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SECOND REPORT

by Professor Göran Sluiter, Co-rapporteur

This report addresses the implementation of the International Criminal Court (ICC) into the domestic legal order. Whereas this essentially concerns states parties, the position of states non-parties is equally relevant when it comes to identifying obstacles to ratification, the effective functioning of the Court and the effective national prosecution of international crimes. The questionnaire that has been circulated thus distinguishes between States parties and States non-parties, but addresses the same three central themes: ratification, cooperation with the Court, and national prosecution of crimes within the jurisdiction of the Court. At this stage, however, the Committee has confined its work to ratification and cooperation. The Committee has decided that, the matter of implementation of substantive international criminal law is too complex to deal with in a single report together with ratification and cooperation matters and is relegated to a subsequent report.

A questionnaire concentrating on the aforementioned ratification and cooperation-themes was circulated to the members of the Committee after the Berlin Conference in 2004. Responses to the questionnaire were received with respect to the following jurisdictions: Austria, Belgium, the Czech Republic, Finland, Germany, Greece, Israel, Italy, Japan, South Africa, South Korea, Sweden, Switzerland, the United Kingdom, Uruguay and the United States of America. In addition to those responses this report is based on various national ratification and implementing legislation as well as national decisions and advices in respect of constitutional compatibility of ratification of the ICC, without pretending to have undertaken a complete survey. This report also takes into account previous reports of a similar nature.¹

¹ Notably Jann K. Kleffner and Charles Garraway, General Report, 'The Compatibility of National Legal Systems with the Statute of the Permanent International Criminal Court (ICC), Part I - Substantive Law', 42 *The Military Law and Law of War Review* (2003), p. 45-88 (French), 119-158 (English), and Jann K. Kleffner, General Report, 'The Compatibility of National Legal Systems with the Statute of the Permanent International Criminal Court (ICC), Part II - Procedural Law', 42 *The Military Law and Law of War Review* (2003), p. 89-118 (French), 159-185 (English).

A first draft of the report was discussed among a number of members of the Committee in Otzenhausen, Germany, on 9 and 10 December 2005, sponsored by ASKO EUROPA FOUNDATION. Following this meeting a revised draft was again circulated among all members of the Committee in February 2006. Members' comments have been incorporated in the final version.

1. Ratification

In respect of States parties the following questions were addressed: Have in the context of the ratification process important incompatibilities with domestic law, especially the constitution, been established? If so, what was the nature of those incompatibilities? In case of established incompatibilities between the ICC Statute and domestic law how has the conflict been solved?

The questionnaire contained the following questions for States non-parties: Are there expectations that your State will ratify the ICC Statute? If yes, when? If not, which are the main objections against ratification? In case your State would ratify the ICC-treaty which important incompatibilities with domestic law, especially the constitution, may be expected? What is the nature of those incompatibilities? How could those incompatibilities be solved?

The responses by States non-parties offer a certain degree of insight into reasons underlying the non-ratification of the Statute. A number of States outright reject at this stage the ratification of the ICC-treaty and have therefore not reached the stage of studying incompatibilities with domestic law in case of ratification. The correspondent for Israel referred to Article 8 (2) (b) (viii) of the ICC Statute and its possible consequences for Israeli settlements activity as the major reason not to ratify the ICC Statute. In light of this obstacle review of Israeli law in light of the Statute has not been conducted, at least not publicly. The US is in a similar position, be it that their objections are of a different and more comprehensive nature than those of Israel.² The US objections also appear to hold up the ratification of the treaty by other States. The correspondent for the Czech Republic mentioned in this respect that political opposition seem to be related to the US position. One should also mention China and India as States which offer explanation for the rejection of the ICC Statute. According to Garraway and Kleffner

China's objections include the inability to accept the jurisdictional provisions of the Statute in that they were not established on the basis of the voluntary acceptance of States; disagreement with the bringing of war crimes in internal armed conflicts under the universal jurisdiction of the Court; consideration that the provisions in the Statute relating to the role of the Security Council were inconsistent with the United Nations Charter; excessive powers of the prosecutor, in particular when acting *proprio motu*; and concern over the definition of crimes against humanity. India, on the other hand, mentions "various security and political considerations" in addition to the lack of definition of the crime of aggression and the absence of an express prohibition of the use of nuclear weapons in the Statute.³

While the position of the abovementioned States offers little hope for ratification in the near future, other States may be more inclined to future ratification. An interesting case concerns the situation of Japan. The correspondent for this State refers to the official explanation of the Japanese government for non-accession, being that it is now examining its domestic law with a positive intention of becoming a party to the Statute. Problems in this process concern the financial contributions (Japan would become a top-contributor upon ratification) as well as legal obstacles. The latter consist of a broad freedom of speech which might conflict with the incitement to genocide⁴ and a certain degree of immunity for Members of Parliament.⁵

The ratification process of the ICC States parties offers insight into the various legal obstacles, especially of a constitutional nature. The prohibition on reservations (art. 120 ICC Statute) undoubtedly triggered more (constitutional) hurdles than in the ratification course of other treaties, but in no case has this proved to be insurmountable. One notices in certain States considerable room in interpretation of the constitution. For example, the correspondent for Greece indicated that the Greek constitution has been interpreted in such a way as to preclude any incompatibilities. In other States this was not the case and either amendment of the

² See for an analysis of those objections the article referred to by the US correspondent: Leila Nadya Sadat, Summer in Rome, Spring in The Hague, Winter in Washington? U.S. Policy towards the International Criminal Court, 21 *Wis. Int'l L. J.* 557, 2003.

³ See supra note 1.

⁴ Note that Japan is not a party to the Genocide Convention.

⁵ See articles 6 and 27 of the ICC Statute.

constitution (for example Germany and Sweden⁶) or a particular ratification process –requiring a certain qualified majority- (for example the Netherlands and Finland) proved to be necessary.

An analysis of established incompatibilities with domestic law serves a twofold purpose. First, it offers an interpretation of the Statute by States parties. Not only may this amount to an interpretative tool, but also serves the second purpose of establishing whether this interpretation and subsequent (legislative) solutions accord with the Statute’s letter and spirit.

With the exception of the United Kingdom –which does not have a written constitution- perceived legal obstacles in the implementation of the Statute are primarily of a constitutional nature. The following can be mentioned.

The constitutional prohibition on extradition of nationals was a main source of incompatibility for Austria and Germany.⁷ In spite of the clear intentions of the drafters of the Rome Statute to circumvent prohibitions of this type by crafting a distinctive form of legal assistance –surrender instead of extradition- constitutive reform was felt necessary in Germany and has been effectuated.⁸ Such reform will probably also be necessary in States with more comprehensive language in respect of the prohibition on extradition of nationals. In the Czech Republic the constitutional bill of fundamental rights and freedoms grants each citizen the right not to be forced to leave his country, which encompasses both extradition and surrender. The same applies to the Finnish Constitution, art. 9 (3), where in spite of the intention of the drafters of the Rome Statute it was recognised that also in the case of surrender a conflict with the constitution arises.

A number of States followed the intentions of the drafters of the Statute. The Ukrainian Constitutional Court ruled in this respect that the constitutional prohibition on the extradition of nationals does not extend to surrender to an international court.⁹ In a similar vein, the Costa Rican constitutional chamber of the Supreme Court considered the right for each Costa Rican not to be compelled to leave the country as not absolute; rather, it should be interpreted in light of the development of human rights law.¹⁰ The Ecuadorian report on constitutionality of the ICC appears to combine both previous arguments.¹¹

Closely related to the prohibition on the extradition of nationals is the right for citizens in certain States not to be removed from his or her natural judge (*ius de non evocando*). The correspondent for Italy identified a possible incompatibility here between Italy’s constitution and arts. 59 and 60 of the ICC Statute on arrest proceedings.

