

The Enforcement of Arrest Warrants by International Forces: From the ICTY to the ICC[†]

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Abstract

The conflict in the former Yugoslavia set a precedent in modern history for having a multinational military force being empowered and directed to execute arrest warrants issued by an international criminal tribunal. On legal grounds, the ICTY attained this result by relying on the broad wording of its governing Statute coupled with the ICTY's own rule-making powers. In contrast, the drafters of the ICC Statute elaborated on the nature of the cooperation from international forces in significantly more details but at the same time opted for reducing the ICC's powers vis-à-vis these forces. Therefore, the ICC Statute now runs contrary to the ICTY's case law recognizing a judicial power to order an international force to execute an ICTY arrest warrant. This deferential stance towards collective enterprises of states not only infringes upon the states parties' general obligation to cooperate with the ICC but in the end weakens the ICC's ability to enforce international criminal justice.

1. Introduction

On 15 March 2005 the International Criminal Tribunal for the former Yugoslavia (ICTY) issued its last indictments,¹ under its strategy endorsed by the United Nations Security Council for completing all investigations by the end of 2004.² A few months earlier, the NATO-led Stabilization Force (SFOR)³ concluded its mission in Bosnia and Herzegovina and handed command of the military operations in the region to the European Union Stabilization Force.⁴ In many respects, the mission of the ICTY is gradually drawing to a close. In numbers, its record may appear fairly satisfactory. As of 1 July 2005, of the 126 individuals who have been indicted by the ICTY, only 10 still remain at large.⁵ However, despite all the – not necessarily ill-founded – criticisms NATO attracts, this result, as

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¹ ICTY Weekly Press Briefing, 16 March 2005, available online at <http://www.un.org/icty/briefing/2005/PB050316.htm> (visited 1 July 2005).

² SC Res. 1503 (2003).

³ SFOR is the legal successor to the NATO-led Implementation Force (IFOR) which was deployed in 1995 to enforce the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, S/1995/999, annex [hereinafter Dayton Peace Agreement], SC Res. 1088 (1996); SC Res. 1031 (1996).

⁴ SC Res. 1575 (2004), at 4; Council Decision 2004/803/CFSP, 2004 O.J. (L 353), at 21.

⁵ *The ICTY at a Glance*, available online at <http://www.un.org/icty/glance/index.htm> (visited 1 July 2005).

characterized by Justice Louise Arbour, is largely attributable to NATO's involvement in international criminal law enforcement.⁶

How did a military organization such as NATO become involved in enforcing the arrest mandates of an international tribunal? Because enforcement remains public international law's longstanding Achilles' heel.⁷ When a country has been the theatre of genocides and crimes against humanity, the local government may well have lost its law and order enforcement abilities or is unwilling to prosecute its perpetrators who are often still holding political positions or military commands.⁸ That reality stood against the effective prosecution of the individuals responsible for the crimes committed, which eventually became in the former Yugoslavia a condition to the implementation of a lasting peace.⁹

Before the Prosecutor of the International Criminal Court (ICC) issues his indictments and arrest warrants, he may wonder whether the individuals accused will

⁶ L. Arbour, 'The International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda', 46 *McGill Law Journal* (2000), at 197. However, the ICTY 2004 Annual Report notes that NATO has not conducted any arrest operation since July 2002, *Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/59/215, 13 August 2004, § 283. Justice Arbour, along with other commentators, have also suggested that the involvement of SFOR is also the cause of the ensuing voluntary surrenders. See e.g. R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford: Oxford University Press, 2004), 163, 169-172; M.P. Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal', 49 *DePaul Law Review* (2000), at 962; C. Trueheart, 'A New Kind of Justice', 285 *Atlantic Monthly* (April 2000), at 80-90. For detailed accounts of the history and progress of arrests made by SFOR, see e.g. S. Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia', 70 *The British Year Book of International Law* (1999), at 167-168; J. Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (Boulder, CO: London Lynne Rienner Publishers, Inc., 2004), 159-163.

⁷ See G.A. Knoop, *Surrendering to International Criminal Courts: Contemporary Practice and Procedures* (Ardsley, NY: Transnational Publishers, 2002), at 1; L.N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsley, NY: Transnational Publishers, 2002), at 276.

⁸ See e.g. Arbour, *supra* note 6, at 197; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal International Law* (1999), at 159.

⁹ M.C. Bassiouni, 'Note explicative sur le statut de la Cour Pénale Internationale', 71 *International Review of Penal Law* (2000), at 41; M.P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham, NC: Carolina Academic Press, 1997), 222; The Century Foundation/Twentieth Century Fund Task Force on Apprehending Indicted War Criminals, *Making Justice Work: The Report of The Century Foundation/Twentieth Century Fund Task Force on Apprehending Indicted War Criminals* (New York: Century Foundation Press, 1998), 13; Arbour, *supra* note 6, at 198; Kerr, *supra* note 6, at 169, 212; D.A. Leurdijk, 'Arresting War Criminals: The Establishment of an International Arresting Team: Fiction, Reality or Both?', in W.A.M. van Dijk and J.L. Hovens (eds), *Arresting War Criminals* (Nijmegen: Wolf Legal Productions, 2001), at 65; R.C. Holbrooke, *To End a War* (New York: Random House, 1998), 338.

voluntarily surrender themselves or custodial states parties will effectuate the apprehensions and turn them over to the ICC. But should the above fail, the ICC may again be left to consider resorting to other forces already patrolling on the ground or that are planned to be deployed in the near future. These forces may be deployed under the will and leadership of a single country or an international organization with at least part of their functions being peacekeeping or even law enforcement. Examples of the former in recent history are the United States' operations in Iraq from 2003 and Syria's 29-year presence in Lebanon. Alternatively, NATO forces have carried these tasks in the former Yugoslavia and more recently, the African Union in Sudan. However, to date, NATO is the only organization in modern history that has been directly involved on a significant scale in the apprehension of persons indicted by an international criminal tribunal.

