

## The ICC and International Criminal Cooperation – Key Aspects and Fundamental Necessities

Hans-Peter Kaul

As you are aware, this presentation will deal with ‘The ICC and International Criminal Cooperation – Key Aspects and Fundamental Necessities’ – and ‘fundamental necessities’ means practical and urgent necessities!

Let me start by making a confession. Even during the Rome Conference in 1998 and afterwards, until the entry into force of the Rome Statute in July 2002, when I continued to be the Head of the German ICC delegation, I was not fully aware how essential, how vital indeed effective criminal cooperation would be for the Court. Only since 2003, when I joined the Court as a Judge, did I become increasingly aware that the Court is totally dependent, 100% dependent, on full, effective and timely cooperation in particular from States Parties. Meanwhile, it is my considered view that the question, whether the Court is able to rely on effective and sustained cooperation, may indeed be decisive for its failure or success, at least in the longer perspective.

Also with regard to the issues of effective criminal cooperation, let me recall an experience which others also have had, time and again: the idea of an International Criminal Court, the Rome Statute and more specifically the system of criminal cooperation contained therein are, as such, no guarantee for progress or even success. Everything remains difficult, nothing falls into place by itself. Every inch of progress needs hard work, needs sustained effort. This is especially true also for the area of criminal cooperation. To ensure cooperation is a continuing task, a permanent necessity and also a permanent challenge where – as we will hear from Håkan Friman – the devil is often in the details.<sup>1</sup>

With this in mind, I would like to divide these remarks into two brief parts. First: let me recall some key aspects of the cooperation regime pursuant to chapter 9 of the Rome Statute which will have an impact on the work of the ICC also in the future. Second: in the light of these key aspects and limitations, what are fundamental necessities and challenges with regard to international criminal cooperation?

As cooperation is such a huge and comprehensive issue in itself, I will focus mainly on issues of cooperation necessary for investigation and prosecution activities. This means that I will generally not deal with requests for cooperation originating from

---

<sup>1</sup> See Friman, H., Chapter 10 in this volume.

the Registry, general cooperation agreements concluded by the Presidency or other specific forms of cooperation concerning the protection of victims and witnesses. Likewise, I will not discuss possible agreements on relocation of witnesses or the enforcement of sentences in accordance with part 10 of the Statute. Instead, I would like to highlight some urgent, burning issues regarding effective criminal cooperation.

## 1. Key Aspects

When we assess the cooperation regime under the Rome Statute, we cannot fail to see that it is characterized by a decisive structural weakness: the Court does not have the competencies and means to enforce its own decisions.<sup>2</sup> Under the Statute, the ICC has no executive powers, no police force of its own or other executive units. It is totally dependent on full, effective, timely and predictable cooperation, in particular from States Parties. This is true especially with regard to the decisive question of the effective execution of arrest warrants and surrender of suspects to The Hague.<sup>3</sup> One may safely assume that this structural weakness was foreseen and planned by the founders of the ICC also in the field of criminal cooperation. With regard to the jurisdiction and admissibility regime of the Rome Statute, it was also with regard to issues of cooperation the wish of the Court's creators that States' sovereignty remain prevailing – and President Kirsch has recalled this morning some of the underlying reasons.<sup>4</sup>

Against this background, part 9 of the Rome Statute on international cooperation and judicial assistance seeks to ensure the functioning of the Court through the following main elements:

- a. States Parties have a general obligation to cooperate fully with the Court with respect to its investigations and prosecutions (article 86).
- b. States Parties shall ensure that procedures are available under national law for all forms of cooperation specified in part 9 (article 88).

<sup>2</sup> For a discussion of the cooperation regime in the Rome Statute, see Kaul, H.P. and Kress, C. (1999), 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', *Yearbook of International Humanitarian Law*, 143; Mochochoko, P. (1999), 'International Cooperation and Judicial Assistance', in Lee, R.S. (ed.), in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiation, Results* (The Hague-London-Boston: Kluwer Law International), p. 305; Oosterveld, V., Perry, M. and McManus, J. (2002), 'The Cooperation of States with the International Criminal Court', in *Fordham International Law Journal* 25:3, 767; Swart, B. and Sluiter, G. (1999), 'The International Criminal Court and International Criminal Cooperation', in Von Hebel, H. et al. (eds), *Reflections on the International Criminal Court*, p. 91.

