

The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC

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Abstract

The article considers whether the obligations of states, which have been referred to the International Criminal Court (ICC) by the United Nations Security Council, are the same as the cooperation obligations of states parties to the ICC Statute. It is argued that despite the lack of clarity in the resolutions referring the situation in Darfur and in Libya to the ICC, the better view is that the obligation imposed on Sudan and Libya to 'cooperate fully' with the ICC should be regarded as an obligation to cooperate in accordance with the provisions of the ICC Statute. This means that those states are entitled to benefit from those limited provisions of the ICC Statute that permit a refusal to cooperate with the Court or permit the state to postpone the execution of a request by the Court for assistance. The article also considers the interaction between the obligations of states to cooperate with the ICC and domestic proceedings against those sought for ICC prosecution. It considers the extent to which the obligation of cooperation may be suspended by an admissibility challenge and addresses whether the permission to suspend the obligation of cooperation may extend to a suspension of the obligation to surrender an accused person to the ICC.

1. Introduction

The primary purpose of international criminal law is to impose responsibility on individuals, under international law, with regard to how they treat

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other individuals. In setting out the crimes within the jurisdiction of the International Criminal Court (ICC), the Statute of the ICC establishes a set of obligations for those individuals who fall within the jurisdiction of the ICC. To the extent that this branch of international law focuses on individuals it represents a departure from traditional international law which is focused on state obligations. However, in constructing the regime of international criminal law, and even the regime of the ICC, it has not proved possible to ignore the role of the state entirely. Since the ICC does not have its own police forces to secure the arrests of individuals suspected of committing crimes or to secure production of evidence, the state has been coopted to fulfil this enforcement function. In order to ensure that the ICC is able to fulfil its mandate of exercising jurisdiction over persons accused of the most serious crimes of international concern, Part 9 of the ICC Statute establishes a detailed regime dealing with cooperation by states with the ICC. This part of the Statute sets out the procedures by which the Court is to make requests to states with regard to the arrest and surrender of accused persons, as well as with regard to other forms of assistance. More importantly, this part sets out the obligations on states parties to cooperate with the ICC. In particular, Article 86, provides that 'State Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Furthermore, Article 89 of the ICC Statute makes it clear that the general obligation on states parties to cooperate with the Court includes an obligation on those states to comply with requests by the Court for the arrest and surrender of persons wanted for prosecution.

In establishing international criminal law and in creating the ICC in particular, the international community (states acting together) has exercised jurisdiction to prescribe (i.e. to define and proscribe international crimes), and states have conferred a jurisdiction to adjudicate these international crimes on themselves (domestic jurisdiction) and on international tribunals (e.g. the ICC). However, the jurisdiction to enforce with respect to these international crimes has remained, to a large degree, within the domain of states as it is they who have the physical power and infrastructure as well as the legal power to compel compliance with the rules prescribed by the international community.

Since all three elements of jurisdiction are necessary for the success of the ICC, and since the exercise of the enforcement jurisdiction is what will lead to success in practice, it is important for the scope and content of the obligation of cooperation to be clearly delineated. However, recent developments, particularly with regard to Libya, have demonstrated that work needs to be done in clarifying the scope of state obligations to cooperate with the ICC. In particular, the interaction between the state obligations of cooperation and two other features of the ICC regime need to be examined in more detail in order to discern how these features of the ICC's overall architecture may affect the obligation of cooperation. The two features in question are: (i) referrals of situations by the United Nations (UN) Security Council to the ICC; and (ii) the principle by which ICC jurisdiction is held to be complementary to national prosecutions.