This essay will analyze the framework set out by the ICTY Statute, the ICC Statute and the documents enacted under their respective authority pursuant to which the international community may seek the participation of international bodies to enforce international criminal tribunals' arrest mandates. For this purpose, I will first examine the relevant statutory scheme of the ICTY, and second, the relevant statutory scheme of the ICC with an emphasis on the implications of the ICC Statute's regime for cooperation of and judicial assistance by international bodies in light of the ICTY experience.

2. The ICTY Regime

A. *The Tribunal's Powers*

The relationship between the ICTY and multinational forces has been a story of regulatory and judicial attempts to delineate the nature and extent of the relationship and adjust to the prevailing situation on the ground in the former Yugoslavia. In the aftermath of the signature of the Dayton Peace Agreement, the ICTY, faced with chronic lack of cooperation by state authorities and division on the United Nations Security Council, was forced to turn to NATO, the only armed force in the region capable of enforcing the Tribunal's arrest warrants. This first section will focus on how the ICTY Statute and its Rules of Procedure and Evidence (ICTY RPE) have contributed to shape the role of multinational forces in the former Yugoslavia.

The ICTY Statute offers few directions as to whether the Tribunal may rely on multinational forces to effectuate arrests of indicted individuals, this task mainly falling upon the shoulders of the states pursuant to Article 29:

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: ...
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

Only Article 19(2) appears to suggest the possibility that a judge may be authorized to order such action:

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

On its face, a plain reading of Article 19(2) suggests at least that nothing prohibits the Tribunal to seek cooperation of multinational forces.¹⁰ This position was indeed confirmed by the ICTY Trial Chamber, holding in *Mrkšić* that the power conferred by Article 19(2) is phrased in discretionary terms and ‘clearly indicates that the Article does not contemplate that arrest warrants may only be directed to States.’¹¹ It was partly with this mindset that Rules 54 to 61 of the ICTY RPE were adopted pursuant to the power of the Tribunal’s permanent judges to make rules of procedure and evidence for any ‘appropriate matters’ (Art. 15 *in fine* ICTYSt.).

¹⁰ See Lamb, *supra* note 6, at 171.

¹¹ Decision on the Motion for Release by the Accused Slavko Dokmanović, *Mrkšić* (IT-95-13a-PT), Trial Chamber, 22 October 1997, § 37.

Rule 54 is the general provision in the ICTY RPE that empowers the Tribunal to issue the necessary orders at any time before and during the trial, which is substantially similar to the wording of Article 19(2) of the ICTY Statute. Rule 54 states that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

While Rule 54 and Article 19(2) are framed in general terms, they appear to constitute sufficient legal basis to authorize the Tribunal to seek the cooperation of multinational forces for the arrest of indicted persons. However, in a further effort to prompt NATO to adopt a more proactive approach in the enforcement of the ICTY's arrest mandates, the Tribunal created Rule 59 *bis* with its paragraph (A) stating that:

(A) Notwithstanding Rules 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody by that authority or international body or the Prosecutor.

The validity of Rule 59 *bis* has been addressed by the ICTY. In *Mrkšić*, the Tribunal held Rule 59 *bis* to be consistent with the provisions of the ICTY Statute as well as its object and purpose, and more specifically, Rule 59 *bis* could actually be regarded as giving effect to Article 19(2). Then Judge McDonald, for the Tribunal, also found additional support in Article 20(2) of the ICTY Statute which outlines the procedure to be followed upon the confirmation of an indictment, as this Article does not make mention of states nor places any limitation upon the authority of an international body in the arrest process. Judge McDonald dismissed the accused's argument that pursuant to Article 29 and Rule 55(B),¹² only states have the authority to bring the accused before the ICTY;

¹² At the time *Mrkšić*, *supra* note 11, was rendered, Rule 55(B) read:

Subject to any order of a Judge or Chamber, a warrant for the arrest of the accused and an order for the surrender of the accused to the Tribunal shall be transmitted by the Registrar to the person or authorities to which it is addressed, including the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is

rather, the mechanism prescribed in Rule 59 *bis* provides an alternative procedure to that contemplated by Article 29 which in no manner precludes the arrest and transfer of accused persons by other methods.¹³ This last finding was later followed in *Nikolić*¹⁴ where the accused was brought under SFOR custody after having been kidnapped by unknown individuals unrelated to SFOR or the Office of the Prosecutor (OTP). The Tribunal again held that the two mechanisms provided under Rules 55 and 59 *bis* ‘do not differ in substance but emanate from the general duty to co-operate with the Tribunal pursuant to Article 29 of the Statute.’¹⁵ Therefore, *Nikolić* and *Mrkšić* stand for the proposition acknowledging the ICTY judges’ use of their rule-making authority ‘to legitimize arrests of alleged war criminals by other multi-national military forces, such as those engaged in NATO’.¹⁶ This result relied on the almost unchecked ability of the ICTY judges to make and change rules of procedure and evidence¹⁷ and a broad and generalized wording of the relevant provisions of the ICTY Statute relating to arrests which left open the possibility to allow international bodies be involved in the process.

