International cooperation, legal assistance and the case of lacking states collaboration within the international criminal court

Cooperación internacional, asistencia jurídica y el caso de colaboración entre estados fallidos en el tribunal penal internacional

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Abstract

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

Keywords: International cooperation, legal assistance, lacking States collaboration, ICC, international criminal justice.

Resumen

El presente trabajo de investigación se centra en el análisis jurídico de los artículos pertinentes del Estatuto de la Corte Penal Internacional sobre la obligación de cooperación entre los estados para el castigo de crímenes graves contra la humanidad y la guerra.

El desarrollo jurisprudencial, comienza con el análisis de los Tribunales especiales y llega a las etapas de los procedimientos que aún están en curso en la Corte Penal Internacional, abre los debates nacionales doctrinales y comparativos y busca elaborar temas específicos tales como solicitudes de asistencia durante las investigaciones preliminares, el papel del Fiscal y la falta de asistencia de algunos Estados que por razones políticas y no solo impiden el desarrollo y el funcionamiento de la justicia penal internacional.

Palabras claves: Cooperación internacional, asistencia legal, falta de colaboración de los Estados, CPI, justicia penal internacional

Introduction

Since the International Criminal Court (ICC) does not have direct executive powers, or an apparatus for conducting investigations on its own and in

exclusive way, investigations of crime as well as the acquisition of evidence usually fall into areas subject to state sovereignty and are based on national law. (Ambos, 1998, p. 3743-3746; Ambos, 1999, p. 739-772; Ahbrechet, 1999; Zimmermann, 1998, p. 170ss, Bower, 2011; Rothe and others, 2013. Safferling, 2012. Van Dem Herik and Stahn, 2010, pg. 586ss. Werle, 2012. Beck and others, 2011. Pikis, 2010. Clark, 2011, pg. 537ss. Krzan, 2016. Carter and others, 2016) (Werle, 2012. Krzan, RZAN, 2016. Ludwin King, 2015. Davidson, 2016, pg. 72ss. Politi and Gioia, 2016) (See, 2012)

National legislation, however, is often lacking in punishing certain crimes, particularly as regards the rules of jurisdiction (See, Wald, 2012, p. 230ss), since it does not always provide for the power to seek and prosecute who is responsible for a crime or for damages of a foreign citizen (Turan, 2015), and therefore with respect to the phenomenon of internationalization of national jurisdiction. This also happens with offenses falling within the jurisdiction of ICC under the constitutional instrument. (Jo and others, 2018). The ICC in order to exercise the necessary coercion for the purposes of justice in the territories of the States, ends up to depend on the procedural mechanism of cooperation. (Bekou and Birkett, 2016)

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

Currently, we can distinguish between four forms of cooperation: extradition, mutual assistance, transfer of criminal proceedings and the enforcement of foreign judgments.[1]

The rules governing international cooperation can be found both in international law laying down the rules applicable to inter-ethnic relations and in domestic law defining the measures, conditions and modalities that States perceive as cooperation. (Liakopoulos, 2014).

The results of regulatory processes developed within state and supranational levels differ in scope and regulatory technique, lacking coherence and specificity. (Rreisinger-Coracini, 2013, p.112ss). These shortcomings therefore indicate the need for integration of judicial cooperation through mutual assistance aimed at a global codification that will enable States to be cumulative and alternative in order to ensure their effectiveness. Legislative approaches by which States adopt various forms of international judicial cooperation are not yet in a position to guarantee effective, solid and coordinated enforcement of judicial cooperation.

The expression "judicial cooperation" refers to and includes activities that the judicial authority of a state carries out in relation to a pending criminal case or already celebrated in a foreign country. In this sense, the formula also appears to be synonymous with the

1. Mutual recognition of judicial decisions does not only imply a further development of the depoliticization movement of judicial cooperation but tends to achieve a genuine copernican revolution of traditional judicial cooperation for the obvious overcoming of some dogmas of national sovereignty, and especially of Member States that have not agreed to take part in the adoption of binding acts in the criminal field and above all in the community context. The aim is to create within the scope of the object and for the purposes indicated a hard podium under which mutual recognition would be impossible without the States being free to "maintain or introduce a higher level of protection for people (...)". See about the same argument: Ambos, 2006. Suominen, 2011. Klip, 2012. Tomašek, 2010, pg. 174ss. Janseens, 2013. Sluitter and others, 2013. Kenner and others, 2014. Gomez and Diez, 2015. Mitsilegas, 2007, pg. 1ss. Van Ballegooij and Bàrd, 2016, pg. 442ss. Niblock, 2016, pg. 250ss. Lorenze Sánchez Arjona, 2014. Cano and Isabel, 2018.

notion of judicial assistance, [2] which concerns the execution of acts to facilitate the pursuit of judicial activity in a third party, as well as the transfer of proceedings and the enforcement of foreign penalties. (Augstìnyovà, 2014, pg. 2). The jurisdiction of ICC is based on the principle of subsidiarity (art. 17 of the Statute of the ICC. Bergsmo, 2010) and/or complementarity[3] in order to adjudicate "the most serious crimes of international scope" (Art. 4 and 6 of the ICC; Kelly, 2012, p. 126s; De Hert and others, 2018) according to art. 1 of the Statute. (Krzan, 2016)

The safeguard clause foreseen by art. 10 of the Statute also states that "no provision of this part may be construed as limiting or otherwise prejudicing the rules of international law existing or in formation for purposes other than those of this Statute"[4].

The possible lack of ad hoc national legislation, which allow for judicial cooperation at international level and especially in the context of international criminal courts, is now debated (Allen, 2012, pg. 123ss) by both the case law of the courts and by the attempt, *rectius* requirement not to subtract the perpetrators of crimes (Hall, 2011, pg. 640ss) that offend international public order (Waterlow and Schumacher, 2018) upon delivery to international criminal courts.

According to Stromseth there are three elements of composition that govern cooperation with ICC and States participating in the judicial cooperation system. (Davidson, 2017) These elements are: a. understand the local terrain more deeply and fully: "(...) especially whether domestic justice systems enjoy any degree of local legitimacy (or instead are deeply discredited)-and the goals and hopes of the domestic population who endured the atrocities and must now chart a new future-will be enormously

2. On the distinction between judicial assistance and judicial cooperation see: Frei and others, 1981, "(...) l'entraide judiciaire peut être considerée comme l'activité déployée par les autorités d'un Etat, à la demande d'autorités étrangères, dans l'interêt de l'administration de la justice étrangère (...)".

3. In the case of cooperation between States some have characterized complementarity as passive, see: The ICC's Prosecutor, Luis Moreno-Ocampo, stated: "(...) as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success (...). My duty is to apply the law without political considerations. I will present evidence to court judges and they will decide on the merits of such evidence (...) for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust the situations on the ground (...)". See, Jurdi, 2017, pg. 199ss. Croquet, 2015. See for the principle of complementarity the next cases: ICC Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi and ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case; 25 September 2009, par. 78 with decision of 31 May 2013 and ICC Appeals Chamber, Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2012, entitled: Decision on the admissibility of the case against Saif Al-Islam Gaddafi of 21 May 2014. In particular the case: Katanga Admissibility Judgment (par. 213) ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case of 25 September 2009, para 78, the Chamber held that: "(...) in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the state having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability (...) to be considered by the Court, the correct avenue would rather be for it to make an application under article 19 (4) of the Statute, in which circumstances the Pre-Trial Chamber could decide whether to grant Libya to bring a second challenge to the admissibility of the case (...)". A different opinion was held in the case: Abdullah Al-Senussi of 27 June 2011. ICC Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi of 31 May 2013, parr, 210, 229-230, the Chamber hold that: "(...) that admissibility is not an inquiry into the fairness of the national proceedings per se does not mean (...) that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness (...) at its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a state is not genuinely investigating or prosecuting at all (...)". See also: ICC-Appeals Chamber: The Prosecutor v. Seif Al-Islam Gaddafi, Abdullah Al- Senussi against the decision of Pre-Trial Chamber of 31 May 2013, entitled: Decision on the admissibility of the case against Sait Al-Islam Gaddafi, of 21 May 2014 (ICC-01/11-01711 OA4. See in argument: Augsìnyovà. 2014, pg. 2. The problem of the case Al-Senussi and Gheddaffi does not rely so much on the principle of complementarity with the aim of "covering" the impunity of serious crimes to high-risk States by persons in each of these crimes and the minimum of a guarantee of judicial cooperation between Member States; more the restrictive circle of Security Council Resolution no. 1970 for the ratione tempore of the crimes committed in Libya and as a result remains open the question of who will judge the crimes committed during the Gaddafi regime that certainly from a legal point of view the Court has non the competence. See, Heller, 2013. Tedeschini, 2015, pg. 78ss. According to the author we've already mentioned: "(...) for the ICC to make that goal a reality, a number of requirements and considerations come into play, considerations that touch on transitional justice issues and require a broader, proactive approach to complementarity (...)". See, Akhavan, 2016, pg. 1043. Bo, 2014, pg. 508ss. Kloss, 2017. In the same argument other part of doctrine has a different opinion: "(...) the reference to an "internationally recognized principle of due process" in article 17(2) is perhaps one of the most controversial provisions in the Statute and leaves much room for different interpretations as to the meaning of the reference. The reference to the principle of due process is rather generic; it does not extend to certain principles and guarantees the principle in dubio pro reo and its implications (article 16(2) of the ICCPR). As pointed out in legal doctrine, "(...) though articles 17 and 20 are meant to govern the actions of the (Prosecutor), to some extent, they indicate the existence of limitations on the range of judicial actions that a state may pursue in fulfilling its investigatory and Prosecutorial duties under the Statute (...)". See, Heller, 2012, pg. 85ss. Stahn, 2012, pg. 185ss. Robinson, Obinson, 2012, pg. 165ss. Hassanein, 2017, pg. 108ss. Eessed, 2013, pg. 568ss.

4. In case: Furundžija the Court of Appeal for the ICTY commented art. 10, arguing that: (The ICC Statute) was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. In many areas the Statute may be regarded as indicative of the legal views, that is, opinio juris of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. The Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States (Prosecutor v. Furundžija, ICTY T. Ch., 10 December 1998, para. 227. See, Admire, 2011, pg. 362ss. Gegout, 2013, pg. 802ss. Manley, 2016, pg. 194ss. Kenny, 2017, pg. 122ss.

significant both in shaping the concrete possibilities for post-conflict criminal justice and in influencing public attitudes and confidence in those efforts (...)"; b. think systematically about tribunal's demonstration effects. In that case: "(...) by holding individual perpetrators accountable for their actions, trials demonstrate that certain conduct is out of bounds, unacceptable and universally condemned. Trials for atrocity crimes also aim to demonstrate and to reassure people that justice can be procedurally fair both in terms of due process and, substantively, in terms of even-handed treatment of comparable actions regardless of who committed them (...)" and; c. be proactive about capacity-building and look for synergies. This type of synergy that actually refers to national legislation: "(...) can be the supply side of justice on the ground. International and hybrid criminal tribunals typically enjoy a degree of international support that domestic, post-conflict justice systems can only dream of. These understandably international resources are focused on the challenging task of prosecuting perpetrators of atrocities in fair trials that meet international standards of justice. There are opportunities in international and hybrid tribunals to contribute concretely to domestic legal capacity while doing their own important work to advance justice (...)" (Stromseth, 2009, pg. 87ss).

State assistance is aimed at conducting investigations in the preliminary and deliberative phase (Buisman, 2013, p. 34. Nystedt and others, 2011, pg. 15), in the prosecution of criminal proceedings (Sikkink and Joon Kim, 2013, pg. 272ss) and at the stage of celebration of the process that requires the presence of defendants, since the Statutes of various international courts, art. 20, par. 4, lett. d) of the Statute for the International Criminal Tribunal for Rwanda (ICTR), art. 21, par. 3, lett. a) (Schwarz, 2016. Eliadis, 2018) for the ad hoc Tribunal for Former Yugoslavia (ICTY) and art. 63 of the Statute for ICC [5] do not provide for the process *in absentia*[6]

Obviously court judges, and especially the Prosecutor, can provide evidence[7], documents, testimonies[8] etc., especially during the investigation of the merits of the guilt and the related accusations, despite the physical absence of the accused persons. Obviously a number of exceptions to the obligation[9] to cooperate that do not appear in the Statutes of the ad hoc ICTY (Janjac, 2013. Tofan, 2011. Van Der Wolf, 2011) and for the ICTR (Antkowiak, 2011. Catani, 2012. Cherif Bassiouni, 2010. Doak, 2011.

5. See for the relevant article: Prosecutor v. Zdravko Mucic et al. (Case No. IT-96- 21), ICTY T. Ch., Transcript of 16 April 1998, p. 11255–56; The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Anatole Nsengiyumva and Aloys Ntabakuze (Case No. ICTR-98-41-I), ICTR T. Ch., Minutes of Proceedings of 2 April 2002, para. 1; Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Case No. SCSL-2004-15), Special Court for Sierra Leone T. Ch., Ruling on the issue of the refusal of the third accused, Augustine Gbao, to attend hearing of the Special Court for Sierra Leone on 7 July 2004 and succeeding days, 12 July 2004, para. 12). Under the ICTY in the case: Zdeavko Mucic et al. held that: "(...) there are also national systems which hold that presence at trial is not only a right, but also a duty of the defendant, from which he or she may only be excused under certain limited circumstances (see Sect. 230and 236 of the German Code of Criminal Procedure). In the Statute, the possibility of a waiver of the right to presence is also explicitly mentioned in article 61(2) on the confirmation hearing (albeit referring to the confirmation hearing as a whole, not to parts of it), but whether the Court will interpret this provision as laying down a general principle also applicable to trial proceedings, or whether it will find the opposite that there may be no such waiver for trial proceedings as it is not explicitly laid down in article 63, remains to be seen (...)". See, Decaux, 2010. Fernandez, 2010. Jurdi, 2011. Lagot, 2010. Schabas, 2011. Knittel, 2012, pg. 514ss.

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

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

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

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

Ferioli, 2013. Garbett, 2013. Graham, 2012. Pena and Carayon, 2013. Rauxloh, 2011 (a) and (b), 2011, 2012. Van Dean Wyngaert, 2012. Stolk, 2015, p. 974ss) and/or Rome[10] in the area of delivery, extradition (Sadoff, 2016, p. 248ss), evidence collection, rogatory assistance etc. testify the desire to transpose this form of cooperation from a field marked by equal relations[11] at a level which best expresses an instrumental and serving role, of a vertical nature between the Court of Justice and the Member States and of a horizontal nature between Member States concerning the delivery, extradition, revocation, arrest warrant[12], especially for the collection of evidence showing a clearly superior jurisdiction. (Kahn and Buisman, 2015)

The effects of this kind of relationship are represented by regulatory compliance obligations by the Member States of the Statute[13]; obligations for the proper interpretation of domestic law; responsibility of the State in case not only of breach of obligations established by domestic and international law but also in case of lack of active cooperation with ICC. Then, alongside a limited criminal liability (weak link), there is a strong indirect international criminal responsibility (Dondè Matute, 2018) linked to the phenomenon of punishment for serious crimes in the broad sense, with the consequence that the criminal effects they produce result from the combination of international jurisprudence with internal national rules within the transnational character (Currie, 2015, pg. 30-40) which takes on the elements of the cases examined and the concreteness of the cases examined by the ICC where transnational or material elements may concern: the subject, the material object of the offense, the conduct, the event, the effects of the offense. (Niblock, 2016)

In fact, every interpretive activity should meet its intrinsic boundaries as was the case for instance of state's competence in the repression of crimes. In this case, the repressive system was inspired by the principle of international universality imposed and expressed by the principle of *aut dedere aut judicare* (International Law Commission, 2014; Van Steenberghe, 2013; Newton, 2014) that imposes on States that want or not want to judge the alleged perpetrators of the crime of extradition. (Hayes, 2012, pg. 570ss. Liakopoulos, 2017. Martins Amorium Dutra, 2012, pg. 5ss).