A central point of discussion in the ratification process concerns the relationship between immunities under domestic (constitutional) law and art. 27 of the ICC Statute. Such immunities essentially concern parliamentarians and ministers, but take on a different dimension in constitutional monarchies, where the King does not enjoy functional but full personal immunities. It lies indeed at the heart of the constitutional monarchy that the King is inviolable and the Ministers fully responsible. In respect of art. 27 of the ICC Statute the constitutional monarchies of Spain, Belgium, the Netherlands and Luxembourg appear to adopt similar approaches. Thus, the Spanish Council of State advised that since the King cannot incur responsibility it will be the countersigning official who bears responsibility.¹² Likewise, the Dutch Explanatory Memorandum expressed the opinion that the King can simply not commit (international) crimes, as there is always ministerial responsibility.¹³ The question arises whether such a position corresponds to art. 27. The Luxembourg *Conseil d’Etat* is critical in this respect and advised that full ministerial responsibility for all acts of the King may be pivotal in a constitutional monarchy, but does not accord with art. 27. It should be noted that Sweden recognises fully the incompatibility between art. 27 of the ICC Statute and full immunity under its constitution for the King and prepares constitutional changes in this respect after the 2006 elections.

⁶ Note that constitutional amendments have been postponed for practical reasons in Sweden, because this requires an intervening election. According to the correspondent for Sweden the constitutional problems –which concerned full immunity for the Head of State and qualified immunity for ministers- were essentially regarded as ‘theoretical’ that could be solved later, namely after the upcoming elections of 2006.

⁷ Cp. Art. 12 of the Austrian Constitution and Art. 16 of the German Constitution; constitutional amendment for this reason was also necessary in Slovakia (see supra note 1).

⁸ Art. 16 has been amended by adding the following sentence: “A different regulation to cover extradition to a Member State of the European Union or to an international criminal court may be laid down by law, provided that constitutional principles are observed”.

⁹ Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, 11 July 2001.

¹⁰ Advisory opinion on the constitutionality of the draft law of approbation of the Rome Statute on the ICC, Supreme Court of Justice (constitutional chamber), 1 November 2000.

¹¹ Report of Dr. Hernan Salgado Pesante in the case No. 0005-2000-CI on the ICC Statute, 21 February 2001.

¹² *Dictamen del Consejo de Estado de 22 agosto de 1999 (sobre el Estatuto de Roma)*, No. 1.37499/99/MM.

¹³ Explanatory Memorandum to the Ratification Act, *TK, vergaderjaar 2000-2001*, 27 484 (R 1699), no. 3, p. 9.

In a considerable number of States the issue of functional immunities for MP's and members of the government was addressed in the ratification process.¹⁴ In States non-parties this is advanced in the varying degrees as a reason for non-ratification. The correspondent for the Czech Republic in this respect mentions immunities as one of the main incompatibilities with domestic law, but points out that these immunities may be waived. The correspondent for Japan, however, considers immunity for members of the Diet as an absolute constitutional rule, which will theoretically require amendment in case of ratification. He also points out that Japan might not amend this rule, even if it decides to ratify the Rome Statute, because of the practical consideration that members of Diet will quite scarcely be involved in the crimes under the jurisdiction of the ICC. A similar absolute view was taken in the Netherlands, where the Council of State advised the government in light of art. 27 of the ICC Statute to adopt the ratification procedure requiring a two-thirds majority.¹⁵ For the same reason, constitutional amendment was advised in Luxembourg¹⁶, Belgium¹⁷ and France¹⁸.

A greater degree of flexibility can be found in other States. The correspondent for Finland indicates that the procedural regulations concerning the scope of immunities accruing to the President, government and MP's were seen to concern domestic proceedings only. Also in the opinion of the Ukrainian constitutional court national constitutional immunities are only applicable before national courts.¹⁹ In a similar vein the Costa Rican Supreme Court took the view that national constitutional immunities are not absolute and should not impede the functioning of the Court.²⁰ In South Korea the conflict between art. 27 ICC Statute and art. 84 of the Constitution, providing for immunities, was solved by the general presumption that national law must be interpreted in accordance with international obligations. Other jurisdictions passed over the matter. The Council of State of Spain took the view that since the immunity for MP's is confined to opinions and votes expressed within the Assembly there is little likelihood of a clash with art. 27, with the possible exception of incitement to genocide.²¹ A more or less similar approach was adopted in Sweden where the government preparing the ratification bill dismissed the problem of incompatibility with art. 27 of the Statute in the sphere of constitutional immunity as a theoretical problem which could be solved later.

The enforcement of ICC-sentences has triggered debates in respect of constitutional compatibility on two levels. First, in a small number of States the possible execution of sentences of life imprisonment raised some concern. The Spanish Council of State considered that art. 77, allowing for life imprisonment, could be considered contrary to art. 25 (2) of the constitution which provides that sentences of imprisonment shall be oriented towards rehabilitation.²² The Costa Rican Supreme Court referred in this respect to art. 40 of its Constitution according to which no one may be subjected to life imprisonment.²³ However, it also took into account the wording of art. 80 of the ICC Statute and we will later see –regarding the issue of early release- that except for the host State States parties incur no duties under the Statute to execute sentences of imprisonment. In other words, Spain and Costa Rica are in a position to negotiate terms of execution and to exclude the execution of sentences of life imprisonment.

Second, the constitutional power to grant amnesty or pardon has given rise to debate in the ratification process in several States. It is also identified as a possible future obstacle for ratification in States non-parties.²⁴ It seems to arise as a true problem of incompatibility, however, only for the Netherlands which has a –residual- duty to enforce sentences of imprisonment pursuant to art. 103 (4) of the Statute. In this respect one notices that France attaches great value to the possibility offered by art. 103 to attach conditions to the enforcement of sentences in order to avoid incompatibility with its constitutional right to pardon.²⁵ Finland, however, considered the language of art. 110 of the Statute in conflict with the constitutional power of pardon, which extends to all sentences served in Finland.

The Dutch government solved the incompatibility by not considering the right to pardon as a sovereign prerogative, but as a discretionary power that can be transferred to an international organisation.²⁶ An even more

¹⁴ In addition to the States dealt with below this concerns Austria, Slovakia and Tunisia.

¹⁵ Supra note 13.

¹⁶ *Avis du Conseil d'Etat*, No 44.088, Doc. Parl. 4502, 4 May 1999.

¹⁷ *Avis du Conseil d'Etat du 21 avril 1999*, Parliamentary Document 2-239 (1999/2000), p. 94.

¹⁸ Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court), *Conseil constitutionnel*, in *Journal Officiel*, No. 20, 24 January 1999, p. 1317.

¹⁹ Supra note 9.

²⁰ Supra note 10.

²¹ Supra note 12.

²² Supra note 12. Also note the similar provision in the Ecuadorian Constitution, art. 208. In his report on the constitutionality of the ICC, Dr. Heman Salgado Pesante considered that since art. 110 provides for automatic review the ICC-sentences will in practice not be indefinite sentences.

²³ Supra note 10.

²⁴ As is the case with the Czech Republic, according to its correspondent.

²⁵ *Conseil constitutionnel*, supra note 18.