Under Article 13(b) ICC Statute, the Security Council may refer to the ICC a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed. The main purpose of this provision is to extend the jurisdiction of the ICC to crimes occurring outside the territory of a state party and committed by non-nationals of a state party, since in the case of a Security Council referral it is not necessary to show any link between the crime committed and a state party.¹ Therefore, in the case of a Security Council referral the state in respect of which a situation has been referred to the Court (i.e. the state on whose territory the crime is committed, or whose nationals have committed the crimes) is likely to be a non-party to the ICC Statute. Being a non-party that state will not have the pre-existing obligations set out in Part 9 of the Statute. This raises questions as to the extent of that state's obligations to cooperate with the Court. More generally, when the Security Council refers a situation in a non-party to the ICC, questions arise as to the applicability of the ICC Statute to that state.² Is that state to be treated as if it were a party to the ICC Statute, such that the provisions of the Statute that impose duties of cooperation on states (or those provisions which remove the rights of states, e.g. the immunity of state officials) are deemed to apply to that state?³ These questions regarding the way in which the ICC Statute is to apply in cases of Security Council referrals raise basic legal issues about the application of treaties to non-parties, the power of the Security Council generally, as well as its competence with regard to the ICC. These questions have arisen most prominently with regard to the Security Council's referral of the Darfur (Sudan) situation to the ICC where the African Union has insisted that Sudan be treated as a non-party to the Statute under Article 98 of the Statute dealing with immunity.⁴ However, these questions now arise with regard to Libya's obligations of cooperation with the ICC and they complicate the operation of the ICC's mandate. Resolving them would have a positive impact with regard to the exercise of ICC jurisdiction in case of Security Council referral.

The other feature of the ICC regime that may have an impact on a state's obligation of cooperation with the ICC is the interaction between ICC

- 1 See Art. 12(2) ICCSt., which provides that in situations referred to the Court other than by Security Council, the Court only has jurisdiction where the crime occurred on the territory of a state party or was committed by a national of a state party.
- 2 See C. Stahn, 'Libya, the International Criminal Court and Complementarity: A Test for "Shared Responsibility"', *Journal of International Criminal Justice (JICJ)* (in this issue).
- 3 On the implications of Security Council referrals for immunity, see D. Akande, 'The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities', 7 *JICJ* (2009) 333; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest', *JICJ* (2009) 315.
- 4 For decisions issued by the African Union (AU), see Stahn, *supra* note 2, footnote 45. See also D. Akande, 'Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case', *EJILTalk!*, 4 July 2009, available online at <http://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/> (visited 13 March 2012).

proceedings and domestic proceedings. The ICC is based on the principle of complementarity.⁵ This is the principle that the ICC is a court of last resort that will only act where national courts have failed to act. Where a case before the Court is being investigated or prosecuted (or has been investigated or prosecuted) by a state that has jurisdiction over that case, the case is rendered inadmissible before the ICC, unless the state in question is unwilling or unable genuinely to carry out the investigation or prosecution.⁶ The question that arises is whether the obligations of cooperation imposed by the Statute on states apply in cases where domestic jurisdictions are also seized with investigating or prosecuting the case before the ICC. Are states bound to continue to fulfil the requests of the ICC, for example, with regard to arrest and surrender of the person concerned? Or may states postpone compliance with those requests until admissibility challenges have been resolved? What happens if the state is investigating or is seeking to prosecute the person wanted by the ICC not for the same conduct the ICC is investigating but for different conduct or different crimes? Would the state, in such circumstances, be bound to cooperate with the ICC and even to surrender the person to the ICC? This latter question arises because the ICC has taken the view that complementarity relates to instances where both the person and the conduct charged in ICC proceedings and domestic proceedings are the same.⁷ Thus, where either the person or the conduct is not the same, an admissibility challenge will not be fruitful. However, even in that circumstance questions might arise as to whether the ICC prosecution ought to take priority over the domestic prosecution especially as to sequencing or timing of the two cases.

The article explores the two issues highlighted above. The article first addresses whether the cooperation obligations of states in respect of which there is a Security Council referral to the ICC are the same as the cooperation obligations of ICC states parties. In this regard, the key question is: what defines the cooperation obligations of states in respect of which the Security Council has made a referral? In other words, what is the legal basis of any obligation of cooperation for such states; where do those obligations come from? In addressing these questions, I focus on whether a state with respect to which the Security Council has referred a situation to the ICC is entitled to rely on the limited provisions of the ICC Statute that restrict or may suspend the obligation of cooperation provided in the Statute. This issue provides a good test case for answering the question whether, in the case of a Security Council referral, the obligation of cooperation is one that is determined by the Statute or is determined instead by the Security Council resolution that makes the referral. To put the issue in other terms, the question raised is whether the Security Council, in making a referral, can modify the obligation

5 See ICCSt., Preamble: 'Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction', and also Art. 17 ICCSt.

6 Art. 17 ICCSt.

7 For a fuller discussion and appropriate references, see Stahn, *supra* note 2, section 4.

of the state to cooperate such that the state has a more (or less) extensive obligation than is provided for in the ICC Statute.