To this end, the horizontal element stems from the fact that the Statute is based on a consensual basis and this implies that the contracting parties have the power not

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

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

12. The Rome Statute makes no distinction between ordinary and international arrest warrants, since no special procedure has been envisaged in the event of a state failing to deliver an individual and not be processed by individuals in absentia before the Court International Penal Code to establish a standard in this sense, through its inclusion in the rules of procedure. See from the CTY the following cases: Nikolic case, IT-94-2; Mrkšic and others case, IT- 95-13/1; Karadžic and Mladic case, IT- 95-5/18-I; Rajic case, IT-95-12 and from the ICC the first Decision to Unseal the Warant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents", Doc. ICC-01/04-01/06-37, of 23 March 2006 from the first Chamber trial. See, Anoushirvani, 2010, pg. 213ss. Van Laar, 2011.

13. See also the case of non-member States of the Court's Statute but required to cooperate with the Court through the Security Council Resolution: UN Security Council Resolutions 1593 (2005) and 1970 (2011)/SC Res 1970, 26 February 2011, S/RES/1970 (2011). It was the first Resolution based on art. 13, par. b) for the situation of Darfur in Sudan. In particular, the resolution referred that: "(...) the government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution (...)" that means that a Member non State may cooperate with the ICC. The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al- Rahman, informed the Security Council The Prosecutor v. Omar Hassan Ahmad Al Bashir, where in this case the pre-Chamber and not the Prosecutor informed the Security Council about the non-cooperation of Chad and Kenya (Al-Bashir ICC- 02/05-01/09-109, Pre-Trial Chamber I, 27 August 2010; Al-Bashir ICC-02/05- 01/09-107, Pre-Trial Chamber I, 27 August 2010). See also: Al-Bashir ICC-02/05-01/09-140, Pre-Trial Chamber I, 13 December 2011, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir; Al-Bashir ICC-02/05-01/09-129, Pre-Trial Chamber I, 12 May 2011, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti; Al-Bashir ICC-02/05-01/09-139, Pre-Trial Chamber I, 12 December 2011, Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir. Al Bashir ICC-02/05-01/09-159, Pre-Trial Chamber II, 5 September 2013, Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al Bashir's Arrest and Surrender to the Court; Al-Bashir ICC-02/05-01/09-195, Pre-Trial Chamber II, 9 April 2014, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court. See, Ruiz Verduzco, 2014, pg. 42ss. Liakopoulos, 2014. Lhotský, 2016. Marecha and Chigora, 2011, pg. 40ss. Camargos, 2013, pg. 199ss.

to assume any obligations that could affect the rights of third States.[14] (*pacta tersiis nec nocent nec prosunt*).

Other horizontal aspects, of minor importance, are repeated in Part IX of the Statute[15] which recognize and give value to the prerogatives in national law, prefiguring the possibility for States to interfere both in inquiry and in court's proceedings[16]. This interference can be dangerous if the cooperative attitude of States is lacking, so as to facilitate the execution of court's requests.

Equally important is art. 73 of the Statute of ICC, which is in line with the horizontal model of cooperation and demonstrates the prevalence of the obligation arising from an international agreement between a State Party and a Third State on the obligation to cooperate with the Court, since if the Court requests a contracting state to produce a document or information disclosed by a third party, if the latter is not a State Party "and refuses to consent to the disclosure, the state has informed the Court that it is unable to provide the document or information due to an existing obligation of confidentiality compared to that which it holds"[17].

Art. 29 of the Statute of the ICTY[18] similar to art. 28[19] of ICTR provides for an unconditional obligation to cooperate with the States on requests. States must respond without delay referring primarily to violations of humanitarian law[20] and *erga omnes*

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

15. See from the international law the case of: Arrest Warrant (Democratic Republic of the Congo v. Belgium) of 14 February 2002 and Lotus (France v. Turkey) of 7 September 1927.

16. The relationship-between the national and international jurisdictions characterizing the ICC based on primacy- is different from that of the ad hoc tribunals and it is not conceivable the formal need for devolution of cases of greater importance to national jurisdictions. Excluding the crime of aggression and war crimes, the criminal acts described in the Rome Statute are not "just" crimes and therefore can be committed by anyone regardless of their qualifications, people are accused of having committed international crimes according to the titles of (article 25 (3) (a)), "ordering, soliciting or inducing" (article 25 (3) (b)), or in accordance with the provisions of "indirect co- perpetration" determine the responsibility of the hierarchical superior for acts committed by the subjects (article 28 (a)). However, the validation hearing may take place in absentia according to art. 61 par. 2 of the Statute if the accused cannot be found or escaped. The Statute and the rules of procedure maintain some silence regarding the powers of the chairman of the college to determine the way in which the trial will be conducted in absentia and above all for the order and the conditions for the submission of evidence (rec. 122). For further details see: Caban, 2015. The Prosecutor v. Bosco Ntaganda, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309, 9 June 2014; The Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-14, 27 June 2011. The Prosecutor v. Bosco Ntaganda, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda; see also: Situation in Uganda, Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-57, 13 October 2005. The Prosecutor v. Jean-Pierre Bemba Gombo, Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009. The Prosecutor V Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of MrAbdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled: Decision on the admissibility of the case against Abdullah Al- Senussi, 24 July 2014, ICC-01/11-01/11-565. For the case Al Senussi and Gedaffi argue that:" (...) on the one hand, McDermott has argued that the "reference to "due process" in the complementarity clause is perfectly ambiguous" and "certainly leaves room for the Court to take fair trial considerations into account". However, on the other, Heller, rejects the "due process thesis", which he considers to be "contradicted by the text, context, purpose and history of article 17". Exploring a few of these, textually, he argues that the requirement to "have regard to principles of due process" in article 17(2) is a "sub-ordinate clause", which "simply explains how the Court should determine whether one or more of the paragraphs (the criteria for admissibility in articles 17(2) (a-c)) are satisfied". It is not an independent base on which to challenge admissibility. Furthermore, historically, proposals that due process should be a basis for determining admissibility were rejected by many delegates to the Court. This echoes the words of Prosecutor Moreno-Ocampo several years earlier that "we are not a human rights Court. We are not checking the fairness of the proceedings". On the basis of this interpretation of the statutory provisions, the Court appears not to have erred procedurally (...) it appears that the normative demands on the ICC to respond to flagrant violation of rights to a fair trial can be met on the basis of the Statute, more specifically "unwillingness" under article 17(2). Yet while creativity in interpretation of article 17 in theory enables the Court to act on Libyan violations of the accused's human rights, both defendants continue to remain without access to legal representation (...)". See: Diver and Miller, 2015. Dixon and Teenovey, 2013. Grossman, 2013, pg. 62-105. Kersten, 2014, pg. 188-209. De Vos, 2012, pg. 456-478. Kersten, 2016. Megrèt and Samson, 2013, pg. 585-586. Nouwen, 2012, 2013. Pavel, 2014. Van Der Merwe and Kemp, 2016. Stahn, 2015. Vasiliev, 2016. Waters, 2013. Liakopoulos, 2012. McDermott, (2016).

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

18. For the case of international cooperation see the cooperation firmed with Serbia in the case: P. Jojić, J. Ostojić, V. Radeta (IT-03-67-R77.5) of 1st August 2016.

19. With the Rule 7bis (b), Rule 39(iii) and Rule 54bis of the ICTY. The obligation of cooperation was confirmed from the Tribunal in the next case: Prosecutor v. Tihorim Blaskiç, Appeal Chamber, 29 October 1997, IT-95- 14-AR 108 bis, in whose device it is sanctioned: "(...) le Tribunal international peut citer à comparaître des personnes agissant à titre privé ou leur décerner des injonctions ou d'autres ordonnances contraignantes et que, en cas de non-respect de ces citations, injonctions ou ordonnances, soit l'État compétent peut prendre les mesures coercitives prévues par sa législation, soit le Tribunal international peut engager des procédures pour outrage (...)". See, Chernor Jalloh and Marong, 2015. Yokohama, 2018, pg. 278ss. Kuczyńska, 2016, pg. 328ss. Bosco, 2017, pg. 398ss.

20. Art. 1 common to the Four Geneva Conventions of 1949 and Art. 1, 88 and 89 of the first additional Protocol of 1977 lead to a limitation/constraint on cooperation resulting from international customary law, given that it is a duty of States to ensure compliance with the rules of international humanitarian law, through any appropriate instrument. A general obligation reflected in the fulfillment of requests for cooperation with the Court, although not following

obligations. (Cherif Bassiouni, 1995. Macleod, 2010). The obligation arising from the binding nature of the United Nations Resolution n. 827 and its imposition on all States as an *erga omnes* obligation was clearly defined by the Appeals Chamber of the ICTY in the *Blaškić* case of 29 October 1997[21]. Moreover, par. 4 of the United Nations Resolution n. 827 establishes the obligation to implement the Resolution and the Statute[22]. In international cooperation the Statute dedicates a part to itself: Chapter IX consisting of 17 articles[23] based on interstate judicial assistance and extradition. This statutory body should be supplemented by the provisions contained in the rules of procedure and in addition to the applicable rules of international law (art. 21 of the Statute)[24].

The opening provision (art. 86) lays down the principle of a general obligation on States Parties to cooperate with the ICC. Obligation and important affirmation of the functioning of the Court (Sluiter, 2010, pg. 462s) and particularly of the "internationalization" of domestic law (in the sense that repressive devices appear as the carrier of national law to supranational interests (Liakopoulos, 2017), *rectius* instruments for the application of decentralized international and community law) do not exclude the full cooperation of ICC with the European Union Institutions.[25]

a cooperation agreement or a Resolution of the Security Council. See, Fenrick, 1999, pg. 318ss.

21. In the sentence of 29 October 1997 after the appeal of Croatia the ICTY has affirmed that: "(...) the international Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States (...)". In the same case, the Appeals Chamber has taken a position on the criteria for cooperation by the Prosecutor and the Member States of the Statute wishing to cooperate with the Court of First Instance. In particular, it was stated that: "(...) the Appeals Chamber identified the following criteria for an order for the production of documents to be met: (i) identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in number. The Appeals Chamber agreed with the submission of counsel for the accused that, where the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefore, and should still be required to identify the specific documents in question in some appropriate manner. The trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89(B) and (D), to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars(ii) set out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its Prosecutorial or defense strategy it should say so and at least indicate the general grounds on which its request rests; (iii) not be unduly onerous. As already referred to above, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial; and (iv) give the requested state sufficient time for compliance; this, of course, would not authorize any unwarranted delays by that State. Reasonable and workable deadlines could be set by the trial Chamber after consulting the requested State. (...)". Criteria that are also adopted in the following cases: ICTR, Prosecutor v. Bagosora et al., Request to the government of Rwanda for Cooperation and Assistance Pursuant to article 28 of the Statute, ICTR-98-41-T, T. Ch. of 10 March 2004, par. 4; ICTR, Prosecutor v. Bagosora et al., Decision on Request to the Republic of Togo for Assistance Pursuant to article 28 of the Statute, ICTR-98-41-T, T. Ch. of 31 October 2005, par. 2. ICTR, Prosecutor v. Bizimungu et al., Decision on Nzuwonemeye's Motion Requesting the Cooperation of the government of Ghana Pursuant to article 28 of the Statute, ICTR-99-56-T of 13 February 2006, par. 6; ICTR, Prosecutor v. Bizimungu et al., Decision on Casimir Bizimungu's Request for Disclosure of the Bruguiere Report and the Cooperation of France, ICTR-99-50-T, T. Ch. of 25 September 2006, par. 25; ICTR, Prosecutor v. Nahimana et al., Decision on the motion to stay the proceedings in the trial of Ferdinand Nahimana, ICTR-99-52-T, T. Ch. of 5 June 2003, par. 11 which refers to: "(...) a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial (...)". See in argument: Findlay, 2013. Sprack, 2012. Büngener, 2012. Findley, 2011, pg. 12ss. Friman, 2015. Kendall, 2011, pg. 585ss. Kendall and Nouwen, 2013, pg. 235ss. Khan and Shah, 2013, pg. 191ss. Matthews and Malek, 2014. Taylor, 2013, pg. 272ss. DeGuzman, 2012, pg. 266ss. Heinze, 2014. Vogler and Huber, 2008.

22. In the same spirit with the case: Kenyatta. See, statement to the United Nations Security Council on the situation in Libya pursuant to UNSCR 1970(2011) of 9 November 2016. Stahn, pg. 325ss. Aloisi, 2013, pg. 152ss.

23. See the decision of 10 December 1998: Furundžija case, IT-95-17/1-T, par. 149- 150, in which it is argued: "(...) that, in international law, the responsibility of the States is usually brought about by the adoption and application of legislation which does not comply with international standards (...) and where the Court makes explicit refer to the articles incorporated into its Statutes (...)". See, Ciampi, 2002.

24. "(...) the applicable treaties (...) the principles and rules of international law, including the consolidated principles of international law on armed conflict; (c) failing that, the general principles of law to the domestic law of the legal systems of the world, including, where appropriate, the domestic law of States that would have jurisdiction over crime, provided that such principles are not in conflict with this Statute, international law and international standards and criteria recognized (...)". See, Cassese, 1997. Bailey, 2014, pg. 513ss.

25. See, Decision 2002/494/JHA, of 13 June 2002 (OJ L 167, p. 1), setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes; Framework Decision 2002/584/JHA, of 13 June 2002 (OJ L 190, p. 1), on the European arrest warrant and the surrender procedures between Member States; and Decision 2003/335/JHA, of 8 May 2003 (OJ L 118, p. 12), concerning the investigation and prosecution of genocide, crimes against humanity and war crimes. The EU was the first Regional Organization to sign with the ICC an agreement on cooperation and assistance on 10 April 2006 (OJ L 115 of 28.04.2006). The European Union law does not allow the adoption of punishment for ad hoc crimes and does not exclude criminal offenses and punishments for certain offenses in their constitutive Statutes up to Lisbon, leaving them open to cultivation by adopting hard and soft law acts "as we see the last years according to the principles of the Union within a legal space for security and justice". In this spirit, the European Union has adopted a common position no. 2001/443/CFSP since 11 June 2001, stating the need for the universality of the Rome Convention. This is a partial membership that in reality at first sight would have diminished the effectiveness of the Statute. The EU has also ruled that the ratification of the Statute is a necessary condition for the candidate countries to become members of the Union (already ratified the Member States of the Union with the exception of France, Romania), reaffirming the principles set out in the common position no. 2002/474/CFSP. The European Parliament, with its Resolution of 4 July 2002, repeatedly expressed its support for the ICC and criticized the US position with respect to both the American Service Members Protection Act (ASPA) and the exemption agreements The Commission of the European Union, contradicted the obligations arising from participation in the Statute of the Court. Exceptions that allowed the European Parliament to approve, on 30 September 2002, full ambiguity and no concrete points of reference regarding the exception agreements where it is established that such agreements, as negotiated by the United States, are contrary to the Statute of ICC. See also the Council common position 2003/444/CFSP of 16 June 2003 on ICC; Action Plan in support of the Common Position on the International Criminal Court, 15 February 2004. Article 11 of the Cotonou Agreement with the ACP States: "(...) 6. In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to: -share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of ICC; and fight against international crime in accordance with international law, giving due regard to the Rome Statute. The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments". See also, The Africa-EU Strategic Partnership. A Joint Africa-EU Strategy, 9 December 2007: "(...) the partners agree that the establishment and the effective functioning of ICC constitute an important development for peace and international justice (...)". AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009. See in argument: Aoun, 2012. Matei and others, 2014, pg. 65ss. Fehl, 2014. Artusy, 2016. Collantes-Celador, 2016. Whiting, 2014, pg. 166ss. Meernik, 2013, pg. 172ss. Lingaas, 2016, pg. 80ss. Decheva, 2018.