²⁶ Explanatory memorandum to the Ratification Act, *TK, vergaderjaar 2000-2001*, 27 484 (R 1699), no. 3, pp. 9, 10.

progressive approach was adopted by the Belgian *Conseil d'Etat*, which considered its constitutional right to pardon limited to penalties imposed by Belgian Courts.²⁷

While not always possible to link this to a direct constitutional provision,²⁸ the conduct of investigations by the Prosecutor on national territory (art. 99 (4) ICC Statute) has been a matter of discussion in a small number of States in light of the protection of national sovereignty. Especially in civil law States the conduct of investigations is preserved to (national) judicial authorities as it is the case in Italy, whose constitution will require adaptation to make it possible for the Prosecutor to conduct investigations on Italian territory. However, such powers can be transferred to international organisations, as was recognised by the Spanish Council of State.²⁹ The correspondent for Finland makes in this respect mention of the particular purpose of the ICC – protection of peace and of human rights- which amounts to the particular form of cooperation provided for in the Finnish constitution. Only France to my knowledge has clearly stated the incompatibility between art. 99 (4) of the Statute and national sovereignty:

Le pouvoir reconnu au procureur de réaliser ces actes hors la présence des autorités judiciaires françaises compétentes est de nature à porter atteinte aux conditions essentielles d'exercice de la souveraineté nationale.³⁰

The amendment procedure of the Statute has raised concerns from a constitutional perspective in at least two States parties. Pursuant to arts. 121 (3) and 122 (2) of the Statute an amendment shall take effect after approval by a two-thirds majority. As a result a State can be bound by amendments absent national ratification procedures. This was identified as a potential threat to national sovereignty by Finland and the Netherlands and both States considered this to be in conflict with the constitution.³¹ It should be noted, however, that the correspondent for Finland identified art. 122-amendments only to be in conflict with the constitution, because art. 121-amendments allow for subsequent immediate withdrawal from the Statute for non-supportive States (art. 121 (6)). In other words, only art. 122-amendments bind under certain circumstances the objecting State-party without being able to follow the ratification procedure prescribed by the constitution, including parliamentary approval.

2. Cooperation

For States parties the questionnaire contained a number of questions on the implementation of cooperation duties towards the ICC:

- Has your State adopted –or is in the process of adopting- special legislation implementing the duty to provide the ICC with legal assistance?
- If special implementing legislation has been adopted, what is its nature? Does it exhaustively regulate the cooperation relationship with the ICC or does it supplement and/or amend existing domestic law? How does it compare to implementing legislation in respect of the ICTY and ICTR, when such laws have been adopted in your country?
- Has your State prepared for non-obligatory forms of cooperation, especially the enforcement of sentences of imprisonment?³² Does your State attach conditions to voluntary modes of cooperation, in particular the enforcement of sentences of imprisonment?
- On the basis of the domestic law applicable is your State in a position to give effect to all forms of mandatory legal assistance explicitly set out in the ICC Statute (assistance in the prosecution of offences against the administration of justice (art. 70); surrender (art. 89); provisional arrest (art. 92); other forms of cooperation set out in art. 93; on-site investigations (art. 99 (4); enforcement of fines and forfeiture orders (art. 109))?
- Has your state in the organisation of the execution of requests for legal assistance taken into account the obligations set out in the Statute, notably arts. 55 and 59?
- In case a conflict arises between the Court and your State in the implementation of a legal assistance request, how is this solved? How has your state implemented the 'duty to consult' (art. 97) and does it accept the final authority of the Court on cooperation disputes?

²⁷ Supra note 17.

²⁸ Garraway and Kleffner mention Slovakia as a State that has amended or will amend its constitution as a result of art. 99 (4) ICC Statute (supra note 1).

²⁹ Supra note 12; see also the Ecuadorian report on constitutionality of the ICC (supra note 11).

³⁰ Supra note 18.

³¹ For the Netherlands, see reaction to advice by the Council of State on this point, *TK, vergaderjaar 2000-2001*, 27 484 (R 1699), A, pp. 2 – 4.

³² This does not concern the host-State, the Netherlands for which a –residual- duty to enforce sentences of imprisonment does exist.

- On the basis of applicable law, which grounds of refusal can be identified for your country? Are those identical in scope and content to the ones set out in the Statute? If additional grounds for refusal are applicable to ICC cooperation requests what are the underlying reasons?
- On the basis of applicable law, does your State allow for participation of ICC personnel and defence counsel in the execution of legal assistance requests (art. 99 (1))? If so, under which conditions? Does your State allow for independent and autonomous on-site investigations (art. 99 (4))? If so, under which conditions?
- In your opinion, has your State given effect to both the letter and the spirit of the legal assistance obligations under the ICC Statute?

For States non-parties the following questions were formulated:

- In spite of not being a State party to the ICC would your State be prepared to cooperate with the ICC on a voluntary basis?
- If so, what could be a possible and acceptable modality of regulating such cooperation? Ad hoc acceptance pursuant to art. 12 (3) of the Statute, including cooperation obligations, ad hoc cooperation agreements pursuant to art. 87 (5) of the Statute, or another arrangement?
- In case of ad hoc cooperation with the Court on a voluntary basis, which would be the legal basis under domestic law, or would the adoption of special legislation be required?
- In case there is already a legal basis, for example in the form of ICTY/ICTR cooperation laws, to which forms of legal assistance explicitly set out in the ICC Statute would your State on the basis of that law be in a position to give effect to assistance in the prosecution of offences against the administration of justice (art. 70); surrender (art. 89); provisional arrest (art. 92); other forms of cooperation set out in art. 93; on-site investigations (art. 99 (4)); enforcement of fines and forfeiture orders (art. 109); and the enforcement of sentences of imprisonment (art. 103)?

At the outset it should be noted that the questionnaire was prepared prior to the adoption of SC Resolution 1593. This Resolution submits the situation of Darfur Sudan to the ICC pursuant to art. 13 (b) of the Statute. The matter of cooperation obligations pursuant to Security Council resolutions submitting cases to the Court raises complicated questions, which has everything to do with the fact that the ICC Statute does not regulate the consequences of SC-referral for the cooperation relationship, especially with States non-parties which are UN members. An exception is made for the enforcement of cooperation obligations: pursuant to art. 87 (7) the Court may refer instances of non-cooperation to the Security Council where the latter has referred the matter to the Court.³³

In light of a relevant legal framework, the language of the referring Security Council resolution is vital as to the cooperation duties for States non-parties. In this respect, Resolution 1593 reads –in relevant part- as follows:

Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

While a duty to cooperate for Sudan is hereby established on the basis of the UN Charter (art. 25) its exact scope and content remains a matter of discussion. A vital question in this respect is whether “full cooperation” should be equated with the cooperation relationship between the Court and States parties pursuant to the Statute.

Other States non-parties to the Statute than Sudan are ‘urged’ to cooperate fully with the Court. While no cooperation obligation can be inferred from this language, it raises the question to what extent States non-parties may be prepared to offer legal assistance in respect of the ‘Darfur situation’. The correspondent for the US in this respect goes as far as stating that the US has committed itself through Security Council Resolution 1593 to cooperate with the investigation into the Darfur situation. One does, however, not encounter similar language in respect of other States non-parties, which may be occasioned by a response prior to the adoption of resolution 1593.