However, it is less the applicability of Rule 59 *bis* to NATO forces than the interpretation of Article 29 in the post-*Mrkšić* cases that marked a departure from the earlier understanding of the relationship between NATO and the ICTY. In *Simić*,¹⁸ the Trial Chamber held that Article 29 also applies to international organizations. The Tribunal basically advanced two reasons. First, the ICTY having no police force of its own, the purpose of Article 29 is to secure cooperation of states with the ICTY in its investigations and prosecution of accused persons; and second, the mere fact that Article 29 omits reference to collective enterprises of states such as NATO does not mean that such

believed by the Registrar to be likely to be found, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language the accused understands and that the accused be cautioned in that language.

¹³ *Mrkšić*, *supra* note 11, §§ 14-15, 34-35. See also A. Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, 9 *European Journal International Law* (1998), at 12-13; Lamb, *supra* note 6, at 200.

¹⁴ Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, *Nikolić* (IT-94-2-PT), Trial Chamber, 9 October 2002.

¹⁵ *Ibid.* § 50.

¹⁶ Knoops, *supra* note 7, at 373.

¹⁷ See e.g. Workshop 1 ‘The Need for an International Arresting Team; UN- or Not UN Led?’ in *Arresting War Criminals*, *supra* note 9, at 44; Lamb, *supra* note 6, at 171.

¹⁸ Decision on Motion for Judicial Assistance to Be Provided by SFOR and Others, *Simić* (IT-95-9-PT), Trial Chamber, 18 October 2000.

enterprises are exempted from complying with Article 29.¹⁹ Consequently, the Tribunal concluded that a purposive construction of Article 29 confers on the ICTY the power to *require* an international organization or its competent organ such as SFOR to receive and implement binding orders of the ICTY made pursuant to this Article.²⁰ The subsequent case of *Nikolić* appeared to have endorsed the position in *Simić* (although the Tribunal in *Nikolić* noted the debate amongst scholars on the issue as to whether SFOR has the authority as opposed to the obligation to arrest indicted persons).²¹

It is doubtful that the Tribunal would have ordered an international body to send a military force to the former Yugoslavia to assist in the ICTY mission; nonetheless such order could have been theoretically valid pursuant to the binding character of the ICTY Statute on all members of the United Nations as a measure enacted under Chapter VII of its Charter, combined with the Tribunal's subsequent interpretation of the ICTY Statute. However, in the former Yugoslavia, NATO forces were already deployed in the region and had agreed not only to act as a peacekeeping force but also to contribute to a significant extent in carrying out police enforcement functions including making arrests.²² Moreover, the NATO troops were the only force with the right capabilities to apprehend the individuals indicted by the ICTY.²³ Therefore, the judicial interpretation requiring NATO

¹⁹ *Ibid.* §§ 46-47. See also Judge McDonald's analysis of Article 29 in *Mrkšić*, *supra* note 11.

²⁰ *Simić*, *supra* note 18, §§ 47-48.

²¹ *Nikolić*, *supra* note 14, § 49. Cf. D.A. Mundis, 'Current Developments at the ad hoc International Criminal Tribunals', 1 *Journal of International Criminal Justice* (2003), at 549. Compare J.R.W.D. Jones, 'The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia', 7 *European Journal International Law* (1996), at 239-240 (suggesting that pursuant to the ICTY RPE and SC Res. 827 (1993), IFOR would have a duty to execute the ICTY's arrest warrants); N. Figà-Talamanca, 'The Role of NATO in the Peace Agreement for Bosnia and Herzegovina', 7 *European Journal International Law* (1996), at 173-175 (recognizing the ICTY's power to issue arrest warrants to IFOR contributing states); compare with Decision on Motion by Momir Talić for Provisional Release, *Brđanin* (IT-99-36/1-PT), Trial Chamber, 28 March 2001, § 29, where the Tribunal, while not ruling on the issue, observed that SFOR did not accept any obligation to arrest persons indicted by the ICTY. But see T. Henquet, 'Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR', in G. Boas and W.A. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Boston: Martinus Nijhoff Publishers, 2003), at 138-145; M.B. Harmon and F. Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings', 2 *Journal of International Criminal Justice* (2004), at 412.

²² P. Gaeta, 'Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?' 9 *European Journal International Law* (1998), at 178 (citing an excerpt of a resolution adopted by the North Atlantic Council on 16 December 1995).