Art. 87[26] sets out rules for cooperation requests and art. 88 States that States Parties are required to fulfill their obligations, including the introduction of appropriate regulations and the achievement of that objective. Articles 89 to 92 (delivery of certain persons to the Court, competing requests, content of the arrest and delivery request) and articles 101 to 102 regulate the delivery of persons sought by the Court and articles 83 to 96 (Liakopoulos, 2017) (other forms of cooperation, deferral of the making of a request for ongoing inquiries or ongoing proceedings, deferral of a request for a declaration of inadmissibility, content of a request for other forms of cooperation provided for in art. 93) and 99 (followed by requests under art. 93 and 96) govern other forms of cooperation and assistance[27]. Finally, articles 97 to 98[28] (consultations, cooperation on waiver of immunity and consent for delivery)[29] and 100 (expenses)[30] contain provisions of general nature. The Statute of the ad hoc tribunals allows cooperation with the Member States that are part of the United Nations; instead, the Statute of ICC (art. 87 (5)) provides the possibility for the Court to invite non-Member States to provide assistance on the basis of an ad hoc agreement. (Ole and Askin, 2012). The inspiration for this permission was also based on the exercise of compulsory and optional universal jurisdiction. (Roht-Arriaza and Fernando, 2011) for only serious violations, i.e. violations made during armed conflicts such as the ICTY in *Tadić* case[31]. Thus, the Court may transmit a request for delivery of a wanted person to any state in whose territory an international crime was committed. (Heller, 2018).

We must point out that the lack of a formal nature of the Statute does not exempt States not parties to cooperate with ICC when it comes to crimes arising from the provisions of customary law such as genocidal crimes (Van Der Wolf and De Ruiter, 2011) provided for by the Geneva Convention of 12 August 1949. (Paylan and Klonowiecka-Milart, 2015, pg. 560ss. Satzger, 2017). The Court may also request the assistance of international organizations as it appears in art. 87, par. 6 (Dong, 2009) as well as to constitute a globally wide ranging cooperation network[32] including the

26. According to art. 87 requests for cooperation: "(...) shall be transmitted by diplomatic means or through any other appropriate channel that each State Party may choose at the time of ratification, acceptance or approval of this Statute or accession thereto (...) requests may also be transmitted through the International Criminal Police Organization (INTERPOL) or any competent regional organization (...) the supporting documents are either drawn up in an official language of the requested state or accompanied by a translation into the said language shall be written in one of the working languages of the Court or accompanied by a translation into that language, depending on the choice made by the requested state at the time of ratification acceptance or approval of this Statute or accession to the same (...) of assistance provided under Chapter IX, in particular as regards the protection of information, the Court may take the necessary steps to ensure the safety and physical or psychological well-being of the victims of potential witnesses and their family members. The Court may request that any information provided under this Chapter be communicated and processed in such a way as to preserve the safety and physical or psychological well-being of victims, potential witnesses and members of their families (...) may invite any state not part of this Statute to assist under this Chapter on the basis of an ad hoc agreement or an agreement concluded with that state or any other appropriate base (...) the State not Party to this Statute does not provide them with any participation which is requested under this agreement or agreement (...) may request information or documents from any intergovernmental organization. It may also call for other forms of cooperation and assistance which it has agreed with that organization and which are in accordance with the competences or mandate of the latter. If a State Party fails to comply with a request for judicial cooperation, contrary to the provisions of this Statute, thereby preventing it from exercising its functions and powers under this Statute, the Court may acknowledge and invest the case the Assembly of States Parties or the Security Council if it has been admitted to it (...)". See in argument: Groenhuijsen and Letschert, 2012. Mnookin, 2013, pg. 146ss.

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

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

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

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

31. See, ICTY, Tadić appeal jurisdiction decision (IT-94-1-A) of 15 July 1999, par. 80. In particular: "(...) a necessary limitation on the grave breaches system (...) of the intrusion on state sovereignty that such mandatory universal jurisdiction represents (...)". See, Williams and Taft, 2003, pg. 254ss.

32. Nothing excludes the possibility for the ICC to cooperate in cases related to other international courts such as the International Court of Justice and/or courts that a Member State of the Statute requires the cooperation and assistance of the Court in order to obtain the evidence already collected by the Prosecutor or to conduct joint investigations as provided in the letter of art. 93, par. 10, of the Statute of Rome. The procedure is defined in Rule 194 RPE and it is not easy to accept any requests from the State. The institute of "reverse cooperation" primarily seeks to meet purely probative character ("inter

United Nations Security Council.[33]

In particular, art. 102 of the Statute clarifies that surrender means for a state "to hand over a person to the Court under the Statute"[34] and extradition "handing a person to another state under a Treaty, a Convention or its national legislation" (Liakopoulos, 2017), based on the principle of mutual legal assistance- (Van Der Wolf, 2011).

The delivery system is governed by the rules of the Statute and it is generally true that extradition is always a co-transfer of a person because it is judged by the jurisdiction *ad quem*. Delivery rules are interpreted in the light of the novelty represented by the institutionalization of international criminal jurisdiction, are also in accordance with art. 21 of the Statute[35] and the principles which can be derived from the matter of extradition.

The reference to the specialty rule (art. 101 of the Statute) is the confirmation that the new rules do not intervene on a pure ground even though there is no rule of general international law requiring compliance with the specialty rule in the field

alia") which, at the end of the service, leads to the transmission of declarations, documents or other evidence obtained by the Court. See, Hufnagel and Mccartney, 2017. Fassassi, 2014.

33. See: Declarations that relate to Security Council resolutions or not, and the positions taken by the Prosecutor on judicial or non-judicial assistance to areas that the Court collaborated to bring cases of persons who committed serious crimes. Ex multis: ICC, Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd- Al-Rahman, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, Pre-Trial Chamber I, 26 May 2010, ICC- 02/05-01/07-57; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, Pre- Trial Chamber I, 27 August 2010, ICC-02/05-01/09-109; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's Presence in the Territory of the Republic of Kenya, Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09-107; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre- Trial Chamber I, 12 May 2011, ICC-02/05-01/09-129; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, ICC-02/05-01/09-139; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05-01/09-140.ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011, ICC-02/05-01/09-139; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05- 01/09-140. See in particular: Bensouda, 2012, pg. 442ss. Fassassi, 2014, pg. 36ss. Langer and Roach, 2013, pg.276ss.

34. We specify that Part IX of the Statute, unlike the statutory rules of the ad hoc Tribunals, never speaks of "orders" issued by the Court but only of "requests". In reality, these are only terms, what is important is the extension of the obligation assumed by the States and its concrete application. See also: Prosecutor v. Anto Furundžija, Appeal Chamber, 10 December 1998, IT-95-17/1-T, para. 157, which states that the national rules restricting the pursuit of the person sought by the ICTY do not apply to international crimes falling within the jurisdiction of that Tribunal. See in argument: Imoedemhe, 2016. Verdmann-Wittzack, 2016, pg. 4ss. Diggelmann, 2016, pg. 107ss.

35. See, Zeegers, 2016, which the ultimate author has declared that: "(...) internationally recognized human rights are applicable fully, and thus need not be "reinterpreted" in light of the unique mandate and context of the ICC (...) the mandatory and specific content of article 21(3) of the Statute appears to prevent court judges from adjusting the content of human rights law to the unique ICC-context. The Prosecution argued that the Pre-Trial Chamber had overstepped its powers. It is submitted that the interplay between Pre-Trial Chamber and Prosecution is a sensitive matter that lies at the heart of the compromises reached in Rome between different legal traditions and values, and must be approached with the utmost caution. In relation to the investigative activities undertaken by the Court, this compromise between different legal cultures is represented by two main features of the Statute: the independence and autonomy of the Prosecutor in conducting investigations, always under strict application of the principle of objectivity enshrined in article 54 (1)(a), and the specific supervisory powers of the Pre-Trial Chamber. The system enshrined in the Statute is one where the investigation is not performed or shared with a judicial body, but rather entrusted to the Prosecution, as expressly provided for in article 42 (1) of the Statute: the Office of the Prosecutor shall be responsible for conducting investigations (...) before the Court (...)". At the same time, the system also includes a closed number of provisions empowering the Pre-Trial Chamber to engage in specific instances of judicial supervision over the Prosecution's investigative activities. The Prosecution submits that this delicate balance between both organs must be preserved at all times in order to honour the Statute, and to enable the Court to function in a fair and efficient manner (Situation in the DRC, Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, ICC-01/04, 8 March 2005, 4). In its recent Draft Policy Paper on Case Selection and Prioritization, the OTP clarified that: "(...) following the decision to open an investigation into a situation or a judicial authorization to that effect: (t)he Office will develop a Case Selection Plan which identifies in broad terms the potential cases within the situation. Initially, the Plan will be based on the conclusions from the preliminary examination stage, including the potential cases identified therein. As investigations within a situation proceed, the Office will gradually develop one or more provisional case hypotheses that meet the criteria set out in this policy paper (...)". OTP, Draft Policy Paper on Case Selection and Prioritization (2016) 7. Lubanga case, the Appeals Chamber has noted the sui generis character of jurisdictional challenges based on human rights grounds: abuse of process or gross violations of fundamental rights of the suspect of the accused are not identified as such as grounds for which the Court may refrain from embarking upon the exercise of its jurisdiction (...). Notwithstanding the label attached to it, the application of Mr. Lubanga Dyilo does not challenge the jurisdiction of the Court (...) what the appellant sought was that the Court should refrain from exercising its jurisdiction in the matter in hand. Its true characterization may be identified as a sui generis application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of Mr. Lubanga Dyilo. Prosecutor v. Thomas Lubanga, AC Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, Prosecutor v. Lubanga ICC-01/04-01-06 (OA4), 14 December 2006, 24. Also see: Cengic, 2010, pg. 182-184. In particular: "(...) Katanga's Defence tried to show the limitations of this narrow view: In the time preceding the issuing of an arrest warrant by the ICC there was an increase in interest in the accused by the ICC. This is not a black and white situation. The successful application for a warrant of arrest would be an artificial point to measure the beginning of participation by the ICC in the situation of the accused. At some point during the preceding period of growing interest in the accused there was a formulation of intention on the part of the OTP to treat the accused as a principal suspect in the case concerning Bogoro. It is at that point that the prosecutor assumes a duty of care towards the accused, whatever his status in the DRC (...) the Prosecutor ought to have been in possession of sufficient information, in this particular case, to be aware that the accused's detention in the DRC was inconsistent with international human rights standards (...) the activities of the DRC for admissibility, and on the basis of documents and information received from the DRC with respect to proceedings within the DRC (...) the DRC proceedings against, among others, Thomas Lubanga Dyilo are the subject of serious and increasing criticism. The arrest of TLD by the DRC authorities took place in the context of international pressure, arising from the reaction to the killing of UN (MONUC) peacekeepers on 25 February 2005 (the so called Ndoki incident) (...) to the extent that information is available to the Prosecution, neither at the time of his arrest nor later has evidence emerged that clearly links TLD to the Ndoki incident (...) this situation has resulted in increased criticism from international NGOs, alleging that the detention of TLD and the other leaders of the political e/o military groups may be irregular (...)", Prosecutor v. Germain Katanga (n. 44) 90 and Prosecutor v. Thomas Lubanga (n. 47) 8-11.

of judicial assistance. Examination of this principle refers to conventional practice and internal rules[36]. Equally important is (in multilateral treaties governing judicial assistance) the fact that the principle of specialty is generally not directly envisaged. Its operation emerges from reserves to treaties formulated by States. Thanks to international instruments, there is a clear tendency to achieve a progressive restriction on the scope of the principle with the aim of promoting judicial cooperation and repressive action. (The Prosecutor v. Uhuru Muigai Kenyatta, Decision on the withdrawal of charges against Mr. Kenyatta, ICC-01/09-02/11-1005, 13 March 2015)

This aspect emerges with some evidence only in relation to bilateral agreements, while multilateral instruments do not follow an innovative approach. The provisions of international judicial cooperation shall apply only on condition that they do not prejudice the obligations of other bilateral or multilateral treaties governing or regulating in whole or in part mutual judicial assistance between the contracting States. Conventions and treaties generally provide mutual assistance or specific actions while practice tends to reduce the margin of "unnamed assistance" (*sine nomine firmamentum*).[37]

The different nature of cooperation with ICC allows for the support of the forefront case contained in lett. 1, par. 1, art. 93 of the Statute[38]. Reference is made to those actions called "fishing expeditions" (claims that are usually rejected in the practice of normal Court assistance)[39]; of the material in order to initiate an internal procedure, but it also seems to extend, broader requests for coordination in investigative activities or those actions which, according to certain jurisdictions, could be attributed to forms of police cooperation and not procedural-judicial. (Fassassi, 2014)

States party to the Statute do not have the power to refuse such forms of cooperation, but they should be allowed to introduce rules to their own accord. It must be assumed that the assistance to which the Statute relates to is of general nature. There are no cases falling within the categories of international judicial cooperation cases as for example are the on-site investigations of the Court's Prosecutor in an inquisitorial/accusatory system (Damaška, 1973, p. 506)[40]: possibilities provided by art. 54 (duties and powers of the Prosecutor in the matter of investigations) of the Statute[41], other

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

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

38. According to the article just mentioned: "(...) in regulating forms of cooperation in the field of evidence, it merely establishes that States must facilitate voluntary appearance before the cattle of persons such as witnesses and technical consultants (...)". In such a case, the state must cooperate for the quotation of a person and also allow for the possibility of non-collaboration as a person, rectius a witness may request transfer to another state where his authorities may be opposed not only to the collaboration but also unavailable to make the head appear. See in argument: Bederman, 2011, pg. 540ss. Liolos, 2012. Cryer, 2010, pg. 509-530. Kress and Prost, 2008, pg. 1569-1588. Guy Kim and Hwang, 2012. Klamberg, 2013, pg. 235, 242, 244-246, 253, 257, 276 and 462. Schabas, 2010, pg. 1015-1025.

39. Article 93, par. 1 of the Statute contains a non-exhaustive list of "any other type of assistance" that can facilitate the "investigation and prosecution of crimes within the jurisdiction of the Court" and find execution by means of requests addressed to States Parties.

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

41. See in particular the next cases: Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, 01/04-01/07-T-81, 25 November 2009, pp. 16–17, 34; Prosecutor

than of art. 99 par. 1, to attend the execution of the request for assistance as a form of cooperation. (Guilfoyle, 2016; Kucher and Petrenko, 2015, p. 144ss).

The Prosecutor's procedural forms and powers prevent Court's awareness from being relevant to the conviction of guilt that must be *secundum acta et probed* as well as the possibility of acquittal even when there is evidence but not enough to incriminate a person. In any case, the evidence binds the right to strict legality because they give the force of the reasoning that judicial decisions are elected and legitimate by assertions as verifiable and falsifiable, even if approximate. The validity is conditioned on the truth, although relative to their arguments that jurisdictional power is not the inhuman power purely potentially of justice, but is based on knowledge also plausible and probable but precisely for this being rebuttable and controllable both by the defendant and his defense than by international society. (Schwöbel, 2014)

The reasoning allows for the establishment and control of decisions both in law for breach of law or for defects in interpretation or superstitiousness and in fact due to lack or insufficiency of evidence or inadequate explanation of the connection between conviction and evidence. We refer to the investigations that the Prosecutor carries out in the territory of a State Party (pyramidal investigation strategy)[42] on the basis of an inability of the latter to assist.[43]

Investigations and especially confidential agreements that take place in areas of former armed conflict are linked to the concept of "homes", defined as "(...) the specific incidents in which the crimes were committed by identified perpetrators (...)" (Fujiwara and Parmantier, 2012, pg. 575s). The Prosecutor has adopted the strategy of proceeding only against the major perpetrators of international crimes, leaving national courts to assess the criminal liability of the "lower -ranked" and "intermediate-rank" accused. (Decision on the Prosecutor's request for authorization of an investigation in Georgia (27 January 2016).