³³ One may wonder to what extent art. 87 (7) of the Statute covers non-cooperation by States non-parties. This provision only allows the Court to deal with failure to comply with a request to cooperate *contrary to the Statute* (emphasis added). States non-parties have no obligations under the Statute and thus cannot formally act contrary to it; they can only violate relevant Security Council resolutions imposing a duty to cooperate. In the event of such an interpretation of art. 87 (7) referral to the Security Council of instances of non-cooperation by States non-parties may nevertheless be considered part of the Court’s implied powers.

Be it in case of the Darfur situation or other investigations the cooperation of States non-parties may be as needed as that of States parties. Correspondents from States non-parties –Czech Republic, Israel, Japan and USA- cannot offer much information on possible cooperation with the Court. Chances are particularly small in respect of Israel and the USA. The Czech Republic’s objective is still ratification which obviates at this stage the need for ad hoc assistance; the correspondent of Japan is optimistic in that he believes that Japan will or will try to cooperate with the ICC if the ICC so requests.

The correspondent for Israel points out that Israel may be prepared to provide legal assistance in relation to prosecutions non-related to the Arab-Israeli conflict. Currently, Israeli domestic law does not mention the ICC as one of the (international) tribunals to which Israel may provide legal assistance, but this may be easily remedied by the Minister of Justice.

The situation for ad hoc assistance is most complicated in the USA, in light of the American Service Members Protection Act (ASPA) which forbids the US from cooperating. However, the ASPA contains a waiver provision allowing for legal assistance. As a result, cooperation with the Court lies entirely with the discretion of the US President. In the opinion of the correspondent for the US cooperation

(...) would mostly take the form of sporadic assistance without formal legal framework or, in the case of a suspect wanted by the Court that the US was willing to render, perhaps via extradition first to a State party with which the US has an extradition agreement.

Of the abovementioned States non-parties only the US has adopted cooperation legislation in respect of the ICTY and the ICTR. However, given the opposition against the ICC it is extremely unlikely that this legislation will serve as a possible basis to regulate ad hoc cooperation with the ICC.

Moving now to the States parties, one notices comprehensive legislative reforms. Confining us to the correspondents States parties have adopted special cooperation laws (Austria, Belgium, Finland, Germany, South Africa, Sweden, Switzerland and United Kingdom) or are in the process of doing so (Greece and South Korea). In addition to the corresponding States one can mention special ICC-cooperation laws –adopted or in the process of adoption- for Argentina, Australia, Democratic Republic of Congo, Ecuador, France, Kenya, Liechtenstein, Malta, the Netherlands, New Zealand, Norway and Spain. Domestic cooperation laws are either part of a broader law –an ‘International Crimes Act’- including provisions on the prosecution of international crimes or are promulgated as separate laws.

One notices that the vast majority of cooperation laws tend to regulate in considerable detail the cooperation with the Court. As examples of most detailed laws providing for almost exhaustive regulation of legal assistance to the Court one can mention the Kenyan International Crimes Bill, the Australian International Criminal Court Act 2002 and the New Zealand International Crimes and International Criminal Court Act. A frequent approach – adopted by, for example, Austria, the Netherlands, and the United Kingdom- is that the cooperation law provides a general structure for the relationship with the Court and regulates the substantive elements of the cooperation relationship; for procedural matters –such as the procedure for arrest and surrender- reference may then be made to existing laws pertaining to extradition and inter-state cooperation in criminal matters. Such provisions then apply *mutatis mutandis*.

The Nordic countries –at least Finland and Norway- have opted for a different implementive approach. In this respect the correspondent for Finland mentions that

In the implementation process it was considered most appropriate that national officials directly apply articles of the Rome Statute itself. This was technically executed so that all the provisions of parts 9 and 10 were considered to be of a legislative nature and put into force as law in Finland. Internal legislation is applied as supplementary to the Statute, in instances where the Statute does not contain a provision on a certain matter.

The central provision in the –short- Finnish cooperation law is section 4 which sets out an unconditional duty to cooperate for Finnish authorities and to do so in accordance with the provisions of the Act on International Legal Assistance in Criminal Matters. In a similar vein the Norwegian cooperation law contains only a few provisions, dealing with some key matters leaving the precise implementation to existing laws in the field of extradition and criminal procedure. Comparable to the Nordic countries is the approach adopted by Canada. This country did not adopt an autonomous cooperation law for the ICC, but amended many existing Canadian laws such as the Criminal Code, Extradition Act and Mutual Legal Assistance in Criminal Matters Act, to ensure that Canada could cooperate with the ICC.

These are diametrically opposed approaches; interestingly, they appear to be the result of an identical aspiration, effective implementation of the cooperation obligations. It remains to be seen whether this is better achieved by a more flexible or a more thorough implementive scheme. What is for sure is that autonomous and exhaustive

laws are for outsiders, including officers of organs of the ICC, most transparent and accessible. This may be of importance for effectively issuing requests for assistance with a view to their smooth implementation.

The ICC-cooperation legislation has obviously been strongly inspired by similar laws in respect of the ICTY and ICTR. The correspondents for Austria, Finland, Sweden, the United Kingdom and Switzerland acknowledged that these laws have been taken as a basis. Belgium has adopted a new cooperation law which has annulled the ICTY and ICTR-laws, but contains separate chapters for ICTY/ICTR-cooperation and ICC-cooperation. The Netherlands has seized the opportunity of adopting ICC-legislation to remedy deficiencies in ICTY/ICTR-cooperation law.³⁴

Generally, when comparing ICC-cooperation laws with ICTY/ICTR-cooperation laws one notices that the former are far more detailed and voluminous. For example, where the German ICTY/ICTR-cooperation law contains 8 articles, the ICC-cooperation law consists of 72 articles. This applies to most countries which have adopted cooperation legislation in respect of both the ICTY/ICTR and the ICC. Exceptions are Finland and Norway –which have adopted short, framework legislation in respect of all Courts- and Australia and New Zealand –which have implemented all cooperation obligations by lengthy, exhaustive Acts-.

Explanation for this difference lies not only in the permanent nature of the Court; more important is the detailed cooperation chapters in the Statute itself. The ICC Statute –and later the Rules of Procedure and Evidence- offers far more and better guidance for implementation legislation than the ICTY and ICTR Statutes.

As to the scope of cooperation legislation, the question arises to what extent States are prepared to offer voluntary forms of cooperation. This especially concerns the enforcement of sentences of imprisonment. Pursuant to art. 103 of the Statute sentences of imprisonment are enforced by States having indicated their willingness to do so, with the exception of the host-State. The latter has pursuant to art. 103 (4) a residual duty to accept sentenced persons.

Starting with the host-State, one notices in its implementing legislation full acknowledgement of this residual duty, by *–inter alia-* providing for direct enforcement of ICC sentences.³⁵ Furthermore, the constitutional right to pardon has been relinquished in favour of the ICC.

As to other States parties one notices a general benevolence in the recent legislative reforms in respect of the enforcement of ICC-sentences. This has very recently even materialised in the conclusion of an enforcement agreement between the ICC and Austria.³⁶ At least the following states allow in their cooperation laws for the enforcement of sentences of imprisonment: Argentina, Austria, Australia, Belgium, Congo, Ecuador, Finland,³⁷ Germany, South Africa, United Kingdom,³⁸ France, Kenya, Malta, Norway, Sweden and Spain.

Self-evidently, domestic laws refer in one way or another to a previous agreement between the government and the ICC as to the enforcement of sentences of imprisonment. But once such an agreement has been reached, States generally apply the conditions of part 10 and some even provide for direct enforcement of the sentence.