²³ Scharf, *supra* note 9, at 225; Leurdijk, *supra* note 9, at 65-66; *Mrkšić*, *supra* note 11, § 48. See also R.J. Goldstone, 'What We Have Learned', in C.A.L. Prager and T. Govier (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Waterloo, ON: Wilfrid Laurier University Press, 2003), at 349-350.

to comply with the Tribunal orders for cooperation and judicial assistance in the same manner as states must be understood in the greater factual situation prevailing at the time.

B. The Prosecutor's Powers

The ICTY Statute remains relatively silent about the extent of the ICTY's relationship with international bodies. Within the confines of my above discussion on Article 19(2), it may be noted that the article provides that a judge's power to issue an order for the apprehension of a person indicted by the ICTY is triggered by the Prosecutor's request. The relationship between the Prosecutor and international bodies is timidly laid out in Article 18(1) which states that intergovernmental organizations may provide the Prosecutor with information for her to initiate investigations. It is rather the ICTY RPE, particularly Rule 39, that addresses more directly the Prosecutor's options in dealing with international bodies.²⁴ To that extent, actions that the Prosecutor may ask an international body to take in the enforcement of an arrest warrant should be distinguished from actions that the Prosecutor may directly take herself. Moreover, Rule 53(D) provides that the Prosecutor may, notwithstanding a Tribunal non-disclosure order, disclose indictments to certain entities including international bodies for purposes of preventing the loss of an opportunity to secure the possible arrest of an accused.

If Rules 39 and 53 can be regarded as confirming the legality for the Prosecutor to ask for the assistance of other entities in the conduct of her investigations, including transmitting arrest warrants to international bodies, these two rules do not specifically address the extent of the Prosecutor's involvement in the execution of the arrest warrants. This last issue arose from the facts in *Mrkšić* where the co-accused Slavko Dokmanović challenged his arrest by the United Nations Transitional Administration for Eastern

²⁴ Rule 39 ICTY RPE states as follows:

'In the conduct of an investigation, the Prosecutor may:

- (i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
- (ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants;
- (iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and
- (iv) request such orders as may be necessary from a Trial Chamber or a Judge.'

Slavonia, Baranja and Western Sirmium (UNTAES).²⁵ At the time prior to his arrest, Dokmanović was living in the Federal Republic of Yugoslavia where the UNTAES had no jurisdiction. In order to make the arrest, an investigator of the OTP contacted the accused on several occasions and ultimately lured him out of the Federal Republic of Yugoslavia where he was immediately arrested by the UNTAES.

In its decision denying the accused's motion for release, the Tribunal summarily addressed the issue of the involvement of the OTP in the arrest. In the course of her analysis of Article 20(2) of the ICTY Statute, Judge McDonald held that 'no mention is made of States, nor is any limitation placed upon the authority of an international body or the Prosecutor to participate in the arrest process.'²⁶ Judge McDonald concluded that the accused was in fact arrested by the UNTAES even though the OTP investigator was present at the time of the arrest and also proceeded to read the accused's rights.²⁷ This finding is consistent with Rule 55(G) of the ICTY RPE which contemplates the execution of an ICTY arrest warrant by 'the authorities of a State, or an appropriate authority or international body' with the presence of a member of the OTP if the latter so chooses. It is worth noting that Rule 59 *bis* which supersedes Rule 55, provides that an arrest warrant can be transmitted to the Prosecutor and even contemplates the Prosecutor taking the accused into custody. The decision in *Mrkšić* along with the well-known principle that the ICTY does not have enforcement power of its own prompted Michael Scharf to suggest that although the OTP may not unilaterally arrest indicted persons, it is not prevented 'from participating in operations as an adjunct to the United Nations or NATO.'²⁸ In my opinion, the relevant rules of the ICTY RPE suggest that the OTP should retain a strong participatory role in the apprehension of individuals indicted by the ICTY.

²⁵ The UNTAES was established on 15 January 1996 by SC Res. 1037 (1996) to serve as a transitional government of the region of Eastern Slavonia, Baranja and Western Sirmium for an initial period of 12 months, but was eventually extended until 15 January 1998. To carry out its mandate, the UNTAES was supported by a UN peacekeeping force of 5,000 troops.

²⁶ *Mrkšić*, *supra* note 11, § 38.

²⁷ *Ibid.*, § 51.

²⁸ M.P. Scharf, 'The Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY', 11 *Leiden Journal of International Law* (1998), at 379. See also Knoops, *supra* note 7, at 371; *idem*, *supra* note 6, at 927-928, 971, 977-978.

3. The ICC Regime: Departure from the ICTY Regime

Since its adoption, the ICC Statute has received its large share of praises and criticisms, and the enforcement of its provisions has been subject of wide scrutiny. Many commentators have stressed the importance of the lessons learned from the problems encountered in the former Yugoslavia in building the system for the new ICC.²⁹ In this respect, one would have expected that the leaders of the international community would have remembered the major role played by international organizations towards the achievement of international justice. Nevertheless, the ICC Statute marks a significant departure from the ICTY regime in considering – and lessening – the level of involvement of multinational forces in the arrest of individuals indicted by the ICC. This part will examine the nature of this change and critically analyse its implications on the way the ICC can fulfil its functions.

The ICC Statute provides as well two options pursuant to which multinational forces could be called for assistance: such request can either originate from the Prosecutor or the Court.