This article then turns to the interaction between the obligation of cooperation owed to the Court by states, and the exercise of domestic jurisdiction by states. It considers whether the obligation of states parties to cooperate with the ICC continues to apply when there has been a challenge to the admissibility of a case or situation before the ICC arising out of domestic proceedings dealing with the same person and same conduct. In particular, it addresses whether the obligation of states to arrest and surrender suspects to the ICC continues while there is an ongoing admissibility challenge or whether those obligations are suspended pending the resolution of that challenge. However, the article also addresses situations in which domestic proceedings are pending but which would not fulfil the admissibility test, i.e. cases where domestic proceedings do not relate to the same person or conduct.

Although the first admissibility challenges by a state to cases before the ICC arose in the situation regarding Kenya, the questions addressed in this article have been debated for the first time in the context of the situation in Libya. In the Kenyan situation, the accused persons were not subject to an arrest warrant and so the question whether the obligation to arrest and surrender accused persons to the Court were in fact suspended pending the admissibility challenge did not arise. However, in the Libyan situation, questions regarding the scope and continuing vitality of the obligations of cooperation of Libya arose because the Libyan government that came into power in late 2011, following the conflict in that country and the demise of Colonel Gaddafi, insisted on prosecuting those persons against whom the ICC had issued arrest warrants. This new government also refused, at least at the time of writing, to hand these persons over to the ICC.

The Libyan situation was referred to the ICC, in February 2011, by UN Security Council Resolution 1970. In paragraph 5 of that resolution, the Security Council '*decide[d]* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. Following that referral, the ICC Pre-Trial Chamber, approved warrants for the arrest of Colonel Muammar Gaddafi, his son Saif Al-Islam Gaddafi, and the then head of Libyan military intelligence, Abdullah Al-Senusi. The capture, in November 2011, of Saif Gaddafi and the insistence by Libya's new government that he would be prosecuted in Libya and not turned over to the ICC, raised questions as to whether the Libyan government was in breach of its obligations in failing to respect the ICC's request for surrender, issued at the same time as the arrest warrant.⁸

8 See K.J. Heller, 'Does Libya Have to Surrender Saif to the ICC? (Answer: Yes)', *Opinio Juris*, 23 November 2011, available online at <http://opiniojuris.org/2011/11/23/does-libya-have-to-surrender-saif-to-the-icc-answer-yes/> (visited 27 February 2011) and J.D. Ohlin, 'Libya's Duty to Cooperate with the ICC', *LieberCode*, 23 November 2011, available online at <http://www.liebercode.org/2011/11/libyas-duty-to-cooperate-with-icc.html> (visited 27 February 2011).

The ICC itself issued a press release on 23 November 2011, which stated that:

The warrant of arrest [against Saif] remains outstanding.... The Pre-Trial Chamber Judges have the exclusive competence to decide on the continuation of the ICC judicial procedure. In accordance with Resolution 1970 ... the Libyan authorities have the obligation to cooperate fully with the Court. On 5 July 2011, a request for cooperation with regard to the surrender of the suspect was notified, together with the warrant of arrest, to the Libyan authorities.

Should the Libyan authorities wish to conduct national prosecutions against the suspect, they shall submit a challenge to the admissibility of the case before Pre-Trial Chamber I, pursuant to articles 17 and 19 of the Rome Statute of the ICC. Any decision on the admissibility of a case is under the sole competence of the Judges of the ICC.

Therefore, ... Pre-Trial Chamber I of the ICC remains seized of the case and the Libyan obligation to fully cooperate with the Court remains in force.⁹

Whether or not the Libyan government was in breach of its obligations with respect to the ICC depend on the source and scope of its obligations of cooperation. It also depends on whether those obligations of cooperation are suspended by Libya's reliance on the principle of complementarity that gives precedence to national prosecutions for crimes subject to the ICC's jurisdiction. With regard to the source of Libya's obligations of cooperation, the question is whether that obligation arises under the ICC Statute or under Security Council Resolution 1970, which referred the situation in Libya to the ICC?¹⁰ If the source of that obligation is the Resolution, questions arise as to the scope of that obligation, i.e. what does the obligation to cooperate under that Resolution entail? In particular, the question arises whether the scope of the obligation to cooperate under the SC Resolution is identical with the scope of the obligation to cooperate under the ICC Statute. May Libya rely on grounds for non-cooperation that are set out in the ICC Statute, or are its obligations of cooperation more stringent than those imposed by the Statute on state parties?

