in isolation but in its essential relation to a legal rule in our case at an international level and that we must observe it through the line of legal coordination between this *facti* and *quaestio iuris*. The inspirational culture of the principle of judicial assistance is based on the spirit of solidarity and a comfortable conservative practice that should be sensitized to think that the threshold of punishment for such serious crimes is really the last beach for a last act of justice against crimes that centuries have remained impunished due to so many reasons. In any case, criminal justice cooperation at a supranational level seeks to enforce as much as possible a commitment of responsibility, impartiality and justice of international character.

The point is not who does believe in international criminal tribunals and/or what kind of justice can they guarantee for international community but the fact that the crimes punished in these courts have long convinced, even the most indifferent, of having some credibility even outside by setting certain boundaries that delimit test topics in the context of the instrumental necessity of everything regarding the imputation, the related issues of punishment and the possible determination of the punishment. For decades the punishment of such crimes is faced with great skepticism and especially after the establishment of international criminal tribunals, relying more on the actual autonomy and independence of those institutions that do not fail to recognize ICC's undeniable new elements from the previous international criminal courts so as to enable them to respond effectively to the question of justice and the refusal of impunity[134] affecting one of its major manifestations such as the exercise of criminal jurisdiction. The analysis of the provisions on jurisdiction of ICC with activation mechanisms and in relation with national jurisdictions through cooperation mechanisms is essential in order to establish the actual nature of such an internationalinstitution[135].

The described international legal assistance mechanism primarily respects the legal culture of any country that does not want to participate in the collection of evidence, documents, and mitigate only to discuss the royalties of the so called questions and statuses that establish the demonstration character of the trials and

[134] WECKEL osserved that: "(...) consacre pleinement la notion d'ordre public vèritablement international, ni seulement transnational, ni interètatique (...)". WECKEL, 1998, pag.993.

[135]In primis, if the Court responded that: "(...) aux instances les plus avancèes et innovatrices; ou bien si les exigences de rèalisme et de la mèpdiation ont prèvalu jusqu'au point de crèer un organe de justice faible et probablement incapable d'exercer de manière effective les fonctions qui lui sont en principe assignèes (...)". See, POLITI, 1999, pp. 848ss.

every reasoning was included within a logical demonstrative structure in the sense that every question should be decided on the basis of indisputable criteria always based on a scientific experimental basis based on the concept of verifiability and hypothesis that serve certain tests with relative frequency of a event in a long series of events already monitored by a UN Security Council, other political, diplomatic, scientific channels involving the transition from a known fact to an unknown or completely specific, guaranteed, certain, unambiguous and not contradicted by other elements of the *ratio probabilis* that exceed the limits of tor probability as a means of discovering truth by pointing to the principle of non dispersal of the means of proof with regard to irreparable acts, guaranteed or assumed in special conditions.

Within this spirit of globalization of criminal justice, there are various ways of exercising universal criminal justice through the criminalization of individual behavior and setting precise limits to national repression,for example by banning imprescribility, amnesty and impunity in general; internationalizing the guarantee instruments through the creation of competing or complementary national jurisdictions with national institutions, competent to judge individuals who are the perpetrators of crimes against peace and the security of humanity is, as a matter of fact, the case with the judicial cooperation area between ICC and Member States or not the Statute of the ICC. Importance is given in not just about how the declarations and/or collections of elements, evidence, etc. are out but also regarding the purpose of the truth and *cum quis in perturbatione ponitur,* the whole *mentis* of subjects who have committed facts that do not need the intimate conviction of international community to condemn apotrope crimes without tolerance and understanding but a collaboration with the power (in this case through international criminal Tribunals) of thousands massacred victims[136] for purposes that many times are never hit by any psychic judgment, criminal conviction, mass media, etc. lawfully put into practice worldwide.

In this sense it is possible to say that the idea of S. Agostino and Descartes on the so-called hyperbolic doubt stimulates the search because it is without doubt, the starting point and foundation of a demonstration, a guiding principle, a standard level of rationality and the need for further testing (*notoria non egent probatione*).

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[136] VAN DEN WYNGAERT, 2012, pp. 475ss; WERLE/JESSBERGER, 2014; SCHABAS/BERNAZ, 2011.

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