A. The Prosecutor's Powers

Under the ICC Statute, even before an investigation is initiated by the Prosecutor, Article 15 and Rule 104 of the ICC Rules of Evidence and Procedure (ICC RPE)³⁰ allow the Prosecutor to seek from ‘intergovernmental organizations’ information that will assist him in determining whether there is sufficient information to initiate the investigation. In the event the Prosecutor has decided to open an investigation, Article 54(3) lays down measures that he may employ in his investigative activities, including obtaining the assistance of such intergovernmental organizations:

3. The Prosecutor may:....

²⁹ See e.g. Harmon and Gaynor, *supra* note 21, at 403-412; Cassese, *supra* note 13, at 10-11. Cf. Goldstone, *supra* note 23, at 343.

³⁰ Like its ICTY predecessor, the ICC has its own set of rules of procedure and evidence but in contrast with the powers of the ICTY judges under Article 15 of the ICTY Statute, the ICC Statute permits the adoption of the ICC RPE only by a two-third majority of the members of the assembly of states parties (Art. 51(1) ICCSt.), the ICC judges acting by an absolute majority only being afforded the right to propose amendments to the ICC RPE (Art. 51(2)(b) ICCSt.). It may therefore not come as a complete surprise that nowhere in the ICC RPE can be found a provision equivalent to Rule 59 *bis* of the ICTY RPE.

- (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
- (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

The insertion of the word ‘arrangement’ in sub-paragraph (c) is said to allow the Prosecutor to seek the cooperation of peacekeeping forces.³¹ Even with that purpose in mind, one can legitimately ask whether Article 54(3)(c) could have simply remained in the ICC RPE if the states parties insisted in having such provision spelled out, as Article 54(3)(c)’s wording closely tailors Rule 39(iii) of the ICTY RPE. Indeed, the above initiatives conferred upon the Prosecutor refer back to his general investigating duties and powers, more particularly Article 54(1)(b) which states that the Prosecutor shall ‘[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court’. These appropriate measures have been interpreted as any measure that, in the opinion of the Prosecutor, is geared toward establishing the truth,³² which is the purpose that must guide the manner in which the Prosecutor conducts his investigations. Commentators have mentioned that the powers in Article 54(3)(c) and (d) are self-evident and clearly fall within the Prosecutor’s inherent power.³³

In the context of direct participation by the OTP, for instance in a similar fashion as in *Mrkšić*, no rule in the ICC Statute prevents per se the Prosecutor from participating in enforcement operations within the limits set out under the ICTY regime. The large discretion conferred by Article 54(1)(b) along with the use in this provision of the term ‘shall’ rather suggest that if the Prosecutor believes that the participation of his office in an operation to capture a person indicted by the ICC is required, he would then be under an obligation to provide the appropriate participation from his office for the operation.

³¹ C. Kreß and K. Prost, ‘Article 87: Requests for Cooperation: General Provisions’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden: Nomos, 1999), at 1065; A. Ciampi, ‘The Obligation to Cooperate’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Court: A Commentary*, Vol. 2 (Oxford: Oxford University Press, 2002), at 1621.

³² M. Bergsmo and P. Kruger, ‘Article 54: Duties and Powers of the Prosecutor with Respect to Investigations’, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, *supra* note 31, at 719.

³³ *Ibid.* at 723.

B. The Court's Powers

Like the ICTY, the ICC must rely on states for cooperation and judicial assistance. Article 86 of the ICC Statute imposes upon states parties a general obligation to cooperate with the ICC; this article substantially follows the formulation of Article 29(1) of the ICTY Statute. One can then attempt to parallel Article 29(2) of the ICTY Statute with the combination of Articles 87(1)(a) and 87(7) of the ICC Statute. In this exercise, it should be observed that even though Article 87 has dropped from its vocabulary the term 'order' that is found in Article 29(2) of the ICTY Statute and only kept the term 'request', the Court's requests for assistance should nevertheless be considered as binding upon the states parties. In this respect, Article 87(1)(a) states that '[t]he Court shall have the authority to make requests to States Parties for cooperation' and Article 87(7) provides that failure by a state party to comply with a request to cooperate allows the Court to make such finding and refer the matter to the assembly of states parties or the Security Council for enforcement measures. Furthermore, Article 59(1) of the ICC Statute reiterates states parties' obligation to arrest indicted individuals found within their territory:

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

This provision has been viewed as falling under states parties' general obligation to cooperate.³⁴ Another provision, Article 89(1), deals with the transmission of the arrest warrants to a state in which the indicted person may be found and interestingly provides for an obligation to cooperate with the Court in the event such state receives a request for arrest, whether or not it is party to the Rome Treaty:³⁵

1. The Court may transmit a request for the arrest and surrender of a person ... to any State on the territory of which that person may be found and shall request the cooperation of that

³⁴ A. Schlunck, 'Article 59: Arrest Proceedings in the Custodial State', in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, *supra* note 31, at 766.

³⁵ C. Kreß and K. Prost, 'Article 89: Surrenders of Persons to the Court', in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, *supra* note 31, at 1073.