Such cooperation is irreducible as it is based on unambiguous unavailability[44] but does not mean that on-site investigation is not a form of cooperation with ICC but simply a different cooperation characterized the fact that the State Party does not actively engage but leaves the organs of supranational justice to act in its territory (Buisman, 2013) as a form of passive cooperation (Mityaba, 2012). According to art. 99, par. b) the Prosecutor will be required to consult with the requested state, for which he will never be able to leave, irrespective of the impossibility or excessive delays by the national authorities. (Bruchacher, 2004, pg. 72ss). If the requested state

v. Mbarushimana, ICC PT. Ch. II, Decision on the Confirmation of Charges, ICC- 01/04-01/10-465-Red, 16 December 2011, para. 51; Prosecutor v. Lubanga, ICC T. Ch. I, ICC-01/04-01/06-2842, 14 March 2012, para. 367; Prosecutor v. Katanga and Ngudjolo Chui, ICC T. Ch. II, 01/04-01/07-T-81, 25 November 2009, para. 72); Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-568 (OA 3), 13 October 2006, para. 52; Prosecutor v. Uhuru Muigai Kenyatta, ICC T. Ch. V, ICC-01/09-02/11-728, 26 April 2013, para. 119; Prosecutor v. Mbarushimana, ICC A. Ch., ICC-01/04- 01/10-514 (OA 4), 30 May 2012, para. 44; Prosecutor v. Lubanga, ICC A. Ch., ICC- 01/04-01/06-568 (OA 3), 13 October 2006, para. 54, which states that: "(...) it would be desirable for the investigation to be complete by the time of the confirmation hearing (...)". Prosecutor v. Uhuru Muigai Kenyatta, ICC T. Ch. V, ICC-01/09-02/11- 728, 26 April 2013, para. 121; Prosecutor v. Abakaer Nourain and Jerbo Jamus, ICCT. Ch. IV, ICC-02/05-03/09-158, 6 June 2011, para. 13; Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC, PT. Ch. II, ICC-01/09-02/11-382-Red, 23 January 2012, with dissenting opinion by Judge Hans-Peter Kaul, para. 56; Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC PT. Ch. II, ICC-01/09-01/11-373, 23 January 2012, with dissenting opinion by Judge Hans-Peter Kaul, para. 51; Prosecutor v. Katanga and Ngudjolo Chui, ICC PT. Ch. I, ICC-01/04-01/07-717, 30 September 2008, paras. 144–48; Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09- 02/11-728, T. Ch. V, 26 April 2013, para. 123; Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-1486 (OA 13), 21 October 2008, paras. 42–43; Prosecutor v. Kordić and Čerkez, ICTY T. Ch. III, 25 June 1999, p. 6; Prosecutor v. Kordić and Čerkez (Case No. IT-95-14/2), ICTY T. Ch. III, Transcript, 31 May 1999, pp. 2975- 3045; Prosecutor Naletilić and Martinović, ICTY A. Ch., 3 May 2006, para. 238; Prosecutor v. Ntaganda, ICC PT. Ch. II, ICC-01/04-02/06-247, 6 February 2014, paras. 14–15; Prosecutor v. Abakaer Nourain and Jerbo Jamus, ICC T. Ch. IV, ICC- 02/05-03/09-442-Red2, 21 June 2013, para. 12. See, Bergsmo, 2008, pg. 1077ss. Stahn, 2014. Guarriglia and Hochmayr, 2008, pg. 1128ss.

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

43. At this moments are open 10 cases of investigations asked from the Prosecutor: Georgia (27 January 2016); Central Africa II (May 2014); Mali (January 2013);Ivory Coast (from 2011 to 15 February of 2013); Libya (March 2011); Kenya (March 2010); Darfur-Sudan (March 2005); Central Africa (May 2007); Uganda (July 2004); Democratic Republic of Congo (April 2004). See, Nkanshah, 2014. Cole, 2013. Manisuli, 2012, pg. 388ss.

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

decides to omit to cooperate with the Court with a view to accessing the territory the Prosecutor for the purpose of carrying out an autonomous activity, the latter may not proceed with the transaction but would still be in a position to initiate proceedings provided for by art. 87 of the Statute for the case of non-cooperation.[45]

According to the same article (par. 4), the Prosecutor may undertake investigations that fall within the scope of: "(...) examination without modification of a public site or other public place (...)" (The policy paper on preliminary examinations of Prosecutor, November 2013). The provision is extremely restrictive because the Prosecutor will never go to private property locations, to collect evidence items. There is no judicial cooperation in the strict sense in the hypothesis envisaged by art. 57, par. 3, lett. d of the Statute according to which the Prosecutor may take investigative measures in the territory of a State Party without having assured the cooperation of this state in accordance with Chapter IX of the Statute. The cooperation whose obligation is enshrined in the Statute not only includes active cooperation (art. 86) but also what can be defined as passive cooperation (art. 57)[46].

The foreseeing cooperation of the criminal Court with States Parties is an ineluctable possibility in the context of a relationship between jurisdictions. (Nice and Tromp, 2018). There may be a case that a state is committed to prosecuting an offense of ICC's jurisdiction, which requires the Court's cooperation to fulfill its own ends of justice. This is the situation provided by art. 93, par. 10 of the Statute: a form of cooperation on the contrary, that is, reciprocal or inverse of the one provided for by States Parties to the Court. This prediction is the natural corollary of the principle of complementarity (Hobbs, 2012): in the face of a state Court proceeding to the repression of core crimes against humanity (Dubler Sc and Kalyk, 2018), war crimes for which ICC would be competent, the Court can not escape the obligation to provide the requested cooperation. (Guilfoyle, 2016)

The hypothesis of lack of cooperation by the States

In the absence of an unjustified failure by a State Party to cooperate which prevents the organs of the Court from exercising the functions and powers provided for in the Statute, the Court shall, after having taken formal note of it, report the matter to the Assembly in the States Parties, which according to art. 112, par. 2 (f) has jurisdiction to examine any matter relating to the lack of cooperation.[47] The Statute, following

45. In particular art. 7 of the aforementioned article provides that in the event that a State Party has prevented, under its powers, the exercise of the Court of Justice may refer the matter to the Assembly of States Parties to take measures/decisions. Motivated investigations are submitted at the request of the UN Security Council pursuant to art. 13, became (b) where the Court may inform and request its intervention officially to continue to pursue political sanctions. In the same spirit we recall the article 18 of the Vienna Convention on the law of treaties provides that: "a state shall refrain from taking any act capable of depriving a treaty of its object and purpose" which in our case requires the Member States of the Statute to avoid political shortcomings collaborate and violate international jurisdictions for their own interests. Article 87 resembles article. 54, par. 3 which states that the Prosecutor: "(...) may seek the cooperation of any (...) intergovernmental organization or arrangement in accordance with its respective competence and/or mandate". See also: Prosecutor v. Lubanga, ICC PT. Ch. I, Decision on Defense Requests for Disclosure of Materials, 17 November 2006, PTC I ordered the Registrar to immediately send a cooperation request to the United Nations in order to obtain notes of interviews of MONUC officials. ASP Report of the Court on the status of on-going cooperation between the International Criminal Court and the United Nations, including in the field, ICC-ASP/12/42, 14 October 2013, 20. The MoU between the ICC and UNOCI was concluded on 12 June 2013. IASP, Report on the activities of the International Criminal Court, ICC-ASP/13/37, 19 November 2014, 73.Moreover: [it] authoris[ed] MONUSCO, through its military component [...] to take all necessary measures to (...) [s]upport and work with the government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with (...) the ICC (...). Support[ing] and work[ing] with the transnational authorities to arrest and bring to justice those responsible for war crimes and crimes against humanity in the [CAR], including through cooperation with States of the region and the ICC (...)". See also: UN SC Resolution 2098 (28 March 2013) UN Doc S/RES/ 2098, 12. This mandate was extended until 31 March 2015 by UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147. In case: Prosecutor v. Bashir, ICC PT. Ch. I, Decision Pursuant to article 87(7) of the ICC Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir including Annexes and Corrigenda, 12 December 2011, Malawi, relied on article 98(1) of the Statute to justify its refusal to comply with the cooperation requests with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir. In the aforementioned case, the Court of Appeals observes that: "(...) an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply (...) in accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the cooperation requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties (...)". See, Klamberg, 2013, pg. 235ss.

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

47. In fact, the article does not provide an exclusive and exhaustive legal basis, but it confers the power to discharge any related task compatible with the spirit of the Statute and the rules of procedure envisaged. A power through an independent and impartial mechanism for monitoring and evaluating the work of the Court which guarantees the efficiency and the universal character of the Court. The rules established by art. 112 which shall apply: "(...) unless otherwise provided for by the Staff Regulations (...)". See in argument: Bos, 2002.

a horizontal approach in the relationship between the Court and the States, did not provide for sanctions nor did it have the authority to act on the part of the Court itself in order to make the cooperation of the recalcitrant States effective. In the silence of the Statute in relation to the consequences of the non cooperation of a State Party (Jones, 2016), it is considered that the matter should be resolved by applying the general rules on state liability. In particular, the United States Assembly may require the immediate cessation of incapacitated behavior by the state concerned or consider resorting to collective measures. (Mofett, 2014, pg. 210ss).

From a procedural point of view, the agreement between the ICC and the United Nations confers on the UN Register the task of transmitting the relevant acts to the Security Council through the General Secretary (art. 17) and to receive news of any action taken.[48] The provision in question does not appear to allow the Court to inform the Security Council even if the criminal proceedings in the matter of its competence under Chapter VII of the United Nations Charter have arisen from a complaint of one State or was initiated *motu* by the Prosecutor. The provision does not cover the consequences of minor infringements or those where the failure to cooperate did not have the effect of hindering the Court's action. (Dubler Sc and Kalyk, 2018)

It has been noted in that regard that, in addition to the dispute settlement mechanism referred to in art. 119 (settlement of disputes) of the Statute (Macdonald, 2017, pg. 630s), any reaction, although not channeled through the Assembly of States Parties or the Security Council, should be taken by the States in cooperation, owing to the *erga omnes* nature of the obligation to cooperate with the Court not excluding, however, the adoption of countermeasures identified. (Dubler Sc and Kalyk, 2018). The statutory provisions require that the office of the Court which has advanced to the request for cooperation-to which the State concerned has not followed-left a request to the competent Chamber, for the latter to initiate the procedure provided for in art. 87, par. 7 of the Statute (Regulation 109)[49].

The subject of the requests for cooperation is well defined by art. 89, which governs the delivery of persons to the Court, and art. 93 concerning the assistance aimed at facilitating the investigation and prosecution of criminal offenses under the jurisdiction of the Court. The Statute (art. 87) does not identify the organs within it[50]. However, the implementing provisions, when establishing the offices responsible for the transmission of requests for cooperation, distinguish between the Chamber or the Prosecutor's Office, thus authorizing both of them to act under their respective prerogatives, the cooperation provided for in title 9 of the Statute, at the request of the Prosecutor, to the Preliminary Chamber, which has to issue its orders and order the necessary mandates for the purposes of an investigation into the proceedings. (Cryer, 2010). The initiative may also be taken by the accused person who may appeal to the Court to issue an order to assist in preparing its defense as is apparent from

48. As we can see in case: Kony and others (ICC-02/04-01/05-320). See: Michelon and others, 2016, pg. 246ss.

49. See the case of a self-referral act sent to the Court by the Head of the transition state in Libya on May 30, 2014, the Prosecutor has decided to initiate investigations (and thus open the situation called "Central African Republic II") the events committed in central African territory starting in August 2012, which would fall into the grip of war crimes. Following the Security Council Resolution 2127 (2013), a Commission of inquiry has been set up to investigate human rights and human rights violations committed in the State concerned from 1 January 2013. It should be recalled that the Referral power was first exercised with Resolution no. 1593 (2005) and there were four Security Council resolutions that explicitly referred to art. 16 of the Statute. We refer to the resolutions: 1422 (2003), 1487 (2003), 1497 (2003) and 1593 (2005). In the event of referrals by the Security Council there is a possibility that the Court may report on the non-cooperation of a state but without any measures envisaged by the Council in the event of non-compliance by "forcing" the Council, based on Chapter VI of the Charter, exercise its conciliatory functions. The Security Council has the power to block proceedings before the Court after the adoption of a decision after a favorable vote of a majority of the members of the Council and the decision should be of a temporary nature and without prejudice to the nature of the Court's independence and impartiality. See also: United Nations Security Council, Report of the Secretary-General on the implementation of Security Council Resolutions 2139 (2014), 2165 (2014) and 2191 (2014), 11 November 2015, UN Doc. S/2015/862 e United Nations Security Council, 7419th meeting, 27 March 2015, UN Doc. S/PV.7419. See in argument: Jessberger and Geneuss, 2013, pg. 502ss. Falkowska, 2012, pg. 201-236. Weldehaimanot, 2011, pg. 208-235.

50. See, the situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang, No.: ICC-01/09-01/11 of 30 June 2014. In particular, the Prosecutor stated that: "(...) the GoK's observations merit weight, but only to the extent that they are cogent and well-reasoned. In this case, they are not. Indeed, the Court cannot be asked to accept blindly a State's position on what its legislation says when that state has not shown that its interpretation is firmly rooted in the applicable domestic provisions, or when its arguments are manifestly weak or plainly unpersuasive (...)".

art. 57 (preliminary chamber functions and power), par. 3, lett. b)[51]. Much of the requests for cooperation, and in particular those listed in art. 93, see as the protagonist the Prosecutor who, based on art. 54, par. 3, let c) provides that the Prosecutor may conclude any agreement or agreement that is not contrary to the provisions of the Statute and may be necessary to facilitate the cooperation of a state, an intergovernmental organization or a person. (Davidson, 2010)

According to art. 15 regarding the role of Prosecutor during the preliminary examination, the Prosecutor may request information from the States in order to assess whether there are any elements to justify the initiation of investigations. This issue has been questioned in problematic terms by the Committee of the parties in the "informal expert paper"[52], in which two possible interpretations have been made: on the one hand a restrictive reading would lead to the exclusion of the Prosecutor from using title 9 for this phase of the investigation, the only place that the decision of the preliminary chamber authorizing the commencement of the formal investigation would become the duty of cooperation of the States dictated by art. 86[53] and 93 of the Statute. (Cryer, 2010; Safferling, 2012). And to a second interpretation: in the opinion of the "informal expert paper" (Dubler Sc and Kalyk, 2018) it would be better to respond both to the willingness expressed by the States during the negotiation to significantly contain the Prosecutor's powers of initiative and the literal interpretation of art. 86 which deals with the cooperation of States Parties in investigating and prosecuting criminal offenses falling within the jurisdiction of the Court, with the sole purpose of investigating only those initiated and following the authorization of the preliminary chamber. Some States may have problems of legal and political nature to comply with this request in the absence of a precise legal basis for their national legal system. (Meierhenrich, 2015, p. 97–127).