While States parties are generally prepared to enforce sentences of imprisonment, it is a different matter whether in practice they will be selected. An important obstacle from the perspective of the ICC lies in the stiff conditions set out by Art. 106, according to which the enforcement shall be consistent with widely accepted international treaty standards governing treatment of prisoners. In this respect, the correspondent for South Africa frankly states that

It is not clear however that South Africa will be placed on the list of states available for enforcement duty. The Rome Statute makes it clear that there can be ‘no question of sending a prisoner to a State with prison conditions that do not meet international standards’. This is a particular problem for South Africa, given the poor state of its prisons.

³⁴ This concerned the lack of adequate mechanism to implement a measure as provided for in art. 24 (3) ICTY Statute. This came to the fore when the ICTY ordered States to search for and –where appropriate- freeze assets of Slobodan Milošević (Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević, Milutinović, Šainović, Ojdanić and Stojiljković*, Case No. IT-99-37-I, Judge Hunt, 24 May 1999)

³⁵ A certain reluctance was, however, expressed to accept sentences which are not available under Dutch law, ie temporary sentences above 20 years. It needs to be noted that this reluctance will soon no longer be applicable as the Netherlands is about to augment temporary sentences of imprisonment for serious offences under national law from 20 to 30 years.

³⁶ Signed on 27 October 2005.

³⁷ In this regard the correspondent for Finland referred to the Finnish declaration made to the ICC in the summer of 2003, in which Finland announced itself as a willing State in the sense of art. 103 (1) (b) of the Statute; according to the correspondent no conditions were attached to this declaration.

³⁸ According to the UK correspondent the UK has indicated its willingness to sign an enforcement agreement with the Court and hopes to conclude one in 2006.

This is just one of the obstacles in the enforcement-process; one can think also of other reasons why States may not be keen on accepting convicted persons. Yet, compared to the ICTY and ICTR experience there are reasons to be more optimistic. First, the ICC will learn from that experience and, for example, will wisely not wait with the conclusion of enforcement agreements until the last moment, as is demonstrated by conclusion of such an agreement with Austria prior to the commencement of any trial. Second, bearing in mind the voluntary adherence to the Court an appeal to States parties –and their ‘*Organisationstreue*’- will probably be more successful than in case of the ‘imposed’ ICTY and ICTR.

In order to establish the adequacy of the legal basis for compliance with cooperation obligations the following question has been submitted:

On the basis of the domestic law applicable is your State in a position to give effect to all forms of mandatory legal assistance explicitly set out in the ICC Statute (assistance in the prosecution of offences against the administration of justice (art. 70); surrender (art. 89); provisional arrest (art. 92); other forms of cooperation set out in art. 93; on-site investigations (art. 99 (4); enforcement of fines and forfeiture orders (art. 109))?³⁹

If this question is answered in the negative one could conclude that even prior to the execution of a request for assistance, the specific duty of art. 88 of the Statute has not been complied with. From a more practical perspective, States parties must be in a position to comply with all mandatory forms of legal assistance set out in the Statute.

The following correspondents have answered the aforementioned question fully and unconditionally in the affirmative for their respective States, namely Austria, Belgium, Finland, Germany, the United Kingdom and South Africa. The correspondent for Sweden answered this question in the affirmative with the exception of hearing a party to a case under oath. One also encounters provisions enabling all or most of these types of legal assistance in the cooperation laws of Australia, Congo, Ecuador, France, Kenya, Switzerland, Liechtenstein, Malta, the Netherlands, New Zealand, and Spain.

Problematic for certain States is the conduct of on-site investigations pursuant to art. 99 (4) –or under extreme circumstances- art. 57 (3) (d) of the Statute. One notices that this type of (passive) assistance is missing in the cooperation laws of, for example, Congo, the United Kingdom and the Netherlands. As will be further explored below, the rationale of this omission may vary considerably from State to State, illustrating either resistance to this form of assistance (for example, the Netherlands) or easy acceptance (for example, the United Kingdom). Other States, such as Belgium, allow for on-site investigations but under certain conditions.

Again, the ICC Statute offers sufficient guidance as to the required types of assistance. States parties tend to faithfully provide for the required mandatory forms of assistance in their cooperation laws, sometimes by directly referring to the relevant provisions in the ICC Statute. As will be explored below problems arise when the ICC Statute offers ambiguous language, as is the case with art. 99 (4).

Interestingly, it occurs that States exceed the forms of cooperation set out in the Statute. This may seem a laudable approach, but may also prove to be problematic, as can be demonstrated by States obliging witnesses to appear before the ICC. Section 5 of the draft of the Finnish cooperation law obliged witnesses to follow the summons of the Court, under threat of a fine. In Finnish Parliament, however, this possibility of coercive measures was rejected, because of the principle of voluntary appearance, as embodied in art. 93 (1) (e) of the Statute. A similar parliamentary correction has not occurred in South Africa. Sec. 19 of the its cooperation act stipulates that any person summoned by the Court who, without sufficient cause, fails to attend at the time and place specified in the summons, is guilty of an offence. As was already mentioned, the ICC Statute obliges States only in art. 93 (1) (e) to facilitate the *voluntary* appearance. Also bearing in mind art. 93 (7) (a) (i) one can safely say that the appearance of witnesses before the Court is a matter of their own free will.⁴⁰ As a result, the South African cooperation scheme appears to be over-inclusive and raise the interesting question whether in this specific point such an over-inclusive nature is *contra legem*.

The ICC Statute is innovative in containing specific obligations on a procedural level in the implementation of requests for assistance. These obligations, set out in arts. 55 and 59 of the Statute, are occasioned by the desire to protect the rights of individuals also in the national implementation of requests for assistance. In this light, the question was submitted whether states parties in the organisation of the execution of requests for legal assistance have taken into account the obligations set out in arts. 55 and 59.

Again one notices overall faithful implementation of those provisions, as is acknowledged by the correspondents for Austria, Belgium (as far as art. 59 is concerned), Germany, South Africa, Sweden (as far as art. 55 is

³⁹ The question has also been dealt with by Kleffner in his report supra note 1. However, in that report a distinction was made between collection of evidence, other forms of cooperation, and arrest and surrender.

⁴⁰ See in more detail Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*. Intersentia, Antwerp 2002, pp. 253 – 255.

concerned) and the United Kingdom. Certain correspondents underline that the material protection set out in arts. 55 and 59 was already part of domestic criminal procedure and applicable on that basis.

In addition to the States dealt with by the correspondents one retrieves implementation of arts. 55 and/or 59 in at least the following cooperation laws: Australia⁴¹, Argentina⁴², Congo⁴³, Ecuador⁴⁴, France⁴⁵, Kenya⁴⁶, Liechtenstein⁴⁷, the Netherlands⁴⁸, New Zealand⁴⁹, Spain⁵⁰.

Finland allows for direct application of arts. 55 and 59 of the Statute. More generally, it can be contended that both provisions, but especially art. 55, contain self-executing rights that are directly effective in so-called monist States, like the Netherlands or France. Thus, in those States even in the absence of adequate implementing legislation arts. 55 and 59 may be directly applicable and invoked by individuals before national courts.