State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

However, in contrast with the ICTY regime pursuant to which the Tribunal read in the ICTY Statute an obligation of states to comply with the Tribunal's orders, Article 87(6) of the ICC Statute specifically addresses the relationship between the Court and intergovernmental organizations in providing that:

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

In several respects, Article 87(6) mirrors the powers of the Prosecutor in Article 54(3)(c) and (d), but with Article 87(6) explicitly stating that intergovernmental organizations are not under the obligation to cooperate with the Court or the Prosecutor by using the term 'ask'.³⁶ Moreover, a further indication of the voluntary character of Article 87(6) is found in the Court's power of referral to the assembly of states parties or the Security Council of a situation of failure to cooperate, which the ICC Statute only provides in respect of a state party and a state non-party to the Rome Treaty but that has entered into an ad hoc arrangement or agreement with the Court (Art. 87(7) and (5)).³⁷ Therefore, Article 87(6) can be read as contradicting the ICTY case law that held international bodies (or intergovernmental organizations) to have the same duty as states to cooperate with and provide judicial assistance to the Tribunal.

A careful reader would have noted the absence of the term 'arrangement' in Article 87(6). Some commentators believed that this omission was not deliberate, so therefore a 'general rule of systematical interpretation ... pursuant to which the complementary rules

³⁶ Kreß and Prost, *supra* note 31, at 1064. Cf. K. Ambos, 'Les fondements juridiques de la Cour pénale internationale', 10 *Revue trimestrielle des droits de l'homme* (1999), at 765; N. Zaik, 'Les aspects institutionnels de la Cour pénale internationale', 129 *Journal de droit international* (2002), at 466.

³⁷ Cf. Sadat, *supra* note 7, at 307; Ambos, *supra* note 36, at 756; Zaik, *supra* note 36, at 466.

[in Articles 54(3) and 87(6)] should be coherent’³⁸ should apply, meaning the Court as well as the Prosecutor are authorized to seek cooperation from peacekeeping forces.

Part of the implementation of agreements between the ICC and intergovernmental organizations is further delineated in the *Regulations of the Court*.³⁹ Article 52 of the ICC Statute provides that the judges shall, in accordance with the Statute and the ICC Regulations, adopt, by an absolute majority, regulations for the ‘routine functioning’ of the Court. In the practice of international courts, Article 52 is a novelty resulting from the balance struck between states’ will to not entrust judges with overreaching ‘legislative powers’ over certain issues of substantive importance and the need for the Court to efficiently conduct its affairs, including the ability to make decisions on subsidiary matters.⁴⁰ The criterion of ‘routine functioning’ has therefore been adopted to distinguish regulations from rules of procedure and evidence, and the term has been interpreted to include ‘the internal organization and administration of the Court, but not its relations to the parties before it.’⁴¹

Regulation 107 is the main provision dealing directly with agreements between the ICC and intergovernmental organizations. Paragraph 1 provides that all cooperation agreements with an intergovernmental organization, setting out a general framework for cooperation on matters within the competency of more than one organ of the Court, must be negotiated under the authority of the President of the Court. The same paragraph also states that the authority of the President cannot impede on the Prosecutor’s power to enter his own cooperation agreements under Article 54(3)(d). With respect to an arrangement or agreement ‘not setting out a general framework for cooperation’, the President may, pursuant to paragraph 2, delegate the relevant organ to conclude it, without prejudice again to the Prosecutor’s power under Article 54(3)(d).

C. The Optional Cooperation under Article 87(6)

³⁸ Kreß and Prost, *supra* note 31, at 1065.

³⁹ Regulations of the Court, 26 May 2004, ICC/Pre/001 [hereinafter ICC Regulations].

⁴⁰ B. Broomhall, ‘Article 51: Rules of Procedure and Evidence’, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, *supra* note 31, at 680-683.

⁴¹ H.-J. Behrens, ‘Article 52: Regulations of the Court’, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, *supra* note 31, at 697.

Echoing the ICTY regime, the provisions in the ICC Statute clearly confer not only the authority but the obligation upon individual states parties, and sometimes even states non-party to the Rome Treaty, to cooperate with the Court, as well as a judicial power to issue binding requests for cooperation. Therefore, the sole provision prohibiting the Court from extending its requests to a collective of states is Article 87(6) of the ICC Statute. Article 87(6) contemplates probably the preferred method within the international community for the ICC to secure cooperation from an intergovernmental organization, that is, by way of agreement. Voluntary cooperation has already been resorted to in the past. On 9 May 1996, the NATO Supreme Headquarters Allied Powers Europe and the ICTY concluded a Memorandum of Understanding setting out the 'practical arrangements for the detention and transfer of persons indicted for war crimes to the ICTY'.⁴² A problematic situation could then arise in the event where an intergovernmental organization effectively enters into a cooperation and assistance agreement but then fails to meet its obligations set out under the agreement. This situation is not so far-fetched as it was nearly the case in the former Yugoslavia with the implementation of provisions of the Dayton Peace Agreement and the Memorandum of Understanding related to the arrest of persons indicted by the ICTY. On this issue, NATO's early positions were to deny itself any power to execute arrests⁴³ and later to literally follow until the mid-1997 a restrictive policy of apprehension of individuals indicted by the ICTY only when encountered in the course of IFOR/SFOR's duties.