51. See the case: ICC, Prosecutor v. Katanga and Ngudjolo Chui, Decision on the "defense's Application pursuant to article 57(3)(b) of the Statute to Seek Cooperation of the Democratic Republic of Congo (DRC)", ICC-01/04-01/07-444 of 25 April 2008, pag. 5 e the dissenting opinion of the judge Anita Ušaka attached to the Decision on the "Defense's Application pursuant to article 57(3)(b) of the Statute to Seek Cooperation of the Democratic Republic of Congo (DRC)", Prosecutor v. Katanga, ICC-01/04-01/07-444 of 25 April 2008: "(...) this interpretation of article 57(3)(b) would indeed set a higher standard than the one elaborated in Rule 116(1) RPE, the majority's view does not seem to do that. The decision did not find the material requested not to be necessary to the defense, something that judge Ušaka seemed to suggest, but it rather found the Chamber's intervention to assist the defense in obtaining these materials to be unnecessary at this stage. The reason for this was the possibility for the defense to obtain the documents elsewhere (...) the ICC legal framework does seem to support the proposition that the defense may not seek cooperation from a state when there is another source that can provide this information. The defense should be able to consult different sources to be able to compare or corroborate. See also: Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Decision on the "defense Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the government of the Republic of Sudan, ICC-02/05-03/09-95 of 17 November 2010, par. 1 (Banda and Jerbo Decision on article 57(3) (b) request); ICC, Decision on the "Defense Request for an order for State Cooperation Pursuant to article 57(3)(b) of the Rome Statute, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, PTC I (single judge) of 24 March 2011, where it has been stated that: "(...) the defense submitted that it was essential for the preparation of a request for interim release that the Chamber sought the cooperation of France in order to obtain confirmation that the French authorities agreed to receive Mr. Mbarushimana onto French territory, should he be released (p. 3). (...) Considering that it is for the Chamber to request observation from the State concerned (according to regulation 51) only if and when an application for interim release is made, and that it is not required that such observations should be obtained by the person applying for interim release and included in that person's application (p. 3). (...) Therefore, the information the defense seeks is not material to the proper preparation of a request for interim release, within the meaning of Rule 116(1) (a) of the Rules (p. 4). ICC, Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Defense Application for Leave to Appeal the Decision on the defense Application pursuant to article 57(3) (b) of the Statute for an order for the preparation and transmission of a cooperation request to the government of the Republic of Sudan of 17 November 2010, ICC-02/05-03/09-105, 19 November 2010, par. 8, where the defense stated that: "(...) an effect of the Decision may be that a defense team that intends to challenge the charges at confirmation (with the arguable effect that confirmation may be less likely) will obtain the assistance requested, whereas a defense team that does not contest the charges (with the effect that confirmation may be more likely) will be denied the requested assistance and so hampered in its preparation for trial (...)".

52. According to the informal expert paper: "(...) it is only once a reasonable basis has been found by the Prosecutor under article 53(1) or the Pre-Trial Chamber under article 15(4), that an investigation would commence, and at that point Part 9 would become available to the Prosecutor (...) with the resulting obligations for the States Parties under articles 86 and 93. Consequently, the measures taken during a preliminary examination are not measures within a formal "investigation" (...) the OTP expert paper on complementarity makes clear that "as a practical matter, it is expected that States Parties and other supportive States will choose to co-operate voluntarily with the OTP, and will likely respond to reason-able requests for information. Co-operation might also be further encouraged by courteously making States aware of the possibility that reasonable inferences might of necessity be drawn if information cannot be collected because of non-co-operation", see OTP, Informal Expert Paper (n 26) 30 (...)". See in particular: ROOMHALL et al., Informal expert paper: Fact-finding and investigative functions of the Office of the Prosecutor, Including international co-operation, 2003, pp. 23, 25-29. OTP, Policy Paper on Preliminary Examinations (2013) at 85. The OTP expert paper on fact- finding and investigations has rightly observed that: "(...) the relationship with the state exercising jurisdiction under complementarity is critical to facilitating the admissibility determination by the Prosecutor and that the degree to which there is a cooperative arrangement established may determine how successful the Prosecutor is in discharging his responsibilities (...) in this respect, the experts acknowledged that, although the standards set forth by article 17 are of an unambiguously legal nature, there may be need to be political discussions and arrangements undertaken in order to facilitate decisions based on those legal standards (...)". Prosecutor v. William Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, 39. Schabas, pg. 365ss.

53. Prosecutor v. Banda and Jerbo, ICC T. Ch. IV, Decision on "Defense Application pursuant to articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the government of the Republic of the Sudan", 1 July 2011, para. 15; Prosecutor v. Gaddafi et al., ICC PT. Ch. I, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11, 7 March 2012, para. 12. See, Sluiter, 2010, pg. 461ss.

Art. 15, par. 2 also provides that the Prosecutor[54] may at this stage use the collaboration of intergovernmental or non governmental organizations[55] for a preliminary identification of witnesses[56] and for other information that may be relevant. The same provision limits the taking of evidence by the Prosecutor only at the seat of the Court. The informal expert paper does not seem to exclude the possibility for States or other organizations to provide evidence from potential witnesses (Robinson, 2011, pg. 355-384), including spontaneous written statements and that the Prosecutor may, with the consent of the state concerned, extend the taking of evidence even in the territory of the latter. Based on the principle of specialty, the objective of witnessing[57] and proving the innocence or guilt of a person subject to criminal proceedings is considered to be prevalent in relation to the general principle of confidentiality in the interests of the requested state. Court's cooperation requests are transmitted to the States concerned by the UN Registry or the Prosecutor's Office. The communication channels indicated in art. 87 of the Statute provide the traditional ways through diplomatic channels and that the participating state is part of the Statute of the Court thus enabling a standard of protection of information transmitted through a judicial assistance procedure.

54. For the pre-investigations see: Situation in the Republic of Kenya, ICC PT. Ch. II, Decision Pursuant to article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 23; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011, para. 17; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, and the opinion of judge: Fernández de Gurmendi's; Situation in the Republic of Côte d'Ivoire, ICC-02/11-15, 3 October 2011, para. 24; Stegmiller, 2011, pp. 209 ff.; Situation in the Central African Republic, ICC PT. Ch. III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, 30 November 2006; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III; Situation in the Republic of Côte d'Ivoire, ICC-02/11-15, 3 October 2011, para. 29; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to article 15(3) of the Statute, ICC-02/11-6, 6 July 2011, para. 10; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to article 15(3) of the Statute, ICC-02/11-6, 6 July 2011, para. 9; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to article 15(3) of the Statute, ICC-02/11-6, 6 July 2011, para. 9; see also Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Decision Pursuant to article 15 of the ICC Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011, para. 19; Situation in the Republic of Kenya, ICC PT. Ch. II, Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, paras. 21–25; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, 3 October 2011, para. 17). According to the new OTP of 2014 (CAR II investigations), the scale of the crimes can be assessed by looking at: "(...) the number of direct and indirect victims, the extent of the damage caused by the crimes (...) (and) their geographical or temporal spread (...) focuses on the number of victims and the scope of the crimes. It acknowledges that crimes become more grave as the number of victims increases and as their geographic and temporal scope increases (...) refers to the specific elements of each offense such as the killings, rapes, and other crimes (...) the nature of the crimes refers to the specific kinds of wrongful acts that have been committed like murder, rape, or torture. It also implicitly recognizes that there is a hierarchy among crimes and that some kinds of crimes are graver than others. For example, as noted below, killings are generally viewed as more grave than rapes, which are in turn viewed as more grave than assaults (...)". See in argument: Ford, 2015, pg. 152ss. Groome, 2014, pg. 3ss. Ford, 2013, pg. 45ss. Lekha and Brown, 2012, pg. 222ss. Stegmiller, 2011. Ventura, 2013, pg. 52ss.

55. See the section 69 of the program budget for 2004 in official records of the ASP (2003), (ICC-ASP/2/10, p. 47 it is reported that: "(...) the Prosecutor must have a strong capacity to conduct external relations activities as requires by the complementarity regime of the Rome Statute (...) capacity to provide factual support to the professional general relations advisers (...) the external relations and complementarity unit provides these services to the chief Prosecutor (...)". in this case the principle of complementarity is applied, which entrusts the Member States with the priority criminal and subsidiary jurisdiction of the Court for the recognition of the relevant offenses of the offenses provided for in the Staff Regulations. Cooperation requests to NGOs may relate to the drafting or transmission of reports, or the call to testify about events that are known to them due to the activities carried out on the ground, or to contain a real delegation to conducting investigations account of the Prosecutor of the Court in relation to the area they have carried out their work. Prosecutor v. Simić et al., Decision on the motion for judicial assistance to be provided by SFOR and others, IT-95-9-PT, 18 October 2000, par. 36. Human Rights Watch, The International Criminal Court: how nongovernmental organizations can contribute to the prosecution of war crimes. September 2004, pp. 14ss. The Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/06- 2842, 14 March 2012, para. 141 ("Judgment"); The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, ICC-01/04- 01/07-717, 1 October 2008, para. 131; In argument also see: Ambos (2012), pg. 118ss. The Prosecutor v. Laurent Gbagbo, Decision on the confirmation of charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, note 119 and par. 60. See also: Report on Preliminary Examination Activities 2014, 2 December 2014, par. 37ss. See: the importance of the information obtained by the International Committee of the Red Cross has already been recognized by the Tribunal for the Former Yugoslavia in the case Simić (The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, IT-95-9-PT, 27 July 1999, par. 76.). See, FOKSA, The Issue of Reparations Before the International Criminal Court: Case Study Prosecutor v. Thomas Lubanga Dyilo, Czech Yearbook of Public & Private International Law, 2013. Regarding the interests of Justice Hall reports that: "(...) the suspect is so old that he or she is unlikely to live to the end of the trial and final judgment, although this situation is likely to be rare and should be considered in the light of the recent successful prosecutions in the Sawaniuk, Touvier, Papon and Preibke cases; the suspect is so infirm as to be unfit to stand trial, although this ground must be invoked only when all alternatives, including limits on the hours of the trial, have been considered and rejected; in applying the exceptions to prosecutions by anyone listed in article 53(2) (c), it will be important to bear in mind the Preamble to the ICC Statute (...)". See, Hall, 2017, pp. 342ss. De Souza Días, 2017, n. 3.

56. The agreement entered into force on 12 June 2013. See, Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field, ICC-ASP/12/42, 14 October 2013, par. 20. There is no question of direct alignment of a mission with the International Criminal Court, but cooperation within the relevant sphere and in accordance with the Statute of the Court and with reference to the established Mission Resolution.

57. Article 71 of staff regulation refers to the refusal to comply with an order of the Court provided for in the procedural rule no. 171 and punishable by monetary sanction. Therefore, the obligation of testimony provided by art. 73 of the Statute to privileged defined communications and information (and not to disseminate reports relating to the defender, communications in the context of further categories of professional or confidential relations, privacy protection) that follow the common law system leaving a margin of appreciation for the judge in deciding on the relationship to be protected and the absolute protection of the complete confidentiality of the right to technical defense. In particular, this category also includes the privileged communications referred to in art. 66 of the Statute, that is, testimonies of people working with international organizations who must ensure the non-disclosure of documentary material that can be used at all procedural steps by the Court.

Art. 87 allows the submission of requests for cooperation also through international organizations and INTERPOL[58] or through any relevant regional organization where such solution appears to be more appropriate and not incompatible with the statements made by the States. The wording of the rule is the obvious result of a compromise over the position of some delegations opposed in principle to the designation in the status of predetermined channels of communication. Pragmatical provisions are contained in art. 92, par. 2 and 96 (content of a request for other forms of cooperation provided for in art. 93). Par. 1 for the transmission of the request for arrest[59] is also provisional (art. 92)[60] and requests for judicial assistance to allow the use of any other means of transmission of a written document[61].

Art. 87 of the Statute requires the requested state-without distinguishing in such a case between a State Party or not-the obligation of confidentiality on the requests, provided that their disclosure is not made necessary by the execution of the cooperation. Par. 4 of the same art. 87 establishes, in connection with the general provision contained in art. 87[62], that particular measures of protection of the information

58. See the cooperation proposed: negotiated relationship Agreement between ICC and UN of 2004 where articles 3, 15 and 18 of the Agreement disciples reciprocal obligations in the exchange of information and consultation on matters of mutual interest to ICC and UN and engage the parties to conclude agreements that favor cooperation between the UN and the Prosecutor.

59. An interesting case related to arrests and deliveries in the history of the ICC concerns the 2009 and 2010 arrest warrants, based on article 59 of the Statute and on the basis of Resolution no. 1593, the ICC expressly called on States Parties, including South Africa, to arrest Al-Bashir if they came across their national territory. The Court also relied on Resolution 1593 authorizing the Court to investigate and prosecute Sudan with respect to the situation in Darfur. The language used in paragraph 2 of the Resolution is too vague and does not explicitly require a waiver of immunity. The Court obliged South African authorities to "take all reasonable steps to arrest President Al-Bashir. During the hearing before the North Gauteng High Court where it focused solely on article 27 (2) of the staff regulations, without sufficiently explaining the complex relationship with article 98 (1), in the light of Resolution 1593 of the Security Council. In fact the reasoning of the North Gauteng High Court was very uncertain and confused. On the other hand, the South African government claimed that Al-Bashir enjoyed immunity from arrest, since, after accepting in January 2015 to host the African Union summit, the government entered into an agreement concluded on June 4 2015 pursuant to article VIII of the Agreement: the privileges and immunities provided for the duration of the meeting to members of the Commission of the African Union and staff members as well as delegates and other representatives of intergovernmental organizations present at the meetings. Within this spirit, the Host State refers to those contained in Sections (C) and (D), articles V and VI of the General Convention on Privileges and Immunities of the Organization for African Unity, including immunity from arrest and detention. The Democratic Republic of the Congo, as part of the Statute, failed to comply with the request for the arrest and delivery of Al-Bashir to the Court and justified this choice by invoking the decision of the African Union for which no Head of State should be delivered to the ICC. Certainly this was a real defeat for ICC. See in argument: Akande, 2012. De Wet, 2015. Tladi, 2015. Cryer, 2010, pg. 513ss. Moss, 2012. Ssenynojo, 2010. ICC, Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, ICC- 02/05-01/07-57 (25 May 2010). The same regulatory reasoning was used without the cooperation of a UN resolution in the case of investigations and the request for arrest warrant in the case of Côte d'Ivoire in relation to those responsible for certain crimes punished by the Court. See requests of the accusation of standards 38-2 of the courts of the course for supplementing the numbers of pages of the mandate of arrival (September 3, 2015). A case of special cooperation obligation arises in the case of OA Al-Bashir from the moment when the ICC for the first time formulated a seizure of office against a president in office (despite the immunity planned and not to be prosecuted according to article 72 of the Statute, and nothing excluding the essence of Al-Bashir's responsibility for committing crimes), based on the usual overarching and cautious Resolution that is too generic and prudent as usual to monitor reactions, and especially to African countries with great difficulty they are part of international organizations and in the case of ratification of the Statute of the Court. The resolving Resolution n. 1593, based on Chapter VII of the UN Charter based on the interpretation: peace in the area through justice without fully covering the work of ICC to continue, especially the Prosecutor (article 13 of the Statute)-in this case with difficulty seen that Sudan has not ratified the Statute-and 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 (...)". The international doctrine has maintained two strands of thinking, arguing that the delivery to the ICC is a violation of the conditional Resolution and conventional law, and a second group that, due to immunity obtained by that person, plus the non-ratification of the State by the Statute of the Court rightly and symbolically, the organization of the African Union has denied its delivery "(...) This interpretation is flawed in three respects. Firstly, as mentioned earlier, this interpretation violates a separate principle of law of treaties, which is that treaties cannot bind third parties (...). The second problem is that reading down (...) article 27(2) in the case of al-Bashir does not make it redundant. Article 27(2) is only inoperative in that specific and narrow class of cases where two criteria are met: a non-State Party has not voluntarily accepted the jurisdiction of the Court and persons clothed with personal immunity are indicted (...). Article 98(1) precludes the Court from requesting States to arrest persons if that request would violate other international obligations owed by those States, such as obligations to respect immunities (...)". The ICC, confident and in good faith for the punishment of serious crimes, sincerely hoped for full judicial cooperation with the African Union Assembly which in 2009 precisely denied cooperation with the ICC and as a result the arrest against al-Bashir. On the one hand, the issue of personal immunity is not a matter of legal action, but only of extrajudicial and political discussion by the ICC, since the protection of the independence of a state body and especially a president may not necessarily have relations with other States and more with an international Tribunal that has always been seen with suspicion and criticized for its non-impartiality for the punishment of serious crimes. On the other hand, it is not the responsibility of ICC to force, rectius speaking force majeure a warrant of arrest implying the full cooperation of other States, whether or not part of the Statute of ICC. In practice, the Organization for African Union declared "content" and interested ("no charges shall be commenced or continued before any international court or tribunal against any serving AU Head of State or government (...)") for investigations against Kenyan President U. Kenyatta and his deputy W. Ruto and proudly spoke about the transformation of the current Court of the Organization of the African Union into a new African Court for Human Rights and Peoples. The extension of the African Court's powers is certainly paving the way for the punishment of international crimes, but it also leaves broad margins of interpretation regarding the impartiality of justice and in this case the guarantee of punishment for international protection crimes. Also see the ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges against Mr. Uhuru Muigai Kenyatta, ICC, 5 December 2014, she explained as follows: "(...) the Prosecution submitted its revised 8 April 2014 request to the government of Kenya, the material the government sent us simply did not respond to a significant portion of our revised request for Records. In short, most of the material sought in my revised request was not provided. This is despite the fact that the ICC judges clearly confirmed that my revised request was valid, and dismissed all of the government's objections to it. In this situation the most relevant documentary evidence regarding the post-election violence could only be found in Kenya. Yet, despite assurances of its willingness to cooperate with the Court, the government of Kenya failed to follow through on those assurances (...)". See in argument: Kiyani, 2013, pg. 467ss. Murungu and Biegon, 2011. Papillon, 2010, pg. 279ss. Van Der Vyver, 2011, pg. 691ss. Needham, 2011, pg. 234ss. Terzian, 2011, pg. 299ss. Van Der Vyver, 2015, pg. 559ss. Imoedemhe, 2015, pg. 88ss. Chinedu Olugbuo, 2014, pg. 355ss. Werle and Fernandez, 2014. Steinberg, 2016. DeGuzman, 2012, pg. 265ss. Olugbuo, 2014, pg. 371ss. Tladi, 2015, pg. 15ss. Uerpmann-Wittzack, 2016, pg. 70ss.