One notices that art. 59 of the Statute has generally been implemented in one way or another. As a result individuals are in a position to challenge the arrest and subsequent surrender on the grounds set out in art. 59 (2). The various legislative approaches have been described in more detail by Kleffner in his report, from the perspective of available options to challenge arrest and surrender.⁵¹ What transpires from the national approaches is uncertainty as to the appropriate remedies in case of violation of art. 59 (2) of the Statute. This is occasioned by the tension between art. 59 (2) and art. 59 (4, 5 and 6): on the one hand, there is an unconditional duty to supervise the arrested person's rights pursuant to art. 59 (2), but remedies in the form of (interim) release may find opposition in the Court's views (cp. Art. 59 (4,5)). It can be argued that the division of distinctive tasks between national courts and the ICC is not clear in respect of arrest proceedings. It can be expected that a person surrendered to the Court will complain about non-observance of art. 59 (2) in national arrest proceedings; since this is a statutory right a legitimate claim for remedy by the ICC may be submitted.

Examining the correspondents' reports and the cooperation laws it is clear that art. 59 is far more visible in national implementation than the rights set out in art. 55. In respect of the latter provision it is important to note that the rights therein do not only apply to investigations conducted by the Prosecutor, but also to investigations and questioning of a suspect by national authorities, pursuant to a request made under Part 9. To the extent that those rights are not provided for in the specific cooperation laws they may already be applicable on the basis of existing laws on criminal procedure and cooperation in criminal matters; they may also be directly effective in monist states. However, there is one right in art. 55 which is not readily available in a number of civil law jurisdictions, namely the right to be questioned in the presence of counsel. For example, in the Netherlands and Austria counsel has no right to be present during interrogations of a suspect by the police. Those –and other– States are recommended to examine carefully the full applicability of art. 55 in their domestic legal order.⁵²

An important element of the ICC cooperation regime is its particular focus on settling cooperation disputes via consultations, a word that appears no less than 16 times in Part 9. In case consultations fail it is firmly established pursuant to arts. 87 (7) and 119 of the Statute that the Court has the final say in a cooperation dispute. Thus, before moving to the scope of the cooperation duty for States parties the following questions must be addressed:

In case a conflict arises between the Court and a State party in the implementation of a legal assistance request, how is this solved? How has the 'duty to consult' been implemented (art. 97) and do States parties accept the final authority of the Court on cooperation disputes?

One notices a variety of approaches here. Part of the States parties do not consider consultations a matter for cooperation legislation, but rather leave this to the reserved domain of the executive branch, in particular the Minister of Justice, who maintains contacts with the Court. Other States do provide for consultations in

⁴¹ Cp. Sections 23, 24 and 131 (art. 59) and 71 (art. 55) of the International Criminal Court Act 2002.

⁴² Arts 32 and 33 (implementing art. 59) of the *Ley de implementacion del Estatuto de Roma de la Corte Penal Internacional*.

⁴³ Arts. 45 and 46 (implementing art. 59) Congolese *Projet de Loi*.

⁴⁴ Arts. 139 – 149 (implementing art. 59 and art. 55, but the latter only in the context of arrest and surrender) *Proyecto de Ley sobre Delitos contra la Humanidad*.

⁴⁵ Especially arts. 627-8, 627-9 (only implementing art. 59) of the *Loi no 2002-268 du 26 février relative à la coopération avec la CPI*.

⁴⁶ Arts. 34 – 36, and 38 (implementing art. 59) and art. 85 (implementing art. 55) of the International Crimes Bill, 2005.

⁴⁷ Arts. 32 and 33 (implementing art. 59) and art. 55 (implementing art. 55) of draft *Gesetz über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung von schwerwiegenden Verletzungen des humanitären Völkerrechts (ZIG)*.

⁴⁸ Arts. 18, 24 and 26 (implementing art. 59 and in that context art. 55) of the *Uitvoeringswet Internationaal Strafhof*.

⁴⁹ Arts. 39 and 40 (implementing art. 59) and art. 90 (implementing art. 55) International Crimes and ICC Act 2000.

⁵⁰ Arts. 11 and 12 (implementing art. 59) *Proyecto de Ley: Organica de Cooperacion con la Corte Penal Internacional*.

⁵¹ Supra note 1.

⁵² On the consequences of art. 55 (2) (d) for Dutch criminal procedure see Göran Sluiter, *Raadsman bij politieverhoor – De dimensie van het internationale strafprocesrecht*, in A.H.E.C. Jordaans, P.A.M. Mevis and J. Wöretshofer, *Praktisch strafrecht. Liber amicorum J.M. Reijntjes*, WLP 2005, pp. 525 – 540.

legislation regulating the cooperation relationship with the Court. The latter group of States include Austria, Sweden and South Africa, as indicated by their respective correspondents. Certain correspondents mentioned the division of tasks between the executive branch and the judicial branch as a reason not to specifically legislate on this matter. In this respect the correspondent for Germany stated that

In the context of other matters of cooperation (than surrender, gks), sec. 68 of the Law on Cooperation determines that, in principle, the Federal Ministry of Justice shall decide on requests for legal assistance of the ICC in agreement with the Federal Foreign Office. These organs are also primarily competent with regard to acts concerning the duty to consult.

Likewise, the correspondent for the UK answered this question by stating that

[t]his is not a matter for legislative action. The Act is designed to provide a full legal framework for cooperation. Matters of dispute outside that legal framework would be resolved by negotiation between the Court and the Secretary of State. This would include any consultations required under Article 97.

Other States, such as Belgium, also do not deal with the duty to consult in their cooperation laws.

Within the group of States that specifically implement art. 97 one can again identify different approaches. The Netherlands cooperation law deals in a single provision with both the grounds for refusal and the duty to consult, the latter containing specific duties for the Minister of Justice when he encounters obstacles, as recognized by the Statute, in the execution of a request for assistance.⁵³ A similar combination can be found in the laws of New Zealand,⁵⁴ Kenya⁵⁵ and Liechtenstein⁵⁶. Likewise, the duty to consult is part of the general section of the Australian cooperation law, applying to all requests for assistance.⁵⁷ Less specific is the French law which obliges the *Procureur de la République* to inform the competent authorities of all difficulties in the execution of requests with a view to consultations in the sense of art. 97 of the Statute.⁵⁸ The Spanish law combines the assignment of competent organs with the duty to consult, the latter in accordance with the Statute.⁵⁹

One thus notices in a number of States the connection between possible grounds for refusal or postponement and consultations with the Court. None of the cooperation laws is, however, instructive as to the final authority in cooperation disputes. Obviously, States and the Court do not want to have it come that far and one may indeed say this is not a matter for legislation. Yet, what transpires from certain cooperation laws is the position that after consultations have been conducted a State may unilaterally withhold cooperation, hereby finalising the dispute.⁶⁰ The correspondent for Sweden informs us that although generally after consultations cooperation must be provided as requested by the Court the final authority of the Court in these matters appears not to be fully expected beforehand:

(...) the travaux préparatoires refer to a final way out in the case of an irreconcilable difference of opinion, namely the invocation of one or other of the state responsibility grounds usually necessary for precluding the wrongfulness of an act otherwise in breach of a treaty obligation.

It is intriguing and to a certain degree also disconcerting that in this stage States already appear to explore justifications for failure to comply with the ICC treaty.

As to the question of material grounds to withhold or postpone legal assistance to the Court, the question submitted to the correspondents is the following:

On the basis of applicable law, which grounds of refusal can be identified for your country? Are those identical in scope and content to the ones set out in the Statute? If additional grounds for refusal are applicable to ICC cooperation requests what are the underlying reasons?

One may discern among all States a tendency to be 'under-inclusive', in the sense of providing for less grounds for refusal than permissible under the Statute than 'over-inclusive' (more grounds for refusal than permissible

⁵³ Art. 7 Dutch cooperation law (*Uitvoeringswet Internationaal Strafhof*).