2. The Obligation of Cooperation Under the ICC Statute and Relevant Security Council Resolutions: Are They the Same?

Despite the fact that Article 86 of the ICC Statute provides for a general obligation of states parties to 'cooperate fully with the Court', that provision states that this obligation exists only 'in accordance with the provisions of the

9 ICC Press Release, 'Course of action before the ICC following the arrest of the suspect Saif Al Islam Gaddafi in Libya', (ICC-CPI-20111123-PR746), 23 November 2011. It is unclear whether the press release is issued by the Press Office acting alone or at the suggestion, or with the approval, of the judges. It is unfortunate that the ICC should appear to be deciding legal questions by press release.

10 Adopted 26 February 2011.

Statute'.¹¹ This proviso suggests that the obligation of cooperation is limited by what the Statute provides.¹² In particular, the Statute provides a few limited grounds on which a State might be entitled to postpone, or even to refuse, the execution of a request by the Court for cooperation.¹³ As shall be seen the grounds for postponement or suspension arise principally in cases where there are domestic criminal proceedings which somehow relate to a situation referred to the Court or to a case before the Court.

As has been pointed out above, where the Security Council refers a situation to the ICC under Article 13(b) of the ICC Statute, it will usually be the case that the State with respect to which the situation occurs is not a party to the ICC Statute. This is because the main purpose of allowing Security Council referrals is to extend the jurisdiction of the ICC to situations occurring outside the territory of a state party and with respect to acts committed by non-nationals of a state party.¹⁴ However, since the ICC Statute is a treaty, it is not binding on states that are not party to it.¹⁵ Thus, in a situation of a Security Council referral, the state on whose territory the crimes are being committed, not being a party to the ICC Statute, will not ordinarily have the obligations of cooperation that are detailed in the ICC Statute. In order to ensure that the Court is able to function in a similar manner as it would in cases regarding crimes committed on the territory of, or by nationals of non-state parties, it is incumbent on the Security Council, when it makes a referral with regard to a situation concerning a non-party, to impose obligations of cooperation on that non-party.

In the two instances in which the Security Council has referred situations to the ICC (Sudan and Libya), the Council has decided that the countries in which the situations are occurring (Sudan and Libya): 'shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'.¹⁶

The imposition, by the Security Council, of the obligation of cooperation solves the *pacta tertiis* problem as the Security Council resolution becomes the direct source of the obligation of Sudan and Libya to cooperate with the ICC. Since the Security Council will, in cases of referral under Article 13 of the Statute, be acting under Chapter VII of the UN Charter, the Council will be

11 Art. 86 ICCSt. states: 'State Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

12 See R. Cryer, et al., *An Introduction to International Criminal Law and Procedure* (2nd edn., Cambridge University Press, 2010), at 511.

13 See Arts 89(2); 93(3) and (4); 94; 95 ICCSt. See more generally, G. Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligation of States* (Intersentia, 2002), 161 *et seq.*

14 Under Art. 12(2) ICCSt., the Court has jurisdiction over crimes committed in the territory of a state party or by nationals of a state party. The ICC also has jurisdiction where a non-party to the Statute accepts jurisdiction with regard to crimes committed within its territory or by its nationals. See Art. 12(3) ICCSt.

15 Art. 34 Vienna Convention on the Law of Treaties (VCLT).

16 SC Res. 1593 (2005), 31 March 2005, § 2 (on Sudan); SC Res. 1970 (2011), 26 February 2011, § 5 (on Libya).

acting in the mode in which it is capable of imposing binding obligation on states. As these states are party to the UN Charter and have accepted, under Article 25 of the Charter, the power of the Council to bind them, the competence of the Council to impose obligations of cooperation with the ICC cannot be doubted.¹⁷ When acting in this regard, the Council is acting in a manner similar to its imposition, on all states, of obligations of cooperation with the ad hoc tribunals created by the Council.¹⁸

