Chapter 10 The responsibility to enforce – Connecting justice with unity

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1. Introduction

The issue of international cooperation has come to take on an increasingly focal role in discussions surrounding the effectiveness of the International Criminal Court. Five years into the Court’s life and ten years since the adoption of the Rome Statute the success or failure of the Court continues to be judged not by the standard of its fair trials guarantees, the expeditious of its proceedings or the quality of its jurisprudence, but by whether it can apprehend the accused and get its trials underway. This foundational challenge for many international courts and tribunals is compounded by the statutory limitation of gravity as an admissibility threshold before the ICC as well as the policy decision of the Prosecutor to focus on the persons bearing the greatest responsibility. This means that in each situation the Court is likely to aver from focussing on low-intensity crimes committed by easy-to-catch ‘small fry’, but will direct its activities from the outset towards mass atrocities committed under the orders of senior military and political actors, whether from State or non-State entities, based on the evidence.

This paper will examine the central premise underlying the cooperation regime of the ICC Statute, namely the duty assumed by States Parties to act as the enforcement arm of the Court. It will discuss how the structural basis of a system based on proxy enforcement will inevitably manifest itself through irregular support. In an effort to identify more clearly the responsibilities of States in this regard, the paper will locate cooperation towards the ICC in the context of broader notions of collective security and the newly emergent doctrine of the responsibility to protect. This will show that, to maximise its effectiveness, the Rome system should be seen as creating a covenant of undertakings between the individual State and the collective; suggesting that the pursuit of justice (understood here as the rule of law pursuant to the ICC Statute) will only be effective if it is matched by the necessary degree of unity within the international community.

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2. Cooperation: a two-pillar system

It is an indispensable attribute for any court to be able to rely on the expectation that its decisions will be enforced. Under the statutory scheme set for the ICC, nonetheless, the execution of judicial decisions is entrusted not to the hands of a dedicated enforcement agency, but is instead to be implemented indirectly by States Parties, who serve as the proximate source of compliance. In this way, the ICC is intended to function as a part of a global network of judicial authorities. The system of enforcement established by the Rome Statute is thus made dependant on national support (including through international organisations) for all matters pertaining to the collection of evidence, the compelling of persons, the issuance of travel authorisations for witnesses to travel to the Court, the conduct of searches and seizures, the forfeiture of assets, the execution of arrest warrants and the surrender of persons.

In the light of this division of labour between the ICC and States Parties, the failure to date of State Parties to ensure the execution of the majority of the arrests warrants issued by the Court has put the issue of international cooperation at the centre of deliberations. The judges are increasingly inquiring as to the fulfilment by States of their cooperation obligations, particularly in respect of the warrants of arrests issued by the Court.¹ The President of the Court and the Prosecutor, moreover, have made repeated calls on States to shoulder their responsibilities under the Statute.² As Philippe Kirsch, noted in his 2006 address to the Assembly of States Parties (ASP) and again to the United Nations General Assembly in 2007, the Rome Statute establishes a two-pillar system: a judicial pillar, represented by the Court itself, and an enforcement pillar, which belongs to States.³ In response to these appeals, States Parties, in turn, have placed the issue of cooperation at the centre of their deliberations. The omnibus resolution of the ASP at its fifth session stressed “that effective cooperation remains essential for the Court to carry out its activities,” urged States to comply with their obligations in the area of judicial assistance, encouraged the intensification of support to the ICC, and tasked the ASP Bureau to examine ways to improve cooperation with the Court.⁴

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¹ See e.g. Pre-Trial Chamber examination of State cooperation with regard to the execution of its warrants of arrest: Prosecutor v. Joseph Kony et al., Order to the Prosecutor for the submission of additional information on the status of the execution of the warrants of arrest in the situation in Uganda, 30 November 2006.
² Address by Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice, Nuremberg, 26 June 2007; available at www.icc-cpi.int/otp/otp_events/LMO_20070624.html.