60. In the ad hoc tribunals scheduled and entered into the Prosecutor's jurisdiction instead in the International Criminal Court decided by the same Court.

61. In the case of arrest warrant of 13 June 2015 of S. Mudacamura (ICCC-01/04- 01/12-1-Red) the Court is based on art. 58 of the Statute and in the arrest of 24 August 2014 of B. Ntasganda (ICC-01/04-02/06-2-t) in art. 61.

62. See, Prosecutor v. Mucic et al. (Case No. IT-96-21-A), ICTY A. Ch., Appeals Judgment, 20 February 2001, para. 763; Prosecutor v. Bralo (Case No. IT-95-17), ICTY T. Ch., Trial Judgment, 7 December 2005, para. 27; Prosecutor v. Brđanin (Case No. IT-99-36), ICTY T. Ch., Trial Judgment, 1 September 2004, para. 1096; Prosecutor v. Kunarac, Kovač and Vuković (Case No. (Prosecutor v. Lubanga, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para. 33); Prosecutor v. Mucic et al. (Case No. IT-96-21-A), ICTY A. Ch., Appeals Judgment, 20 February 2001, para. 763; Prosecutor v. Bralo (Case No. IT-95-17), ICTY T. Ch., Trial Judgment, 7 December 2005, para. 27; Prosecutor v. Brđanin (Case No. IT-99-36), ICTY T. Ch., Trial Judgment, 1 September 2004, para. 1096; Prosecutor v. Kunarac, Kovač and Vuković (Case No. IT-96-23&23/1), ICTY T. Ch., Trial Judgment, 22 February 2001, para. 847).

contained therein may be taken by the Court to ensure the physical and psychological security and well-being of the victims[63] of potential witnesses and their family members, and consequently States will have to followed these measures in dealing with the above information in the execution of the requests themselves. (Bachvarova, 2017. Fedorova, 2012. Foroughi and Dastan, 2017. Nicholson, 2018. Liakopoulos, 2018)

Art. 100 disciplines a practical aspect of cooperation, the one relating to the allocation of the burden of payment of the related costs. The Statute seems not to have detached itself from the traditional rules laid down by the judicial cooperation treaties.

Equally important is art. 96 that regulates the content of the requests for legal assistance referred to in art. 93, establishing, first of all, that they must be written. The Statute resumes with the necessary adjustments when it normally prescribes non-binding Mutual Assistance Treaties and, in particular, the Model Treaty on Mutual Assistance in Criminal Matters approved by the United Nations with the Resolution n. 45/117 of 14 December 1990 (UN doc. A/RES/45/117); the Inter-American Convention on Mutual Assistance in Criminal Matters of 23 May 1992; the Model Treaty of Extradition, the Model Treaty on the Transfer of Proceedings or Criminal Matters, the Model Agreement on the Transfer of Supervision of Offenders conditional sentences or conditionally released on December 14, 1990.

Art. 99 regulates how to execute assistance requests. It must be a request for assistance in conducting those investigative activities that are required to ensure "successful execution", a provision that has been formulated considering that the Prosecutor's direct activity is a sort of extrema ration in the investigation. Moreover, Regulation n.108 of the Regulations of the Court (RoC) provides that the commencement of the proceedings does not suspend the effectiveness of the request, unless such decision is taken by the Charter. The scheme is that of the international standard of international rogatory, according to which the request for assistance is carried out by the national authorities of the state required in accordance with the principle of territorial sovereignty. Primarily important is the one defined as *locus regit actum* considered a recognized principle because of its use in the conventional system that has to be observed. (Dubler Sc and Kalyk, 2018).

International law has sought over time to evolve towards the assumption of typical procedural forms seeking to secure the rights of defense, which can not be sacrificed for the sole reason that the probative acquisition takes place in a foreigner state rather than in the territory of the previous state. In fact, it is a request for execution of certain activities carried out by a foreign judicial authority, the transfer of the court judges of the place of the proceedings is a form of cooperation which is distinct from the "traditional" rogatory.

A first limitation is that of double criminality which constitutes an optional refusal reason which leaves the requested state the possibility in the concrete case of refusing to execute the requested activity; and a second limit is that of discrimination when the conduct or the outcome of the trial may be conditioned by considerations

Prosecutor v. Blaškić (Case No. IT-95-14), ICTY A. Ch., Appeals Judgment, 29 July 2004, para. 697; Prosecutor v. Blagojević and Jokić (Case No. IT-02-60) ICTY T. Ch., Trial Judgment, 17 January 2005, para. 850; Prosecutor v. Babić (Case No. IT-03-72), ICTY A. Ch., Appeals Judgment, 18 July 2005, para. 43; Prosecutor v. Lubanga, ICC T. Ch., Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012; Prosecutor v. Katanga, ICC T. Ch., Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07-3484, 23 May, 2014, para. 35; Prosecutor v. Lubanga, ICC A. Ch, Judgment, ICC-01/04-01/06-3121-Red, 1 December 2014). Prosecutor v. Blagojević and Jokić (Case No. IT-02-60), ICTY T. Ch., Trial Judgment, 7 January 2005, paras. 858–860; Prosecutor v. Plavšić (Case No. IT-00- 39&40/1), ICTY T. Ch., Sentencing Judgment, 27 February 2003, paras. 85–94 and 110; Prosecutor v. Krstić (Case No. IT-98-33-T), ICTY T. Ch., Trial Judgment, 2 August 2001, para. 700). See, D'Ascoli, 2011. Kurth, 2013, pg. 432ss. Fehr, 2017.

63. See: Rules of Procedure and Evidence, ICC-ASP/1/3. Rule 16(4) of the rules of procedure and evidence provides as follows: "(...) agreements on relocation and provision of support services on the territory of a state of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential (...)".

relating to race, religion, sex, nationality, language[64], public opinion or personal or social conditions. Collection of evidence before the national authorities must comply with the rules for their admissibility before the Court referred to in art. 69 (proofs). (Prosecutor v. Ruto et al., ICC T. Ch., Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, ICC-01/09- 01/11-1274-Corr2, 17 April 2014, paras. 100 and 193; Prosecutor v. Katanga and Chui, ICC T. Ch.; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, paras. 107-113) Evidence entirety of Document DRC-OTP-1017-0572, 25 May 2011, para. 1; Prosecutor v. Katanga and Ngudjolo (Case No. ICC-01/04–01/07), ICC T. Ch. II, Decision on the Bar Table Motion of the Defense of Germain Katanga, 21 October 2011, para. 16; Prosecutor v. Katanga and Ngudjolo, ICC T. Ch., Decision on the Bar Table Motion of the defense of Germain Katanga, 21 October 2011, paras. 16–19; Prosecutor v. Jean-Pierre Bemba Gombo, ICC A. Ch., Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled: "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, paras. 2–3, 45 and 70; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, 30 September 2008, para. 78).

The only limit of the Statute is the only hypothesis of prohibited procedures: "not compliant or compatible" according to the Statute[65], which may affect the "power" of refusing to collaborate in collecting evidence from the state that according to the Court has committed an international crime. (Mcdermott, 2016)

It is not sufficient, therefore, that the state asserts that the requested procedure is only for national proceedings or that there is a contrary procedural practice. There must be an express ban on law. Among the particular enforcement procedures, the same art. 99 provides that the Court may request the presence or participation in the execution of the request of certain persons. This applies in particular to the presence of the Prosecutor in the execution of the act, whose role may be made more or less active in the acquisition of investigative acts. The Prosecutor may request to examine the witnesses directly or to be present at a search.

An additional way of execution is indicated in art. 55 where it is established that the person investigated before being questioned by national authorities[66] in the execution

64. According to art. 50 of the Court's the working languages are the English and French by defining official languages in which the Court's judgments and other decisions must be translated into the fundamental questions listed in rule 140 of the Court's rules of procedure. Article 67 of the Statute provides for the accused the right to be assisted free of charge by a competent interpreter and to benefit from the translations required to meet and the requirements of fairness/equilibrium if he is incapable of comprehending and speaking perfectly the language used in the proceedings or in documents submitted to the Court. See, Osasona, 2014. Mycntryke, 2003, pg. 270ss. Shahabudden, 2012.

65. Or at pre-established evidence in relation to the dispute that is not obtained illegally and violates internationally recognized status or human rights. The inadmissibility of a trial may also result from the violation of one of the rules of procedure which compromises the unreliability of the evidence and the antithesis and bad administration of the proceedings. Of course, the damage to the procedure allows wide margin of discretion, such as the taking of statements extorted by violence or threats or torture. It is the task of the Prosecutor and the Chamber to verify whether a breach of a trial substantially and typically affects its reliability, but also on the conduct of the trial. A limit of this road is included in art. 69 of the Statute governing the relevance and eligibility of evidence collection from a state to be determined in accordance with the application of national law.

66. According to our opinion art. 55 disciplines systematically the rights recognized to persons during an investigation by referring to persons during investigations and is divided into two parts. The first lists the rights recognized to anyone involved in investigations and during the investigation the person should not be forced to accuse himself or confess his guilt; should not be subjected to any form of coercion, physical construction or threat to torture or other forms of cruel, inhuman or degrading treatment or punishment. If interrogated in a language other than the one that he understands and speaks, he is entitled to the free assistance of an interpreter and all translations necessary to meet the requirements of fairness, he must not be arbitrarily subjected to arrest or detention and should not be deprived of personal liberty except on the basis of the reasons and in accordance with the procedures established by the Statute. These rights are recognized to a person no longer involved in the investigations according to par. 2 of the same article quoted in the investigations and any title but on the basis of which there have emerged elements to suggest that he has committed a crime of jurisdiction of the Court and when it is in the process of being questioned by the Prosecutor or the national authorities. In ICC, the interrogation follows the arrest or the voluntary appearance of the suspect in accordance with a summons but the provision of art. 55 may apply theoretically to other situations prior to the issuance of a precautionary measure. It seems that it is born and can be exercised not only in the limelight of the interrogation in vinculis but also when it is about to proceed to the same act against a free person receiving the notification of a warrant or appearing voluntarily to the Court. See: Harris, 1967, pg. 358ss. It should be noted that Rule 117 (2) of the International Criminal Court states that at any time after the arrest the person subject to the restriction of personal freedom may apply to the Pre-Trial Chamber for the appointment of a defender to be assisted in proceedings before to the Court by requiring the Pre-Trial Chamber to decide on that application. See, Regan and others, 1999. Hall, 1999, pg. 735ss. In fact, there are no coded forms for the taking of evidence or guarantees of the contradictory certain and claimed by the defense. According to the first paragraph, lett. a) of art. 56 the Prosecutor must notify the competent College that at the request of the public Prosecutor itself may take the necessary measures to ensure the effectiveness and integrity of the proceedings and to protect the rights of the defense. The measures listed in this articulation mentioned above are not exhaustive, but it is of no value because it provides that the Pre-Trial Chamber may authorize a defender to participate in the conduct of probationary proceedings not only when the right to the assistance of the defendant is already explicitly acknowledged but also at a time prior to the one identified by the latter or when they have not yet arisen in relation to a specific subject reason to believe that he has committed a criminal offense falling within the jurisdiction of the Court and according to the first case-law

of a request for cooperation, the rights listed must be informed in order to guarantee the accused a minimum standard of guarantees. (Young, 2011. Youngsok, 2010. Zgonec-Rozej, 2010). As far as concerns the requests made by State Parties to the Court, the procedural provisions stipulate that they will be carried out to the possible extent, in accordance with the procedures set out by the requesting state. Art. 99 provides that if the Court requests the urgent transmission of the requested documents or evidence, they will be sent by the State in due course. Par. 5 of art. 99 also refers to the provisions contained in art. 72 on the protection of national security information: when hearing or interrogating a person (Liakopoulos, 2018), the latter may also oppose the obligation of the requested state to enforce the assistance request in order to prevent the disclosure of confidential information for defense or national security. In this spirit, a general limitation to the execution of the rigor is the fact that the taking of evidence may undermine the sovereignty, public order, security or other essential interests of the State.

According to par. 1 of art. 99 the Prosecutor has the right to ask to participate actively in the collection of evidence; par. 4 of the same provision allows him to execute the application directly on the territory of the State Party concerned under the general laid down by art. 54, par. 2 to conduct on-site investigations.(Schüller, 2013, pg. 227ss). The scheme in this case is also traditional rogatory on international level. The Statute has adopted a compromise solution to break the hypothesis now contemplated by art. 57, par. 3, lett. c) the one falling within the scope of cooperation governed by title 9 of the Statute. (Banda and Jerbo ICC-02/05-03/09-170, Trial Chamber IV, 1 July 2011, Decision on "Defense Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union", par. 14; Banda and Jerbo ICC-02/05-03/09-169, Trial Chamber IV, 1 July 2011, Decision on "defense Application pursuant to articles 57(3)(b) & 64(6) (a) of the Statute for an order for the preparation and transmission of a cooperation request to the government of the Republic of the Sudan", par. 17).

It was considered the most extreme scenario, or that of the State Party in which investigative acts are to be carried out, which is manifestly impossible because of the unavailability of all authorities or all the components of its judicial system competent to enforce to the requests for cooperation provided for in title 9. (Sluitter, 2018). In such a case, the Prosecutor may address the preliminary chamber to obtain authorization to conduct specific investigative measures within the territory of that state by bringing requests for cooperation to be carried out in some other States other than non judicial authorities. In that case, the preliminary chamber must ascertain in order to grant such authorization. These elements must be based on evidence of a certain non existence, as evidenced by the use of the term clery.

The preliminary chamber after receiving the written request[67] the Prosecutor should inform the state concerned by asking its opinion on the matter to be taken into account in the adoption of its final decisions which do not also exclude the possibility of non acceptance with precise and valid reasons from the part of the state in which it is requested to cooperate immediately. (Liakopoulos, 2018).

Acts to be carried out on site must not involve the use of coercion measures for which an order or authorization of the judicial authority is therefore required. The

you have not already known the transition from situation to case.