<sup>3</sup> See Swart, B. (2002), 'Arrest and Surrender', in Cassese, A., Gaeta, P. and Jones, J.R.W.D. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford: Oxford University Press), p. 1639.

<sup>4</sup> See Kirsch, P., Chapter 1, this volume.

- c. States Parties shall consult with the Court without delay in order to resolve any problems which may impede or prevent the execution of requests (article 97).

The measures stipulated in part 9 represent the minimum and guaranteed obligations accepted by States Parties becoming Parties to the Statute. States not parties have no obligation to cooperate except when the Security Council refers a situation to the Court pursuant to article 13b and obliges non-Member States under Chapter VII of the UN Charter to cooperate with the Court (in passing, let me recall that Security Council Resolution 1593 on Darfur regrettably does not contain a general obligation for UN Member States to cooperate with the ICC).

All in all, the system of cooperation under the Rome Statute may be regarded as a compromise and as a hybrid system. It contains a mix of elements of vertical and horizontal criminal cooperation of both the supra-national and inter-state model of cooperation. While States Parties have a general obligation to fully cooperate with the Court, there remains in practice a lot of discretion, for example, if a request for cooperation is in conflict with a national 'existing fundamental legal principle of general application' or where the documents or evidence concerned relate to national security.<sup>5</sup> States are thus not under any strict obligation to give priority to the Court's requests for surrender or assistance. Instead, the Statute foresees consultations in cases of problems arising in the context of a cooperation request from the Court.<sup>6</sup>

This may suffice as a very brief summary of the overall situation regarding the cooperation regime under the Statute.

## 2. Fundamental Necessities

This regime as laid down in part 9 of the Statute must be seen as a reality and a fact of life which cannot be altered easily – and also not at the Review Conference in 2009. This regime therefore must be accepted by all concerned, namely the Court itself and in particular the Office of the Prosecutor, the States Parties, international organizations and NGOs. All these actors are called upon to breathe life into the cooperation system under the Statute and to exhaust its possibilities for effective, speedy, unreserved and sustained cooperation. This is in itself an ongoing task and challenge, with many related necessities. Amongst them, let me highlight in particular three fundamental necessities:

- a. Firstly, the joint development of a new and innovative system of best practices of international criminal cooperation: direct, point to point, flexible, without unnecessary bureaucracy, with full use of modern information technology and a fast flow of information and supportive measures.

<sup>5</sup> Article 93(3) and article 93(4) in conjunction with article 72.

<sup>6</sup> In addition to article 97, other provisions in the Statute such as article 72 (7)(a) (1); article 89 (2) and (4); article 91 (4); article 93 (3) and (9); article 96 (3); article 99 (4); article 100 (1)(f) also contain the need for consultation between States and the Court in case of problems arising in the execution of a cooperation request.

- b. Second, the gradual build-up and increasing strengthening of a solid and reliable network of efficient international cooperation based on trust and confidence between the Court and State Parties.
- c. Thirdly, practical solutions for the making of arrests and the surrender of suspects to the ICC.

In general, these necessities require a new openness and a new thinking, a proactive thinking commensurate to the task to make the ICC system work. The starting point is clear: the ICC is located in The Hague, far away from situations like those in Uganda, the DRC and Darfur. It has no police force of its own, no soldiers, and no powers of enforcement. All concerned must be prepared to draw appropriate conclusions from these facts in order to overcome these handicaps.

Let us now have a brief look at the respective roles of the main actors involved and desirable forms of cooperation and division of labour among them.

With regard to the first and the second necessities, it is the responsibility of both the Court and States Parties to develop together a new system of best practices of effective criminal cooperation and to build up a solid and reliable new network of international cooperation.

#### 2.a. The Role of the Court

The first responsibility to make the ICC system of cooperation work lies with the Court itself, in particular with the Office of the Prosecutor. The Prosecutor and his Office as the driving force of the ICC bear a special responsibility both for effective investigations as effective cooperation.<sup>7</sup> In this respect, let me share with you a saying which I have picked up from the young people at our Court. They say – and you can hear this quite often – ‘The Office of the Prosecutor is the engine, systematic efforts for effective investigations and equally effective cooperation are the fuel for the entire Court.’