⁵⁴ Obliging the Attorney General or the Minister to consult with the ICC in case one of the grounds for refusal recognized by the Statute is applicable (section 28 of the International Crimes and ICC Act 2000);

⁵⁵ This provision is almost identical to the New Zealand cooperation law: sec. 24 of the International Crimes Bill 2005

⁵⁶ Art. 9 Liechtenstein draft cooperation law (*Gesetz über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung von schwerwiegenden Verletzungen des humanitären Völkerrechts (ZIG)*).

⁵⁷ Sec. 11 of the ICC Act 2002.

⁵⁸ Art. 627-3 of the French cooperation law (*Loi no 2002-268 du 26 février 2002 relative à la coopération avec la Cour pénale internationale*).

⁵⁹ See art. 6 *Proyecto de Ley*.

⁶⁰ Cp. The explanatory memorandum to the Australian International Criminal Court Bill 2002, commentary to clause 11.

under the Statute). Such a tendency is not necessarily self-evident; an argument can be made that the duty to consult implies that other grounds for refusal may be advanced than those set out in the Statute. However, the Court has considerably more margin of appreciation in assessing such a claim than in case of a refusal in accordance with the Statute.⁶¹ Although an under-inclusive cooperation law may seem indicative of a progressive cooperation approach, it does not mean that absent provision for grounds of refusal in legislation these and other States may not make use of those and other grounds in the actual provision of legal assistance.

One notices that the most detailed cooperation laws, i.e. the laws of Australia, Kenya and New Zealand, are certainly most inclusive in that they contain generally all possibilities to refuse or postpone assistance under the Statute. Mention should also be made of the Swedish law which refers to traditional inter-State legal assistance on this point and, as a result, brings on clearly inappropriate grounds for refusal, such as the political offence exception. However, section 13 of the cooperation law specifically states that these grounds are not to be applied if the result would be that Sweden is in breach of its obligations under the Statute. Even without knowledge of Swedish mutual legal assistance law, one may expect that the generally broad inter-State grounds for refusal absorb, in one way or another, the grounds for refusal set out in the Statute. In this respect, one could say the Swedish approach is neither under nor over-inclusive but mirrors perfectly the permissible grounds for refusal.

The majority of cooperation laws, however, are certainly under-inclusive. For example, according to the correspondent for Austria the grounds for refusal are confined to those set out in Arts. 93 (3), 93 (4), 98 (1) and 98 (2) of the Statute. In Belgium, only national security has been advanced as ground for refusal. Other States follow, with national security⁶² and the issue of competing requests for assistance standing out as the most prominent and frequent grounds for refusal.⁶³

The States that have linked the duty to consult with grounds for refusal under the Statute refer to national security, duties towards other States (arts. 73 and 98 of the Statute)⁶⁴, and State or diplomatic immunities (art. 98 (1) of the Statute;⁶⁵ ‘*ordre public*’ (in the sense of art. 93 (3) of the Statute), national security, ongoing national investigation, and State or diplomatic immunity.⁶⁶ Again, without study of explanatory memoranda it is uncertain what the basis for the distinctive selection was and why permissible grounds for refusal have not been provided for in cooperation laws. It exceeds the scope of this report, but would be a worthwhile endeavour to undertake that study with a view to the question whether in light of subsequent State practice (cooperation legislation) certain grounds for refusal are either redundant or need further definition in the Statute or Rules.

Where explanatory memoranda are accessible and have been studied they provide interesting insights as to States’ choices in inserting grounds for refusal. For example, the Netherlands in its explanatory memorandum has opted not to make use of art. 90 of the Statute as a ground for refusal, in the sense that in case of a competing extradition request the Netherlands gives priority to the conflicting ICC request.⁶⁷

Another question that exceeds the scope of this report concerns the distinction between grounds for consultation and grounds for refusal. When certain grounds are mentioned in the context of consultations with the Court this may be regarded as the first step which may culminate in the refusal of the request. Yet, it may also be that after consultations the State concerned accepts the position of the Court as final and binding (anticipating on art. 119). This question, dealing with the final authority of the Court in cooperation disputes, is at the heart of the cooperation relationship.

The precise scope of art. 97 of the Statute –and other references to the duty to consult throughout Part 9- has been a matter of discussion at the Committee’s ‘Otzenhausen session’ in December 2005. The central question in this discussion is whether in light of art. 97 the grounds for refusal set out in the Statute should be considered as exhaustive or not. The Committee generally favoured taking the exhaustive nature of grounds for refusal set out in the Statute as a starting point. It interpreted art. 97 as essentially applying to practical and relatively minor difficulties in the implementation of requests for assistance. The principle of good faith cooperation entails that references to the duty to consult may not be abused with a view to frustrating the effective functioning of the Court.

⁶¹ In more detail, Sluiter, *supra* note 40.

⁶² See on national security as a ground for refusal also the report by Kleffner, *supra* note 1, para. 24, with special focus on the cooperative steps mentioned in art. 72 (5) of the Statute.

⁶³ See, e.g., art. 36 and art. 42 of the Argentinian cooperation law (*Proyecto de ley; Ley de implementacion del Estatuto de Roma de la Corte Penal Internacional*), arts 171 – 175 and 199 of the Ecuadorian cooperation law (*Proyecto de ley sobre delitos contra la humanidad*).

⁶⁴ The Committee wishes to draw attention to the analysis of the scope of application of art. 98 in its previous report which dealt –inter alia- with the so-called article 98 agreements (see ILA Report of the Seventy-First Conference, Berlin 2004, pp. 311 – 320).

⁶⁵ Cp. Art. 9 of the Liechtenstein law (*Gesetz über die Zusammenarbeit mit den Internationalen Gerichten zur Verfolgung von schwerwiegenden Verletzungen des humanitären Völkerrechts (ZIG)*).

⁶⁶ Cp. Art. 4 of the Swiss cooperation law (*Loi fédérale sur la coopération avec la Cour pénale internationale (LCPI) du 22 juin 2001*).

⁶⁷ See Explanatory memorandum to the Ratification Act, *TK, vergaderjaar 2001-2002*, 28 098 (R 1704), no. 3.

The most progressive approach in terms of being under-inclusive has undeniably been adopted by Finland. According to its correspondent

There are no grounds for refusal. Since the legislation provides for all requests by the ICC to be complied with as stated in the request, even the ground for refusal for reasons of national security as set out in art. 93 (4) cannot be applied by the Finnish authorities. This is based on an interpretation of the wording of art. 93 (4) that says a State part “may” refuse a request, thus leaving it up to the states themselves to decide whether to appeal to this ground for refusal. This possibility has been excluded in Finnish law.

Finland may not stand alone, in that also the Congolese draft law does not set out grounds for refusal permissible under the Statute, just like the French cooperation law.

An interesting question, already mentioned above, concerns the scope of application of certain grounds for refusal which have not been precisely defined in the Statute. The most notorious in this respect is undoubtedly art. 93 (3): “an existing fundamental legal principle of general application”.⁶⁸ It is not excluded that this particular ground of refusal will be equated by certain states with the ‘*ordre public*’, which functions as a ground for refusal in inter-State legal assistance. Instructive on this point is the Greek correspondent:

Under applicable law, Greece can refuse to comply with requests for legal assistance for reasons of “*ordre public*”. Courts may, however, interpret the latter concept as not applicable in the context of a request of cooperation by the ICC.