The experience in the former Yugoslavia shows that military commanders are reluctant to actively apprehend indicted persons,⁴⁴ so NATO defended its initial non-intervention and subsequent limited intervention on the basis of various possible readings of its legal mandate under the agreements. The conduct adopted by NATO has prompted commentators to call for the need for legal clarity in delineating the exact role of

⁴² NATO Press Statement on Signing of the Memorandum of Understanding between SHAPE and the International Criminal Tribunal for Former Yugoslavia, 9 May 1996, (96)74, available online at <http://www.nato.int/docu/pr/1996/p96-074e.htm> (visited 1 July 2005). See e.g. *Simić*, *supra* note 18, §§ 44-45; *Nikolić*, *supra* note 14, § 46; 'Workshop 1: The Need for an International Arresting Team; UN- or Not UN Led?', *supra* note 17, at 38-39; Leurdijk, *supra* note 9, at 62-63; Henquet, *supra* note 21, at 130.

⁴³ Maogoto, *supra* note 6, at 157; Holbrooke, *supra* note 9, at 328; Kerr, *supra* note 6, at 154-155.

⁴⁴ Scharf, *supra* note 6, at 964.

multinational forces in carrying arrest warrants.⁴⁵ But by taking the form of negotiated agreements, considerations of clarity are unfortunately not solely within the control of the Court, and therein lies an inherent weakness of consensual undertakings; in the case of the conflict in the former Yugoslavia where NATO was at the outset highly reluctant to engage into such actions, this resulting legal confusion offset any benefit derived from the presumed moral authority and efficiency of voluntary undertakings. From the experience of the ICTY, it appears that the ICC Statute further weakens the Court's position vis-à-vis relevant intergovernmental organizations already present on the ground and otherwise able to capture the indicted persons. These organizations now know that the ICC has no power whatsoever to oblige them actively to search and arrest indicted persons. Therefore, assuming such intergovernmental organization is unwilling to risk its troops in this task, it has all the required latitude to frame a general commitment that may be interpreted in a way to defend a subsequent weak implementation or simply refuse to assist the ICC.

In the context of the relationship between the ICTY and IFOR, it has been suggested that while individual states participating in IFOR could be required to execute an ICTY arrest warrant specifically addressed to them, the obligation would not extend upon NATO itself although the acknowledged conclusion was nevertheless that the NATO-led force would be validly bound to execute the ICTY order.⁴⁶ Whether or not this statement is sound or even consequentially relevant, the binding character of a judicial request for state cooperation under the ICC Statute is logically incompatible with the provision of Article 87(6). The paradox was indeed already identified by the ICTY in *Simić*⁴⁷ where the Tribunal held that the purpose of Article 29 of the ICTY Statute being securing the cooperation with the ICTY in 'the investigation and prosecution of persons responsible for serious violations of international humanitarian law', 'there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organizations and, in particular, their competent organs such as SFOR'.⁴⁸ The Tribunal foresaw and, I believe, rightfully wanted to prevent the awkward situation where

⁴⁵ See e.g. Knoops, *supra* note 7, at 371-372; Scharf, *supra* note 6, at 951-952, 964; P. Vallières-Roland, Centre for European Security and Disarmament, 'Prosecuting War Criminals: A Critique of the Relationship between NATO and the International Criminal Courts' (2002), at 4, available online at <http://www.cesd.org/nato/CrimCts&NATO.PDF> (visited July 1, 2005).

⁴⁶ Figà-Talamanca, *supra* note 21, at 173-175.

⁴⁷ Accord *Nikolić*, *supra* note 14, §§ 49, 50.

⁴⁸ *Simić*, *supra* note 18, § 46.

individual states are compelled to execute arrest warrants but a collective entity comprised of the membership of these same individual states could evade the same request for cooperation and judicial assistance.

An interesting parallel can also be drawn with the closely related issue of the applicability of the Geneva Conventions to NATO forces. Diane Orentlicher dealt with that issue in a similar fashion as the ICTY did in its discussion on Article 29 of the ICTY Statute.

The second principal argument offered in support of the U.S./NATO position is that neither NATO nor SFOR is a party to the Geneva Conventions and Protocols; only states are parties. This position has been urged by, among others, NATO legal adviser Max S. Johnson, Jr.

But this misses the point: the issue is not whether NATO or SFOR themselves are bound by the conventions (although some legal experts believe they are). The core question is whether parties to the conventions, such as the United States, may evade their commitments by joining a multinational force. This question fairly answers itself. By Mr. Johnson's logic, any state could violate the Geneva Conventions with impunity merely by joining other countries in a military alliance.⁴⁹

Contrary to the Geneva Conventions, the ICC Statute expressly provides a different treatment for intergovernmental organizations, which unfortunately leads to the same conclusion contemplated by the ICTY in *Simić*. Consequently, assuming the ICC Statute would have been the governing statute in the former Yugoslavia and all NATO states members were also states parties of the Rome Treaty, it would have ensued that the Tribunal would have power to issue and transmit an arrest warrant to a state party like France but could only ask NATO for its cooperation in the arrest of indicted persons found in Pale in Eastern Bosnia which was at the time a sector under the authority of the French NATO forces.