These considerations mean that it is clear that Libya and Sudan have an international law obligation to cooperate with the Court and that this obligation is one that arises under the UN Charter. Since the obligation is a Charter obligation, it will prevail over any other treaty obligation,¹⁹ thus making it a stronger obligation than the obligations which ICC states parties ordinarily have under the Statute. However, the question arises as to the content of the obligations imposed by the UN Security Council. What does the obligation to ‘cooperate fully’ under the relevant UN Security Council resolutions mean? In particular, does it mean an obligation to cooperate in the manner set out by, and only in circumstances required by, the ICC Statute or does it mean something else? If the obligation to cooperate fully is read to mean an obligation to cooperate as set out by the Statute, it would mean that the state concerned is entitled to rely on those parts of the ICC Statute which permit a refusal to cooperate or permit the state to postpone or suspend a request for cooperation. In the particular context of the obligation to surrender suspects, it may even entitle the state concerned to suspend that obligation where a challenge to admissibility is made.²⁰ However, it might be argued that the relevant UN resolutions do not themselves provide for any exemption from the obligation of cooperation and that an obligation to ‘cooperate fully’ in this context is an obligation to do all that is required by the ICC. It might even be argued that since Libya is not a party to the ICC Statute, and is therefore not bound by that treaty (*qua* treaty); it also does not have rights as such under the treaty.²¹ On this argument, any obligations that Libya has with regard to the International Criminal Court must be derived from the Security Council resolution that refers the Libyan situation to the ICC.

The question whether the Security Council may modify the cooperation obligations provided for in the Statute was first raised by Göran Sluiter, in an

17 Art. 25 UN Charter provides: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

18 Art. 29 ICTYSt. and Art. 28 ICTRSt.; UNSC Res. 827 (1993), 25 May 1993 (on former Yugoslavia) and UNSC Res. 955 (1994), 8 November 1994 (on Rwanda). On obligations of cooperation with the ad hoc tribunals, see Sluiter, *supra* note 13, Chap. 2, section 4.1 and Chap. 5, section 3.

19 Art. 103 UN Charter. See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 (hereinafter, ‘Lockerbie Case (Libya v. United Kingdom)’), at 3, holding (at § 39) that SC resolutions create obligations under the Charter which prevail over other treaty obligations as a result of Art. 103 UN Charter.

20 See Arts 89(2) and 95 ICCSt. See Section 6 below for discussion of the impact of admissibility challenges on obligations of cooperation.

21 Art. 35 VCLT.

article written shortly after the Sudan referral.²² In the article, Professor Sluiter noted that the way in which the Security Council had framed Sudan's obligation of cooperation with the ICC left it unclear whether Sudan could invoke grounds for refusing cooperation that were provided for in the Statute.²³ He also noted that applying Part 9 of the ICC Statute, dealing with cooperation with the Court, to a non-party would be problematic especially as Part 9 often makes reference to procedure in national law, which will be lacking in the case of a non-party.²⁴ However, despite these difficulties, he does not suggest that the obligation of cooperation imposed by the Security Council in the case of Sudan can actually be regarded as different from the obligation of cooperation under the Statute.

In order to address the issue whether Libya or Sudan's obligations of cooperation are different from those imposed by the ICC Statute on States Parties to the Statute, three questions need to be answered: (i) can the Council impose obligations on States that go beyond those required by the ICC Statute? (ii) Has the Council actually imposed obligations of cooperation on Libya or Sudan that go beyond the ICC Statute? and (iii) If the Council has imposed obligations of cooperation which go beyond the Statute, would the ICC be in a position to enforce such obligations?

3. Can the Council Impose Obligations on States that Go beyond those Required by the ICC Statute?

In 2003, the Office of the Prosecutor commissioned an informal expert paper that contemplated that the UN Security Council, could, in the context of a referral, impose obligations of cooperation on states that are greater than those contained in the ICC Statute. The report stated that:

92. A Security Council referral under Article 13(b) can greatly enhance the Prosecutor's authority to compel co-operation from States, including those not party to the Statute.