67. As provided for the Rule 89 of ICC for the ICTY concerning the right to question or question witnesses at their own discretion, allowing the Chambers of the Tribunals ad hoc to collect the admissions of items unilaterally brought by the parties out of Court proceeding inclusion of acts in the investigative sense in the case of the elements to be used for judgment. The judge may put into effect the weighted claim of the recalled provision by verifying whether the trial of a trial relevant and of probative value is compatible with the need to celebrate a fair trial.

rule distinguishes among them in particular the collection of spontaneous declarations or evidence provided voluntarily even without the presence of the authorities of the requested state if that is decisive for the effective execution of the request and the inspection of a site or other public place provided that no modifications are made (Liakopoulos, 2018). Spontaneous declarations are considered usable as information *de quibus* even during the preliminary investigations undertaken in the respect of fundamental rights as provided for in international and national law and have end processing effect and may also be used in non filing proceedings in the same way as spontaneous information, which essentially represents a specification and can therefore be based on the application of a coercive measure.

The execution procedures of Prosecutor's on-site investigations under Title 9 of the Statute are diversified depending on whether or not the state in whose territory the crime was committed. In the case of investigations in the territorial of a State, art. 99, par. 4, lett. c) provides for the on the spot investigation of the existence of a decision on the admissibility of art. 18 (preliminary ruling on procedural matters)[68]or art. 19 (pre litigation questions on the jurisdiction of the Court and the procedural nature of the case); in the case of in situ investigations there are however some limitations. (Prosecutor v. Gaddafi and Senussi (Case No. ICC-01/11-01/11-547-red), ICC AC, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, para. 165; Prosecutor v. Ruto et al., ICC-01/09-01/11-307, AC, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", 30 August 2011, para. 2; Prosecutor v. Gaddafi et al., ICC- 01/11-01/11-344-Red, PTC, 'Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', 31 May 2013, para. 52; Prosecutor v. Mbarushimana, Prosecution's Application under article 58, ICC-01/04-01/10-11-red OTP, 20 August 2010, para. 163; Prosecutor v. Mbarushimana, ICC PT. Ch. I, Decision on the Prosecutor's Application for an Arrest Warrant against (Prosecutor v. Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307, para. 39. Calixte Mbarushimana, ICC-01/04-01/10-1, 28 September 2010, para. 6; Prosecutor v. Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307, para. 39; Prosecutor v. Ruto, ICC A. Ch., Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, ICC-01/09-01/11-307, 30 August 2011, para. 1; Prosecutor v. Lubanga, ICC T. Ch., Decision on two requests for leave to appeal the "Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application, ICC-01/04-01/06-2779, 4 August 2011, para. 11).

The purpose of these measures must be to ensure the effectiveness and integrity of the proceedings and to guarantee the rights of the defense. (Solum, 2004, pg. 181ss)[69].

The wording used: "(...) taking such other action may be necessary (...)", provides that the measures to be adopted must be of the same nature as those already enumerated in the same provision. Moreover, ad hoc tribunals, in the same sector, have made use of another provision that detects another mode of "on site investigations"[70]. This is

68. See, Prosecutor v. Gaddafi and Senussi (Case No. ICC-01/11-01/11-547-red), ICC AC, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, para. 165; Prosecutor v. Ruto et al., ICC-01/09-01/11-307, AC, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", 30 August 2011, para. 2; Prosecutor v. Gaddafi et al., ICC- 01/11-01/11-344-Red, PTC, 'Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', 31 May 2013, para. 52; Prosecutor v. Mbarushimana, Prosecution's Application under article 58, ICC-01/04-01/10-11-red OTP, 20 August 2010, para. 163; Prosecutor v. Mbarushimana, ICC PT. Ch. I, Decision on the Prosecutor's Application for an Arrest Warrant against (Prosecutor v. Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307, para. 39. Calixte Mbarushimana, ICC-01/04-01/10-1, 28 September 2010, para. 6; Prosecutor v. Ruto, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307, para. 39; Prosecutor v. Ruto, ICC A. Ch., Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, ICC-01/09-01/11-307, 30 August 2011, para. 1; Prosecutor v. Lubanga, ICC T. Ch., Decision on two requests for leave to appeal the "Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application, ICC-01/04-01/06-2779, 4 August 2011, para. 11).

69. The author states that: "(...) accurate results are not enough as justice has a price, and there is a point at which that price is not worth paying (...). Another problem surrounding the notion of accuracy is its ambiguous nature: does it promote case accuracy, a correct result in a particular case (an ex post perspective) or systemic accuracy, a correct result in all the future cases (an ex ante perspective) (...) Sometimes, the two do not always go hand in hand. In dismissing accuracy as the sole foundation for a theory of procedural justice (...) because perfection (in the sense of perfect accurate results) is an ideal at best (...) a fair procedure must, at a minimum, strike a fair or reasonable balance between the benefits of accurate outcomes and the costs imposed by the system of procedures (...)".

70. According to M. Bergsmo and V. Tochilovsky for the role of Prosecutor: "(...) we therefore take this opportunity to identify what have come to our attention as possible key issues for early work in this area: respective roles of the Registry, Chambers and Prosecutor's role pursuant to Part 9 of the ICC Statute; composition of the international co-operation unit within OTP; preparation of models agreements, including those under article 54(3)(d) and agreements with the UN related to the Prosecution's co-operation with deployed peacekeeping forces; requests by a state to the Court; Guidelines on co-operation with

the Rule 4 RPE of the ICTY, under which "(...) a chamber may exercise its functions in a place other that the seat of the Tribunal, if so authorized by the President (...). (Sluitter and others, 2013)".

An arrangement that seems to solve the problem of the lack of a rule that allows court judges to proceed to the "on site visits", which have as their sole purpose the collection of elements to discover the truth. In the case of *Kupreskić* and others (IT-95-16-T) of 14 January 2000, in accordance with Rule 4, for the purpose of conducting an on the spot check, the judges of the First Chamber of the Court of First Instance of the ICTY[71] asked and obtained the permission of the President of the Tribunal to go to various villages to investigate. (Ford, 2017, pg. 5ss)[72]. The purpose of the mission in this case was to corroborate the evidence presented by the Prosecutor and the defense in the case; it has in all respects been a form of on site investigation. Such an experience could not, however, appear in ICC, in spite of art. 3, par. 3 of the Statute, provides that: "(...) the Court may meet in any other place, in accordance with the rules of this Statute (...)." (Strijards, 1999, pg. 77–88)

The provision appears to be designed to allow the activities to take place in a place other than the one established and not to regulate a form of in-situ investigation. The Prosecutor will conduct the most extensive consultations with the Court. With regard to this last condition, it should be pointed out that it may be difficult for the Prosecutor to initiate consultations especially when the state is not in a non operational, non cooperative[73], cooperation with ICC[74]. The statutory provision stipulates that the Prosecutor will in any case be required to consider any reasonable conditions or concerns that the state may have advanced during the consultations. According to art. 93 and whether it must be assessed by the state concerned in the light of the ordinary provisions of title 9. The conditions and the procedure laid down in Rule 194

intergovernmental Organizations; approaches to issues of immunity and confidentiality; interaction with the Assembly of States Parties and determination of respective roles with respect to provision of technical assistance on implementing legislation, non-co- operation, and other issues; arrest strategies that respond to non-co-operation from requested States (...)". See, Bergsmo and Tochilovsky, 2017, pg. 743ss.

71. In the same spirit see the case: Kordić e Čerkez (IT-95-14/2) judges of the Tribunal for Former Yugoslavia have authorized the Prosecutor to carry out, within certain public buildings in Bosnia, all activities aimed at: "(...) investigate, search for, collect and seize at or about the Locations any and all of the documents, information and evidence listed on Attachment I (...)". See, Combs, 2010.

72. According to the author: "(...) the typical ICC investigation involves crimes that are: (1) massive in scale, involving large numbers of crime sites, long time periods, and large numbers of victims; (2) terrible in nature, involving the most serious forms of victimization like murder and rape; (3) carried out in a horrific manner, almost always including the systematic and widespread brutalization of the civilian population by organized groups acting with a discriminatory motive and often also including acts of exceptional cruelty; and (4) have an enormous impact on the victims and their societies, resulting in the death or serious injury of thousands of people, often causing widespread destruction, and forcing hundreds of thousands of people to flee the violence. Thus, applying the OTP's definition of gravity (...) the crimes the ICC investigates are extremely grave. As a result, one would also expect them to require significant resources to successfully investigate (...)".

73. The Prosecutor Louise Arbour of the ICTY has declared that: "(...) the main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution. Domestically, the general assumption is that enforcement is universal, i.e. that all crimes beyond the de minimis range will be prosecuted, subject to the determination by the Prosecutor that a charge is appropriate based on a preliminary examination of the facts of the case. In the international context, (...), the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones (...) the problem is not so much the principle of equality of arms interpreted according to the principle of proportionality, but the basis of establishment of the courts, that is, the jurisdiction of the Appeals Chamber, returning to the case: Prlić and others, affirming that "(...) the principle of equality of arms, falling within the fair trial guarantee under the Statute, applies to the Prosecution as well as the Defense (...)". See also in argument: Prosecutor v. Kordić and Čerkez, No. IT-65-14/2-A, Judgment of 17 December 2004 at paras 175-76; Prosecutor v. Milutinović et al, No. IT-99-37- AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds of 13 November 2003, para. 23; Tadić Appeal Judgment (n 52) parr. 48 and 50 (discussing human rights principles from the jurisprudence of the European Court of Human Rights and by the Human Rights Committee); Prosecutor v. Perišić, No. IT- 04-81-PT, Decision on Motion to Appoint Amicus Curiae to Investigate Equality of Arms of 18 June 2007, par. 9; Prosecutor v. Kayishema and Ruzindana, No.ICTR- 95-1-T, Judgment of 21 May 1999, par. 60; Prosecutor v. Kayishema and Ruzindana, No.ICTR-95-1-T, Order on the Motion by the defense Counsel for Application of article 20(2) and (4)(b) of the Statute of the International Criminal Tribunal for Rwanda of 5 May 1997, par. 3; Prosecutor v. Kayishema & Ruzindana, No. ICTR-95-1-A, Judgment of 1st June 2001, parr. 63-71. See, Groulx, 2010, pg. 21ss. Chernor Jalloh and Dibella, 2013. Caban, 2011, pg. 200ss. Opinion confirmed in the case: Kupreskić (ICTY, Prosecutor v. Kupreskić et al., (IT-95-16-T, TC, Decision on Communications Between the Parties And Their Witnesses of 21 September 1998). According to the case Kupresckić and others we can say that the expressions used by the Court of First Instance are interpreted as an obiter that does not entirely reflect the responsibility of the Prosecutor and the rules of the courts. Certainly the difficulties that exist from the point of view of time by means of a warrant, the charge and the first hearing are also noteworthy in the Tadić case, which lasted about 340 days until the Hague, so that part of the doctrine at the time it argued that the arrest warrant should be regulated first by national law for reasons of convenience and after the procedure has been followed by ad hoc criminal Tribunals. In case: Milošević (Prosecutor v. Milošević, Reasons for Decision on Assignment of Defense Counsel, Case No. IT-02-54-T of 22 September 2004), The Trial Chamber refers to art. 21(4) of the Statute and states that: "(...) within the principle that the accused must have a fair trial, which is itself set out in article 21(2) of the Statute. The concept of fairness not only includes these specific rights but also has a much wider ambit, requiring that in all aspects the conduct of the trial must be fair to the accused. Hence, the specific rights are described as "minimum guarantees" (...) fairness is thus the overarching requirement of criminal proceedings (...)". Positions which is confirmed in the case: Norman (Prosecutor v. Norman, Decision on the Application of Samuel Hinga Norman for Self Representation under article 17(4)(d) of the Statute of the Special Court, Case No. SCSL-2004-14-T of 8 June 2004. According to the writer's view, this doctrinal statement can create wrong problems and interpretations, leaving a wide gap of space and questioning the founding of these international criminal Tribunals, as well as the whole international Court system, the role of Prosecutor in a hybrid inquisition and accusatory system that will not make use of elements in favor of the accused therefore lack of fair trial at this stage at the first instance stage and then the same ad hoc Tribunals through Rule 66 in a rigorous and explanatory manner with regard to coordination of the Prosecutor's Investigations argue that: "(...) to be relieved from an obligation (...)

RPE do not make it easy to accept any requests from the State. (Liakopoulos, 2018). In the silence of the implementing provisions, it is presumed that the Prosecutor sends a notice to the state concerned indicating his intention to initiate direct investigations in his territory and, where appropriate, fixing a time line for the expired consultations which may proceed further.

The subject of the request may be of a different kind, as the provision uses the expression "cooperate with" also "provide assistance to": it is not a strengthening tautology but of cooperation in investigative and character assistance wider for the purpose of establishing and conducting criminal proceedings. The entire institute of "reverse cooperation" seems to be primarily aimed at satisfying needs of a purely probative character: in fact, although with an exemplifying wording ("inter alia"), the provision in question leads to the delivery of declarations, documents or other types of evidence obtained by the Court. Given the peculiarities of such investigations, it is considered that the discipline of the formalities provided for in art. 96 for assistance requests.

The Prosecutor can evaluate-depending on the case- in order to prevent the state concerned in the near future refusing to cooperate with the state to be aware of every detail concerning the subject of inquires carried out in its territory. In carrying out on