Now, what does this mean in terms of concrete criminal cooperation? The Prosecutor has a key interest in effective criminal cooperation. Part 9 of the Statute provides the legal framework for such cooperation. The Prosecutor and his Office are called upon to exhaust the potential of this legal framework for firstly, the sustained build-up of an appropriate organisational capacity for cooperation issues which is large enough, which is as efficacious as possible and secondly, the ongoing development of efficient working methods and best practices in particular with regard to cooperation. The question is: do we have this already? Has this already been achieved by the Office of the Prosecutor? Ideally, the Office of the Prosecutor should act as the intellectual driving force, as the creative mastermind for new, systematic and efficient forms of cooperation on the basis of a well-developed concept with clear goals and priorities.

<sup>7</sup> Article 42(1), Part V, Investigation and Prosecution, and Part IX, International Cooperation and Judicial Assistance, of the Rome Statute.

#### 2.b. The Role of States Parties

Especially in the field of cooperation, it is obvious that the Court and the Prosecutor cannot be successful without active and steadfast support from States Parties, both in word and in concrete deed. The hopes and expectations at the ICC are that States Parties will support it as responsible joint owners by engaging in unreserved and systematic cooperation in all practical fields. Whether they will do so remains, as it were, a question to end all questions.

Again, what does this mean in more concrete terms? Here is a short list of concrete areas of enhanced cooperation:

- a. If not done already, States should enact implementing legislation pursuant to article 88 of the Statute that is sufficiently precise to allow for direct cooperation, without the need for additional arrangements.
- b. If not done already, States should enact national legislation to ensure that they are able to investigate and prosecute crimes falling under the Statute.
- c. States should support the Court’s general or situational policies publicly and also in direct contacts with other States and civil societies.
- d. States should provide contextual and background information and advice on interlocutors and suspects, particularly through relevant specialized government departments and agencies.
- e. States should provide intelligence, satellite images, analytical support and communications – and here I would like to add an example: just imagine for a moment how it would help the Prosecutor if US satellite images taken over Darfur would be made available to him!
- f. States should facilitate access to potential witnesses and their voluntary appearance before the Court.
- g. States should establish fast and reliable communication channels including national focal points to ensure immediate cooperation.

In general, if States Parties are genuinely interested in further progress and lasting success of ‘their Court’, the logical course for them is to continuously search for ways and means of strengthening cooperation with the Court.

With regard to the third necessity for practical solutions to the decisive question, the unresolved question of serving arrest warrants and surrendering suspect criminals to the ICC, major responsibility for this rests squarely on the States Parties.

### 3. Arrest and Surrender – Crucial Responsibility of States Parties

It is obvious that States Parties and all forces who support the Court cannot let down the Court in respect of arrest by adopting an attitude along the lines of ‘we have given you the money for the first budgets – now see for yourselves how you get the perpetrators before your Court...’.

This will not work. One must hope that this is clear to all concerned. In the Former Yugoslavia, NATO and coalition forces have made most arrests for the International

Criminal Tribunal for the Former Yugoslavia. With regard to Rwanda, most arrests have been made by neighbouring States. Likewise, States Parties and Security Council members must now find ways and means of supporting the ICC with regard to the decisive question of arrests and surrenders to The Hague. Currently there are since 2005 five arrest warrants confirmed by Pre-Trial Chamber II with regard to suspects from Uganda.<sup>8</sup> Furthermore, there are since 2 May 2007 two arrest warrants concerning two high-ranking Sudanese officials.<sup>9</sup> It remains unclear whether and when these arrest warrants will be executed. This is not good.

As the Court does not have the authority to execute arrest warrants directly on the territory of States, arrests are primarily the responsibility of relevant territorial States. Securing arrests is a complex process that may require the commitment of significant police and military resources. Above all, it requires the necessary political will. While it is mainly for the territorial State to decide on arrest actions, support by other or all States could involve:

- a. Public and vocal support of the international community. Such support and pressure have been crucial to securing surrenders, both voluntary and coercive, to the ICTY, ICTR and the Special Court for Sierra Leone.
- b. States should support territorial States, for example through sharing information on suspect tracking, through logistical support and specialized training for arrest operations.
- c. States should investigate and eliminate networks of financial and logistical supply for perpetrators sought with arrest warrants.
- d. States should create operational groups for coordinated military and diplomatic efforts to secure arrests.