93. As Article 13(b) entails Security Council action under the extensive powers conferred upon it by Chapter VII of the UN Charter, the Security Council could also use its Article 13(b) referral power to specify particular measures to enable the Prosecutor to avoid strict requirements for state co-operation and to act with more authority to investigate a situation.²⁵

It seems clear that the Council can indeed impose obligations on states, which are greater than the obligations that those states have under existing treaties. The International Court of Justice has recognized that Article 103 of the UN Charter, which states that obligations under the Charter prevail over other treaty obligations, also extends to obligations under Security Council

22 G. Sluiter, 'Obtaining Cooperation from Sudan – Where is the Law?' 6 *JICJ* (2008) 871.

23 *Ibid.*, at 877.

24 *Ibid.*, at 881.

25 ICC OTP, *Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation*, 2003 (hereinafter, 'Informal expert paper').

resolutions.²⁶ This recognition that Security Council resolutions prevail over existing treaties necessarily implies that the Council has the power to impose obligations that go beyond existing treaty obligations. Applying these considerations to the ICC Statute, one must recognize that the powers of the Council are not limited by the ICC Statute.²⁷ The Council's powers are determined by the Charter and not by the ICC Statute.

When the Council has made referrals to the ICC, the Council has in practice taken decisions, which go further than what the ICC Statute provides for and which in fact modify the provisions of the Statute. In paragraph 6 of SC Res 1970, the Council

decide[d] that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.²⁸

Although Article 16 of the ICC Statute permits the Security Council to request a deferral of ICC proceedings for a period of 12 months (which may be renewed), neither Resolution 1970 nor Resolution 1593 provides that the limitation of jurisdiction with respect to officials or personnel from non-parties is restricted to 12 months. Therefore, it is difficult to conclude that paragraph 6 of these resolutions was adopted with Article 16 of the ICC Statute in mind (despite the reference to that provision in the preamble to these resolutions). Unlike the deferrals provided for in Article 16, these exemptions from jurisdiction do not have to be renewed annually and have not in practice been so renewed. To the extent that these resolutions go beyond Article 16 they impose an obligation on states not to surrender persons to the Court, though the ICC Statute might require it.

Since the ICC has separate legal personality from its states parties and the ICC itself is not member of the UN, the Court is not itself bound by UN Security Council decisions. However, states (whether parties to the ICC Statute or not) are bound by the Security Council decisions, even where those decisions require violation of the ICC Statute or of other treaties.²⁹ Where Security Council resolutions impose obligations of cooperation on non-parties to the ICC Statute, there would not even be a conflict of obligations or rights with regard to the state concerned since that state has no rights or obligations under the ICC Statute. All that would happen is that the state is placed in a worse position than state parties. This is a political but not a legal problem.

26 *Lockerbie Case (Libya v. United Kingdom)*, *supra* note 19, § 39.

27 See generally D. Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council', in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court* (Hart Publishing, 2004) 95–120.

28 UN SC Res. 1970 (2011), 26 February 2011, § 6. See also UN SC Res. 1593 (2005), § 6 with respect to Sudan and SC Res. 1497 (2003) with respect to the peacekeeping mission in Liberia, though that resolution does not contain a referral to the ICC.

29 Cryer, et al., *supra* note 12, at 175–176.

Even if there were such a conflict, Article 103 of the UN Charter would ensure that the Charter obligation prevails.

4. Has the Council Actually Imposed Obligations of Cooperation on Libya or Sudan that Go beyond the ICC Statute?

The next question is whether the Council, in adopting Security Council Resolutions 1593 and 1970, has in fact imposed obligations of cooperation on Sudan and Libya that go beyond the ICC Statute. It may be observed that there is a difference between the way in which the Security Council has framed the cooperation obligation of Libya and Sudan with regard to the ICC and the way in which it framed the cooperation obligation of all states with regard to the international criminal tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR). As already noted, with the ICC, the Security Council has simply imposed an obligation to 'cooperate fully ... pursuant to this resolution'. However, with respect to the ad hoc Tribunals, the Council decided that 'all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and *the Statute of the International Tribunal ...*'³⁰ So it was clear with regard to the ad hoc tribunals that the cooperation regime envisaged by the Security Council resolution was that set out in the Statute of the ICTY and ICTR (which were annexed to the relevant resolutions). It is not clear why similarly explicit language was left out of the Council resolutions dealing with the ICC. Perhaps there was some nervousness on the part of Security Council members about making explicit that the Council was imposing the ICC Statute on a state not party to it.