to disclose information (...) may prejudice further or ongoing investigations (...)" continuing with Rule 68 asking the Prosecutor: "(...) to disclose to the Defense any material which (...) may suggest the innocence or mitigate the guilt of the accused (...)" implying that there is no strict prerequisite that the test should increase analogously the objective probability of innocence. The Prosecutor's responsibility is evidence of how to "exculpatory/discharge" and consequently subject to disclosure as a warrant for the accused's rights by the Prosecutor. See Prosecutor v. Kordić and Čerkez, IT-95-14/2, Decision on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68 of 26 February 1999, pp. 3ss. The Chamber of First grade has specified that: "(...) brief of argument and statements of facts as well as orders issued freely by the accused himself in the course of his duties, cannot be considered to be prior statements pursuant to Sub-rule 66(A) of the Rules (...)",as the Prosecutor has also confirmed in the case Blaškić, see Prosecutor v. Blaškić, IT-95-14, Decision on the Defense Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66(A) of the rules and the Decision of 27 January 1997, Compelling the Production of All Statements of the Accused, 15 July 1998 (...) they constitute documents covered by Rule 66 (B)" and therefore they can be inspected by the Defense upon request but there is no obligation on the Prosecution to disclose them within the thirty days envisaged in Rule 66(A) (i).73 (...)". In case Krstić (ICTY, Prosecutor v. Krstić, IT-98-33-A, AC, Judgment of 19 April 2004), the Tribunal returned in the argument of fair trial has declared that: "(...) The disclosure of Rule 68 material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached (...)"; as in case Bagosora et al., the Trial Chamber it was based on the case Kristić advancing the opinion that: "(...) the obligation to disclose exculpatory material was fundamental to the fairness of proceedings before the Tribunal (...)"; and repeated the same position in the case: Karemera and others. In that case the judges of the Hague they went on: "(...) the importance of the disclosure of exculpatory information to the fairness of the trial was highlighted, in particular, since any non- disclosure on un-enumerated grounds would be contrary to the interests of justice (...)". In case Karadžić, the Trial Chamber: "(...) has acknowledged a number of disclosure violations committed by the prosecution in the case (...)". In the same spirit the ICTR: "(...) the Prosecution of the fundamental importance of its positive and continuous obligation to disclose exculpatory material under Rule 68 of the Rules (...) but declined to grant financial compensation to the acquitted men (...)"; Prosecutor v. Krnojelac, IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68 of 1st November 1999, para. 11. in the ultimate case the Prosecutor has declared that: "(...) was ordered to file a signed report by a member of its trial team certifying among other things that a full research had been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence (...)". In case Haradinaj and Furundžija the Chamber of appeal has noted that the disclosure is: "(...) close to negligence (...)" from the time that the Prosecutor does not continue to investigate all the elements in his hands but only on some. See also the case: Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision on Defense Disclosure and Related Issues of 24 February 2012, para. 17. The Trial Chamber has declared that the defense may allow the Prosecutor to continue to investigate: "(...) all the material in its possession or control which it intends to use at trial no less than two weeks prior to the scheduled commencement of the defense case (...)". Of the same spirit is also the case Bemba: Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision on Defense Disclosure and Related Issues of 24 February 2012, para. 21(a). In this case the Trial Chamber considered that the scenarios very complicated and that "(...) in exceptional circumstances the need to use a specific item may arise after the two week deadline. The Trial Chamber stated that in that case the defense may still disclose or permit the inspection of the item in question provided that (i) it takes place no later than seven days before its intended use; (ii) the defense explains through a written submission the reasons why the item was disclosed later than the deadline and why it believes it should be allowed to use it; and (iii) after hearing the Prosecutor the Chamber agrees that the Defense should be allowed to use that particular item (...)". In case: Bagosora, the Trial Chamber declared that: "(...) the prosecution had failed to fulfill its disclosure obligations, and exhorted (...) the Prosecution to be more cooperative with the defense Counsel in general, and with respect to disclosure in particular (...)". According to Gibson e Lussiaa-Berdou "(...) while the Chambers of (the ad hoc) Tribunals regularly recall the importance of disclosure as a fundamental component of fair trials, even repeated violations of disclosure obligations by the prosecution fail to elicit sanctions, and the remedy for late or non-disclosure is regularly limited to postponement of the testimony or cross-examination of the relevant witness, rather than the more stringent remedies of exclusion of evidence, dismissal of charges which rely on the evidence, or a stay of proceedings (...)". See, Langer, 2014, pg. 895ss. Kuczyńska, 2015. Schuh, 2010. Tochilovsky, 2008. Equally important on the disclosure issue is the case: Krajišnik and Plavšić, ICTY, Prosecutor v. Krajišnik and Plavšić, Decision on Prosecution Motion for Clarification in Respect of Application of Rules 65, 66(B) and 67(C), T. Ch., IT-00-39 & IT-00-40/1 of 1stAugust 2001, where the Tribunal's Chamber stated that: "(...) to resolve conflicting interpretations of that Rule (...). The prosecution argued, referring to the finding in the Krstić Pre-Trial Conference (...) that Rule 65ter(E)(iii) did not oblige it to disclose the exhibits listed as such. Because this Rule is purely procedural, the prosecution was only willing to disclose the exhibits if it was triggered by a reciprocal disclosure so as to increase the efficiency of proceedings, protect equality of arms and protect the integrity of documentary evidence (...)". Instead in case: Krajišnik and Plavšić it was affirmed that: "(...) to allow a narrow interpretation of the Rules (would be) to override elementary notions of a fair trial, i.e. that the accused, without incurring the obligation of disclosure, should know the case he or she has to meet and should be given adequate opportunity to prepare a Defense (...) the Appeals Chamber's reasoning seems unnecessary in this context. The Defense argued that the Prosecutor's disclosure tactics had led to unfairness, which it did not substantiate in the end (...)". Instead in case Lubanga: "(...) The Lubanga Trial Chamber considered that the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, inter alia, any item that is relevant to the preparation of the defense, and including not only material that may undermine the prosecution case or support a line of argument of the defense but also anything substantive that is relevant, in a more general sense, to defense preparation. This means that the prosecution is to communicate to the defense any material in its possession that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case (...)". In the same case Lubanga stated that: "(...) exculpatory material may be included in the springboard or lead evidence, in the limited circumstances in which this provision should be used, it is likely that a mechanism can be established which facilitates all necessary disclosure; for instance, the prosecution may need to make arrangements with the information provider for disclosure of such parts of the article 54(3)(e) material as will enable it to provide any potentially exculpatory evidence to the accused (...)": Lubanga case, Appeals Chamber: Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled Decision on the consequences of non-disclosure of exculpatory materials covered by article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 of 21 October 2008, par. 44. The judge of Lubanga case states: "(...) that inter partes disclosure should be distinguished from the Rule 121(2)(c) communication of disclosure to the Pre-Trial Chamber (...) disclosure through the Registrar would not be fully consistent with the legal framework of the ICC or the nature of the

the spot investigations, the Prosecutor must in any case comply with the formalities required by the Statute if he intends to use trial evidence[75] for example, when taking a testimony must allow the defender's presence and respect the procedural rules. (Roben, 2003; Robinson, 2014).

Concluding remarks

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

The open debate on cooperation with EU Institutions, which will surely be an open and difficult challenge for the coming years, according to the writer's opinion regarding the dialogue between the Court of Justice of the European Union and international criminal courts, with other courts of international nature and on the other hand between international criminal courts and Constitutional courts. We would be con-

confirmation of charges hearing (...). Disclosure between the parties would be most effective and expeditious (...). The consistency of the disclosure process and the need to safeguard the Court's unique criminal procedure require that disclosure be carried out inter partes with regard to (i) the evidence that subsequently must be communicated to the Pre-Trial Chamber by filing it in the record of the case, that is the evidence on which the parties intend to rely at the confirmation hearing; and (ii) the other materials that the Prosecution must disclose to the defense before the confirmation hearing but that neither party intends to present at that hearing (...)". In case: Bemba, ICC, Prosecutor v. Bemba, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55 of 31 July 2008, par. 67. The Chamber of first grade stated that: "(...) the most important factor in both safeguarding the rights of the defense and enabling the Chamber to exercise its function is not for Prosecutor to disclose the greatest volume of evidence, but to disclose the evidence which is of true relevance to the case, whether that evidence be incriminating or exculpatory. In fact, disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defense in a position where it cannot genuinely exercise its rights, and serves to hold back the proceedings (...)". In the same case the Chamber of first trial has declared that: "(...) the minimum guarantees must be generously interpreted, so as to ensure the defense is placed insofar as possible on an equal footing with the prosecution, in order to protect fully the right of the accused to a fair trial (...). An assessment of the adequacy of the facilities for the defense will clearly be influenced by the extent of those at the disposal of the prosecution, since it will in general be necessary and desirable to rectify significant disparities. However, a fact-sensitive evaluation will be required whenever unfairness is alleged, since it will be impossible to create a situation of absolute equality of arms (...)". We must clarify that the hearing of confirmation of the accusations may mark the passage from the investigation phase to the trial and is celebrated in front of the Pre-Trial Chamber composed of the same judges who performed their duties assigned by the Statute and the Rules for all the length of investigations into the presence of the Prosecutor and the person to whom the charges and his defendant were made. Confirmation hearing is the last celebratory act without the defendant in the Court. The procedure can not go further by staying frozen until the same subject comes into the Court's availability material. Such freezing may take place even before the beginning of the hearing if the pre- trial Chamber does not consider it to allow it to be celebrated in the absence of the person to whom the charges have been made. See in argument: Zeegers, 2016. See also: ICTY, Prosecutor v. Milutinović et al., Decision Denying Prosecution's Request for Certification of Rule 73bis Issue for Appeal, IT-05-87-T of 30 August 2006, par. 1. the Pre-Trial Chamber is addressed in the way of fair trial and declared that: "(...) the use of the word fairness in the context of a criminal trial might commonly refer to fairness for an accused, the Prosecution undoubtedly is entitled to a fair opportunity to present its case. The Statute of the Tribunal obliges each Trial Chamber to ensure that a trial is fair and expeditious (...), with full respect for the rights of the accused, and does not provide that only an accused is entitled to be treated equitably (...)". See, Whiting, 2009, pg. 207ss. See also: the ICC Pre-Trial Chamber II considered ICTY, Prosecutor v. Milutinović et al. , Decision Denying Prosecution's Request for Certification of Rule 73 Bis Issue for Appeal, IT-05-87-T of 30 August 2006, par. 10. See also: Situation in Uganda, Decision on Prosecution's Application for Leave to Appeal dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006, ICC-02/04- 01/05-90-US-Exp of 11 July 2006, par. 24. the right of fair trial is considered under the next aspects: "(...) a general one, "applicable to various types of proceedings (civil, criminal and administrative) and (2) a specific one, related to the rights of the defense in criminal proceedings (...) although use of the word fairness in the context of a criminal trial might commonly refer to fairness for an accused, the prosecution undoubtedly is entitled to a fair opportunity to present its case. The Statute of the Tribunal obliges each Trial Chamber to ensure that a trial is fair and expeditious (...), with full respect for the rights of the accused, and does not provide that only an accused is entitled to be treated equitably (...)". See in argument: Mcntryke, 2003, pg. 270ss. Fedorova, 2012, pg. 165ss. Goldston, 2010, pg. 383ss. Liakopoulos, 2012.

74. For the cases of non collaboration with the ICC see the next cases: -Sudan and Darfur: Prosecutor v. Ahmed Harun and Ali Kushayb. Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan (ICC-02/05-01/07-57 of 25 May 2010); Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad (ICC-02/05-01/09-109 of 27 August 2010); Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti (ICC-02/05-01/09-129 of 12 May 2011); Decision pursuant to article 87(7) o jf the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-140 of 13 December 2011); Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (ICC-02/05-01/09-151 of 26 March 2013); Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (ICC-02/05-01709-195 of 9 April 2014); Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan (ICC-02/05-01/09-227 of 9 March 2015); Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (ICC-02/05- 01/09-266 and ICC-02/05-01/09-266 of 11 July 2016). The case: Prosecutor v. Abdel Raheem Muhammad Hussein. Decision on the Prosecutor's Request for a finding of non-compliance against the Republic of the Sudan (ISS-02/05-01/12-33 of 26 June 2015). The case: The Prosecutor v. Abdallah Banda Abakaer Nourain. Decision on the Prosecution's Request for a Finding of Non-Compliance (ICC-02/05-03/09-641 of 19 November 2015). -Kenya: Prosecutor v. Uhuru Muigai Kenyatta. Second decision on Prosecution's application for a finding of non-compliance under article 87(7) of the Statute (ICC-01/09-02/11-1037 of 19 September 2016). And for the situation in Libya see the case: Prosecutor v. Saif Al-Islam Gaddafi. Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council (ICC-01/11-01/11-577 of 10 December 2014). In all the above cases the languages used from the Court was based on the Security Council of UN and in judicial assistance: "(...) calls upon States Parties to continue their efforts to ensure that the Security Council addresses the communications received from the Court on non-cooperation pursuant to the Rome Statute, encourages the President of the Assembly and the Bureau to continue consulting with the Security Council and also encourages both the Assembly and the Security Council to strengthen their mutual engagement on this matter (...)" according the ICC-Assembly of States Parties (ICC- ASP/15/31 of 8 November 2016). Report of the bureau on non-cooperation.

75. See, in particular, Rules 129-130 of the International Criminal Court, which allow the Court hearing in matter of confirmation of accusations. This is a phase of difficult separation of sources with the risk that a more active judicial body in the assessment of the tact would not be correct to assert a similarity between the position of the Pre-Trial Chamber in the trial before the Court and that of the judge and debating in the biphasic model of Napoleonic mold. The Prosecutor is free to not produce any collected item, and it may well be that he chooses to use the premises in question to present evidence against the defendant and to exploit the result attributed to the International Community to proceedings filed in similar cases.

fronted with a conflict of rules and exception clauses which we believe is a conflict between principles that will be based on some fundamental rules that every democratic system includes in its legislation: the protection of human rights, the degree of satisfaction of justice (Donnelly, 2013), the reliability of international institutions, the satisfaction of the punishment of international crimes as a guarantee of a *super parties* system that collaborates through the system of judicial assistance and cooperation with all its strength in order not to leave unpunished a list of crimes that for decades people have suffered while waiting that the entire international Community through its international justice centers will make effective justice for the punishment of particular crimes and difficult the evaluation of evidence gathered in a globalized society which no longer requires assurance of certainty but the guarantee of balance for the organization, methods and means of an ever evolving international justice and at the same time as a guarantor of balance and greater protection of human rights. (Liakopoulos, 2018)

Among the aims of judicial cooperation proposed and established by ICC is that the collection of evidence and the guilt of a person charged with crimes under the Statute are part of the trial in a circumscribed field of evidence based on a collection difficult and often overcome by national and international laws. Facts in a process are never though and expressed in isolation but in its essential relation to a legal rule in our case at an international level and that we must observe it through the line of legal coordination between this *facti and quaestio iuris*. The inspirational culture of the principle of judicial assistance is based on the spirit of solidarity and a comfortable conservative practice that should be sensitized to think that the threshold of punishment for such serious crimes is really the last beach for a last act of justice against crimes that centuries have remained unpunished due to so many reasons. In any case, criminal justice cooperation at a supranational level seeks to enforce as much as possible a commitment of responsibility, impartiality and justice of international character. (Zongze, 2012).

The point is not who does believe in international criminal tribunals and/or what kind of justice can they guarantee for international community but the fact that the crimes punished in these courts have long convinced, even the most indifferent, of having some credibility even outside by setting certain boundaries that delimit test topics in the context of the instrumental necessity of everything regarding the imputation, the related issues of punishment and the possible determination of the punishment (Liakopoulos, 2014). For decades the punishment of such crimes is faced with great skepticism and especially after the establishment of international criminal tribunals, relying more on the actual autonomy and independence of those Institutions that do not fail to recognize ICC's undeniable new elements (Easton and Piper, 2016) from the previous international criminal courts so as to enable them to respond effectively to the question of justice and the refusal of impunity[76] affecting one of its major manifestations such as the exercise of criminal jurisdiction. The analysis of the provisions on jurisdiction of ICC with activation mechanisms and in relation with national jurisdictions through cooperation mechanisms is essential in order to establish the actual nature of such an international institution[77].

The described international legal assistance mechanism primarily respects the legal culture of any country that does not want to participate in the collection of evi-

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

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

dence, documents, and mitigate only to discuss the royalties of the so called questions and statuses that establish the demonstration character of the trials and every reasoning was included within a logical demonstrative structure in the sense that every question should be decided on the basis of indisputable criteria always based on a scientific experimental basis based on the concept of verifiability and hypothesis that serve certain tests with relative frequency of a event in a long series of events already monitored by a UN Security Council, other political, diplomatic, scientific channels involving the transition from a known fact to an unknown or completely specific, guaranteed, certain, unambiguous and not contradicted by other elements of the *ratio probabilis* that exceed the limits of tor probability as a means of discovering truth by pointing to the principle of non dispersal of the means of proof with regard to irreparable acts, guaranteed or assumed in special conditions. (Liakopoulos, 2018)

Within this spirit of globalization of criminal justice, there are various ways of exercising universal criminal justice through the criminalization of individual behavior and setting precise limits to national repression, for example by banning imprescribility (Baron-Cohen, 2011, pg. 342s), amnesty and impunity in general[78]; internationalizing the guarantee instruments through the creation of competing or complementary national jurisdictions with national institutions (Glasius, 2012, pg. 44ss), competent to judge individuals who are the perpetrators of crimes against peace (Meernik and King, 2010, pg. 309–334) and the security of humanity is, as a matter of fact, the case with the judicial cooperation area between ICC and Member States or not the Statute of the Court. Importance is given in not just about how the declarations and/or collections of elements, evidence, etc. are out but also regarding the purpose of the truth and *cum quis in perturbatione ponitur,* the whole *mentis* of subjects who have committed facts that do not need the intimate conviction of international community to condemn apotrope crimes without tolerance and understanding but a collaboration with the power (in this case through international criminal Tribunals) of thousands massacred victims for purposes that many times are never hit by any psychic judgment, criminal conviction, mass media, etc. lawfully put into practice worldwide. (Van Den Wyngaert, 2012, pg. 475ss. Werle and Jessberger, 2014. Schabas and Bernaz, 2011).

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

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78. See, Abtahi and Koh, 2012, pg. 1ss. Acqaviva, 2011, pg. 789ss. Acquaviva and Heikkilå, 2013. Bekou, 2012, pg. 67ss. Bosco, 2014. Combs, 2013. Cryer et al., 2014. Eberechi, 2011. Galbraith, 2009, pg. 79ss. Chernor Jalloh, 2012, pg. 270ss.

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