While the ultimate responsibility for the execution of arrest warrants on a national territory remains with the territorial State, such State has the possibility to allow or to delegate arrest actions to third parties, such as for instance peacekeeping troops or police forces of other States. It is recognized under international law that arrest actions by such third parties are fully legitimate as long as they are consented to by the territorial State. Many arrests of suspects prosecuted by the ICTY were made on the territory of Bosnia by peacekeeping troops, with the consent of Bosnia. Another example is the attack on a hijacked Lufthansa airplane, liberation of its passengers and arrests of German terrorists by German special police at the airport of Mogadishu in 1977, for which permission had been given by President Barre of Somalia.

<sup>8</sup> Pre-Trial Chamber II, 'Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' (ICC-02/04-01/05-53), 27 September 2005; Pre-Trial Chamber II, 'Warrant of arrest for Vincent Otti' (ICC-02/04-01/05-54), 8 July 2005; Pre-Trial Chamber II, 'Warrant of arrest for Raska Lukwiya' (ICC-02/04-01/05-55), 8 July 2005; Pre-Trial Chamber II, 'Warrant of arrest for Okot Odhiambo' (ICC-02/04-01/05-56), 8 July 2005; Pre-Trial Chamber II, 'Warrant of arrest for Dominic Ongwen' (ICC-02/04-01/05-57), 8 July 2005.

<sup>9</sup> Pre-Trial Chamber I, 'Warrant of arrest for Ali Kushayb' (ICC-02/05-01/07-3-Corr), 27 April 2007; Pre-Trial Chamber I, 'Warrant of arrest for Ahmad Harun' (ICC-02/05-01/07-2-Corr), 27 April 2007.

In particular, those States Parties which regret that ICC arrest warrants are not executed and which want the ICC to more successful, should draw appropriate conclusions from these precedents established in full conformity with international law. When it becomes clear that a territorial State has difficulties in executing an ICC arrest warrant, other States or organizations could or should offer their assistance with adequate police forces. Already in 2000 the European Union took a decision<sup>10</sup> that Member States should be able to provide up to 5000 police officers for international missions across the range of conflict prevention and crisis management. EU Member States also approved the objective to ensure that together they would be able to identify and deploy up to 1000 police officers within 30 days. In 2003, the United Nations and the European Union agreed in a Joint UN-EU Declaration on Crisis Management to strengthen their cooperation in the area of civilian and military crisis management.<sup>11</sup> In 2006, the United Nations announced that the recruitment for a standing police capacity was under way.<sup>12</sup> Concerned States Parties and other actors should actively explore the potential of these and other instruments, with a view to bringing the decisive question of arrests actions in support of the ICC closer to a realistic solution.

All in all, there are some encouraging signs that States Parties are more and more aware of this necessity. On the other side, the list of possible and concrete support measures shown above indicates rather clearly how far we still are from satisfactory progress and solutions with regard to the decisive questions of effective arrests. Nevertheless, for a Judge of the ICC also, it is simply impossible to give up the expectation that over time concerned States will muster the necessary energy and political will to support the Court also in the crucial area of making arrests and surrenders to The Hague.

<sup>10</sup> Santa Maria da Feira, Presidency Conclusions, 19 and 20 June 2000, Document 200/1/00.

<sup>11</sup> Joint UN-EU Declaration on Crisis Management, signed by UN Secretary General Kofi Annan and President of the European Union Silvio Berlusconi, 24 September 2003 (available at [http://europa-eu-un.org/articles/en/article\\_2768\\_en.htm](http://europa-eu-un.org/articles/en/article_2768_en.htm) accessed 10 September 2007).

<sup>12</sup> Statement by Under-Secretary-General for Peacekeeping Operations Jean-Marie Guéhenno, Sixty-first General Assembly, Fourth Committee, 13<sup>th</sup> Meeting, 19 October 2006, UN Document GA/SPD/352.