However, though the Council does not incorporate the ICC Statute explicitly into its resolutions referring situations to the ICC, the better view is that Council has implicitly adopted the regime of the Statute into the relevant Security Council resolutions. It is worth recalling that the words 'cooperate fully' in SC Res 1593 and 1970 mirror the obligations of cooperation in Article 86 of the ICC Statute. That provision states that: 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.' This similarity in language makes it reasonable to conclude that these instruments (the ICC Statute and the Security Council resolutions) provide for the same obligation. Also, as I have previously argued, the fact that the Security Council provides no procedure by which investigations or prosecutions at the ICC are to take place must mean that the Security Council expects the Statute to be the governing law with respect to those investigations or prosecutions

30 See SC Res. 827 (1993), § 4 (emphasis added).

arising out of referrals.³¹ This is because the decision of the Council to refer a situation to the Court can only be effective if a corresponding decision that the Court take such action as the Court can take is implicitly read into the Council decision. However, since Article 1 of ICC Statute provides that '[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute', the Court can only act in accordance with its Statute. Thus, conferring jurisdiction on the Court by means of a Security Council referral is to give operative effect to the Statute with regard to that situation. Furthermore, by requiring Sudan and Libya to cooperate fully with the Court, the Security Council is subjecting Sudan and Libya to the requests and decisions of the Court. As the Court must, under Article 1 of the Statute, act in accordance with its own Statute, the Council by making requests and decisions of the Court binding on those countries is in effect subjecting those states, indirectly, to the provisions of the Statute.

This position is consistent with that taken by the Pre-Trial Chamber in the *Bashir Arrest Warrant decision*. In justifying its exercise of jurisdiction over a head of state of a non-party, the Pre-Trial Chamber stated that the Security Council has accepted that investigations and prosecutions from the Darfur situation 'will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole'.³² The fact that the ICC Statute is to be regarded as the governing framework within which the referral of the situations in Sudan and Libya have taken place, when combined with the fact that the obligation of cooperation in the Security Council resolutions adopts language that is identical with that to be found in the ICC Statute, makes it reasonable to conclude that the obligation of cooperation provided for by the Council is the obligation to cooperate in accordance with the Statute. Moreover, nothing in the Security Council resolution indicates that the Council has imposed obligations greater than those to be found in the Statute. Although the resolutions demands 'full cooperation' with the Court and the Statute allows for cases of non-compliance with requests for assistance, the language of full cooperation is also to be found in Article 86 of the Statute. Also, though the resolutions impose the obligation to cooperate and provide assistance to the Court *and the Prosecutor* while Article 86 speaks only of an obligation to cooperate fully with the Court, there is no material difference on this point as the Statute defines 'the Court' as being composed of all its organs including the Office of the Prosecutor.³³

To conclude on this issue, it should be noted that adopting the position that the obligation of cooperation imposed by the relevant Security Council resolutions is the same obligation of cooperation which is to be found in the

31 D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *JICJ* (2009) 333, 341 *et seq.*

32 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, § 45.

33 Art. 34 ICCSt. See also Sluiter, *supra* note 13, at 158.

ICC Statute means that the limits of those cooperation obligations are also to be found in the Statute. This means that where the Statute provides exceptions to the obligation to cooperate, those States with respect to which the Security Council has imposed an obligation of 'full cooperation' (Libya and Sudan) may rely on such exceptions.

5. If the Council Imposes Obligations of Cooperation which Go beyond the Statute, would the ICC be in a Position to Enforce such Obligations?

A further question would arise if, contrary to the position taken here, the Security Council is deemed to have imposed obligations of cooperation which go beyond the Statute. In such a scenario, there would be the question of what would be the means for enforcing this obligation that arises under a Council resolution but not under the Statute? In particular, would the ICC be in a position to enforce such an obligation? In such a scenario, although Libya will have the obligation to cooperate under the UN Charter, and although Article 103 of the Charter provides that obligations under the Charter prevail over other treaty obligations, it is not clear that *the Court* could enforce such an obligation. The question would be whether the Court could apply a source of law that departs from explicit provisions of its Statute. While the UN Charter has precedence over other treaties as a matter of general international law, the Court is bound by its Statute (Article 1) and Article 21(1)(a)³⁴ of the ICC Statute gives priority to the Statute over other sources of law (perhaps except for human rights law³⁵).