The concrete benefits of such option are also difficult to identify: it could be thought that Article 87(6) constitutes a statement that arrangements with intergovernmental

⁴⁹ The Century Foundation/Twentieth Century Fund Task Force on Apprehending Indicted War Criminals, *supra* note 9, at 93. Cf. Lamb, *supra* note 6, at 192-194 (evoking a similar argument in the context of the applicability of the Geneva Conventions to a multinational force).

organizations to secure enforcement of the ICC's arrest warrants are an option authorized by the ICC Statute. But if the ICC wanted to ask the cooperation of another organization or the latter were willing to execute the Court's arrest warrants, there is no reason why such initiative would be prohibited.⁵⁰ Therefore, at best, Article 87(6) is purely declaratory.

In pursuing the ultimate purpose of investigating and prosecuting the persons accused of the gravest crimes known to humankind, securing the cooperation of all parties involved in the conflict is of crucial importance. After their deployment in the former Yugoslavia in December 1995, NATO forces did not make a single arrest until July 1997.⁵¹ There were embarrassing accounts of high profile war criminals indicted by the ICTY living freely in their neighbourhood and NATO patrols deliberately modifying their route so as to avoid them.⁵² It was only a combination of political and judicial pressure that persuaded NATO to shift its policy with respect to the arrest of indicted individuals. In my view, the vital importance of the role of intergovernmental organizations should have been reflected in the ICC Statute by treating them on the same footing as the individual states.

4. Conclusion

When time comes for the ICC to issue its arrest warrants, it may only rely on a less than handful number of real options. The state party on the territory of which the indicted person is found may decide to diligently enforce the arrest warrant – whether or not as a result of international political pressures – and actively search him for prosecution; or the indicted person might decide to voluntarily surrender himself to the ICC. Today the ICC has the benefit of being able to learn from the experience of preceding international criminal tribunals under which these forms of apprehension or surrender have been attempted or have occurred. This essay was concerned about the other situations when the conventional methods of getting the indicted individuals to face justice fail. And when they do fail, the ICC may probably find itself in a situation similar as in the former Yugoslavia

⁵⁰ In the context of the Prosecutor's powers, commentators have written that the existence of the same provision as Article 87(6) for the Prosecutor was of questionable relevance, see *supra* Part 3. The ICC Regime: Departure from the ICTY Regime, § A. The Prosecutor's Powers.

⁵¹ Scharf, *supra* note 6, at 951.

⁵² Kerr, *supra* note 6, at 156-157; Arbour, *supra* note 6, at 199; L. Palmer and C. Posa, 'The Best-Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground', 12 *Harvard Human Rights Journal* (1999), at 376-378; C. Sudetic, 'The Reluctant Gendarme – Why is France Protecting Indicted War Criminals in the Sector of Bosnia It Controls?', 285 *Atlantic Monthly* (April 2000) 91-98.

where a multinational force already deployed on the ground was the only force with the capabilities to execute the indictments. In these cases, international bodies ought to be involved not merely because they have the capabilities, but because they are virtually the last resource standing between accountability and impunity.

It must be ensured that these international bodies meet their moral duty within the international criminal law system, as they may not want in the first place to fill the role that the situation has made them take. That is why in these still early stages of the ICC's existence, the extent of their relationship with the ICC should be clearly delineated and strengthened as much as possible. This is necessary because situations like another Karadžić and Mladić or indicted individuals freely attending their daily activities, are situations for which the international community should also say: 'never again'.

This area of public international law may lend itself to paralleling the ICC with domestic courts, and further inquiring upon the efficiency (or weaknesses) of domestic criminal systems where to a certain extent, the enforcement of criminal laws has been automated and it is expected that for each criminal offence committed, a national or local government has pre-committed an amount of its resources to find, try and punish the offender. Although international criminal justice may never have at its disposal the equivalent of the full apparel of domestic law enforcement, the ultimate objective of the international community should nevertheless be the achievement of an efficient and predictable law enforcement system, and being capable to rely on an appropriate force to bring to justice indicted persons is part of the equation. Some authors have evoked and explored the idea of endowing the ICC with its own police force.⁵³ It may be that the needed reliability will only come under such condition which merits more serious and in-depth examination from the decision-makers. The international community has already created for itself this ICC and given it the gigantic task of exercising its jurisdiction over those persons accused of the most serious crimes known to humankind. Therefore with such responsibilities should come appropriate powers.

⁵³ See e.g. Harmon and Gaynor, *supra* note 21, at 403, 412; D.J. Scheffer, 'United Nations Peace Operations and Prospects for a Standby Force', 28 *Cornell International Law Journal* (1995) 649-660; H.H. Perritt, Jr., 'Policing International Peace and Security: International Police Forces', 17 *Wisconsin International Law Journal* (1999) 281-324; M.M.L.A. Hendrickx, 'An Operational Blueprint for Arresting War Criminals; A Low Risk and a High Risk Scenario', in *Arresting War Criminals*, *supra* note 9, 25-35; S. Mendlovitz and J. Fousek, 'A UN Constabulary to Enforce the Law on Genocide and Crimes against Humanity', in N. Riemer (ed), *Protection Against Genocide: Mission Impossible?* (Westport, CT: Praeger, 2000) 105-122.