In general, however, legislation offers little to no interpretative tools, as often direct reference is made to the language of art. 93 (3) and other provisions. In general, either a direct reference is made to the Statute or the language is identically copied. Or, especially in respect of vaguely defined grounds such as art. 93 (3) of the Statute, they are not included at all.

After a State has decided to implement a request for assistance the method of execution becomes imminent. Not only may the Court have an interest in a certain method of execution, especially focusing on the presence of the parties to the proceedings, but experiences of the ad hoc Tribunals has also underlined the importance of direct execution by the Court itself in the form of on-site investigations.⁶⁹ The following question was put to the correspondents:

On the basis of applicable law, does your State allow for participation of ICC personnel and defence counsel in the execution of legal assistance requests (art. 99 (1))? If so, under which conditions? Does your State allow for independent and autonomous on-site investigations (art. 99 (4))? If so, under which conditions?

The matter of on-site investigations has already been briefly explored above, both in respect to ratification obstacles (sovereignty) and available forms of legal assistance. Yet, it merits separate examination in that it has been categorised in the Statute as a method of execution, in art. 99.

Answers to the aforementioned question and examination of (draft) cooperation laws undeniably reveal diverging views on this matter between civil law and common law jurisdictions. The former consider criminal procedure as the exercise of State authority *par excellence*; as a result, conduct of investigations by non-national law enforcement officials is generally considered as a breach of national sovereignty. Common law jurisdictions, on the other hand, regard criminal procedure –originally– as a dispute between private parties and therefore have no difficulties with on-site investigations, as long as no compulsory measures are used.

In this light, it is not surprising that the UK correspondent stated in respect of art. 99 (4) (dealing with on-site investigations) that “[i]t was not felt necessary to legislate on this issue as it does not require “compulsory measures””. In contrast with this rather permissive approach is the Belgian correspondent mentioning “[t]he Belgian law puts some conditions to autonomous on-site investigations to protect its sovereignty”.

This illustrates the different views on this matter. Kleffner has already in his report dealt in detail with this question, focusing both on on-site investigations and on a right to be present and participate in the execution of requests for legal assistance, making a distinction between ICC organs and the defence.⁷⁰ Generally speaking, art. 99 (1) is least problematic and appears to have been generally faithfully implemented, as also evidenced by the answers of the correspondents on this point. Art. 99 (4), however, is more problematic and will receive more attention. One can distinguish three situations.

⁶⁸ We leave aside the question of art. 98 of the Statute, which has given rise to controversy as a result of bilateral agreements concluded by the US. Our previous report has dealt with this matter exhaustively.

⁶⁹ In more detail on on-site investigations Sluiter, *supra* note 40, chapter 8.

⁷⁰ See *supra* note 1.

First, there is a group of States that allow for on-site investigations in accordance with art. 99 (4), by either directly referring to that provision or copying its language. These States include Austria, Germany and the detailed cooperation laws of Australia, New Zealand and Kenya.

Second, there is a large group of States that do not mention the conduct of on-site investigations. As to the common law States, which include the UK and South Africa, the absence of legislation on this point is not indicative of opposition to on-site investigations, as was already mentioned. As no compulsory measures will be taken, ICC staff and the defence can rather freely conduct investigations in those States. In this respect, bearing in mind the conditions set out in art. 99 (4) those States are certainly over-permissive. An interesting question here is to what extent ICC investigators may conduct investigations on US territory.⁷¹ Although the American Service Members Protection Act (ASPA) prohibits any form of cooperation with the ICC, the question arises as to whether the conduct of investigations on US territory should be regarded as a form of *cooperation*, when no coercive measures and US authorities are involved. Interestingly, in inter-State legal assistance the United States appears to adopt this position, especially in relation to conduct of US law enforcement officials abroad.

When civil law countries do not provide for on-site investigations there is reason to be more critical. Again, this absence is by no means under all circumstances proof of failure to cooperate; it is possible that this form of cooperation can be arranged outside a legislative framework. Explanatory memoranda may offer more insight. As an example, the Netherlands has not implemented art. 99 (4) on the basis of the argument that in the Netherlands there would be no need for autonomous on-site investigations. This is reflective of the traditional opposition of civil law States against on-site investigations and does not represent faithful implementation of the obligations under the Statute.

Not all States fit within the over- and under-permissive distinction between common law and civil law States on the issue of on-site investigations. We have already come across the unique cooperation position of the Nordic countries, especially Finland. Also on this point it is worth quoting the Finnish response:

As the provisions of Part 9 are enacted law in Finland, there are no grounds on which on-site investigations could be rejected.

The first steps of the ICC already demonstrate the importance of on-site investigations for the effective functioning of the Court. Art. 99 (4) has been severely criticised on two points mainly. First, its language is overly deferential to State sovereignty, containing too many conditions and making it an almost unworkable provision. Second, the provision obliges only to provide assistance in respect of the Prosecutor, hereby creating a potential inequality of arms.

Interestingly, in such an important point for the functioning of the Court States parties could make a difference by providing for over-permissive provisions in their cooperation laws. With the exception of common law countries and unique cases such as Finland this has not (yet) been the case.

A conclusive question has been submitted to the correspondents:

In your opinion, has your State given effect to both the letter and the spirit of the legal assistance obligations under the ICC Statute?

All correspondents from States parties with cooperation legislation have answered this question in the affirmative. The correspondent for Finland has in this respect underlined that the attitude of this country is exemplary in that it goes further than the Rome Statute would require.

On the basis of the answers to the questionnaires as well as on the basis of examination of available and accessible cooperation laws a similar conclusion can be drawn for all states-parties having adopted cooperation laws. Two important points are in the opinion of the Committee indicative of a fully cooperative position:

- States parties appear to be generous in providing for non-mandatory forms of cooperation, especially enforcement of sentences of imprisonment.
- There is a very clear and strong tendency to be under rather than over-inclusive when it comes to grounds for refusal provided for in the Statute.

The '*Organisationstreue*' of States parties also finds reflection outside the cooperation context. Although not yet object of this report, many States are in the process of reforming their substantive criminal law with a view to the principle of complementarity.

This positive note is not to say there are no matters of concern. As always, the proof of the pudding is in the eating and the fact of legislation does not necessarily provide the final answer to the question whether or not

⁷¹ In this respect it should be noted that the US is generally very permissive to foreign law enforcement officials to conduct investigations, as long as no compulsory process is used.

legal assistance is provided for in good faith. On the basis of the various legislative schemes the Committee has identified two areas of uncertainty, which should not develop into areas of concern:

- To what extent are States parties prepared to accept the Court's resolution of a cooperation dispute as final, even in the case of such sensitive matters as national security?
- To what extent are States parties prepared to be more cooperative in important areas, such as on-site investigations?

The Committee is of the opinion that both areas of uncertainty are vital to the effective functioning of the court. The matter of dispute resolution has –fortunately– not yet arisen, but the question of on-site investigations is imminent in light of the situations referred to the Court and ensuing investigations by the Office of the Prosecutor. From a more practical perspective, a more cooperative position from States than provided for under the Statute –notably art. 99 (4)– is indispensable here. The Committee notes that whereas a considerable number of States have in the negotiation process strongly supported stronger obligations than those set out in art. 99 (4), it remains to be seen whether they are now prepared to go beyond those obligations.

Follow-up:

Subsequent to the Toronto meeting, in June 2006, the Committee proposes to examine the implementation of substantive criminal law of the Rome Statute and appropriate matters for the ICC's 2009 Review Conference (art. 123 of the ICC Statute).