Under Article 21(1)(b), the Court may apply 'where appropriate, applicable treaties and the principles and rules of international law'. This means that the UN Charter and relevant UN Security Council resolutions form part of the applicable law before the Court. However, the ICC Pre-Trial Chamber has held that:

those other sources of law provided for in paragraphs (1)b and 1(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules;

34 Art. 21(1) ICCSt.: 'The Court shall apply: (a) *In the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence' (emphasis added). See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 385: 'Article 21 clearly imposes a hierarchy of sources, with a three-tiered cascade of applicable norms.'

35 Art. 21(3) ICCSt. See D. Akande, 'The Sources of International Criminal Law', in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 39, 41–46; A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1051, 1080; also see, G. Hafner and C. Binder, 'The Interpretation of Article 21(3) ICC Statute: Opinion Reviewed', 9 *Austrian Review of International and European Law* (2004) 163, 174.

and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the *Vienna Convention on the Law of Treaties* and article 21(3) of the Statute.

This means that the Court can only resort to the UN Charter and Security Council resolutions as means of defining the obligations of a state to cooperate when the Statute fails to provide a rule for the situation in question. However, since the Statute makes extensive provision regarding the cooperation obligation of states it may be argued that there is no *lacuna* with regard to cooperation. Nevertheless, it might be argued that the Statutes' provisions regarding obligations of cooperation are addressed to state parties and thus there is a *lacuna* with regard to non-party states. While it is true that the obligations of cooperation in Part 9 are addressed only to state parties via Article 86, many other provisions simply refer to the 'requested State'. In particular those provisions, which allow postponement of the execution of a request for assistance (Articles 89(2), 94 and 95), simply provide that a requested state may suspend execution of the request. It may be argued that since these provisions do not specify that they deal only with states parties³⁶ there is no *lacuna* which allows for application of a separate obligation of cooperation provided for in a Security Council resolution.

Given the position taken here that relevant Security Council resolutions do not impose obligations of cooperation that go beyond the Statute, there is no need to take a position, at present, on what would happen were the Security Council to impose an obligation of cooperation going beyond the regime of the Statute. However, it ought to be pointed that it may not matter so much whether the Court can enforce those additional obligations since the powers of the Court in cases of non-compliance with obligations of cooperation are rather limited and in the case of referrals to the Security Council consist mainly in reporting the non-compliance to the Security Council.³⁷

To conclude on the points discussed above, although the Security Council has the power to impose additional obligations of cooperation beyond those that have been set out in the ICC Statute, it has not done so with regard to Sudan and Libya. This means that those states (and in particular Libya) are able to rely on the provisions of the Statute which restrict the obligation of cooperation, and in particular, those which allow for a suspension of the obligations of cooperation in the case of an admissibility challenge.

36 It should be noted that the working group that negotiated Part 9 of the ICC Statute (dealing with cooperation) at the Rome Conference requested that 'The Drafting Committee should consider using the terms "requested State Party" wherever "requested State" appears in part 9'. See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held at Rome, 15 June - 17 July 1998, Official Records, Volume III (Reports and other documents), A/CONF.183/13 (Vol. III) (hereinafter, 'Official Records')*, at 334. It is not clear why the Drafting Committee chose not to make the change.

37 Art. 87(5)(6) and (7) ICCSt.

6. Domestic Proceedings and the Obligation to Cooperate with the ICC

As noted above, the new government in Libya, the National Transition Council, has, at the time of writing, insisted that it will prosecute in Libya Saif Gaddafi, in respect of whom the ICC Pre-Trial Chamber has issued a warrant of arrest and a request for surrender. Thus (and thus far), the Libyan authorities have refused to hand over Saif Gaddafi to the ICC. Since the UN Security Council has imposed on Libya an obligation to cooperate with the ICC, if Libya wishes to retain Mr Gaddafi, the Libya authorities will need to find a provision of the ICC Statute that provides an exception to the obligation of surrender contained in SC Res 1970. As it has been established above that the obligation of cooperation in that Security Council Resolution is an obligation to cooperate in accordance with the ICC Statute, the exceptions to the obligation of cooperation in the Statute should be equally applicable to the obligation in the Resolution.

Whether a state may be entitled to suspend its obligations of cooperation with the ICC as a result of domestic proceedings with respect to the persons wanted by the ICC will depend, in the first place, on whether the domestic proceedings relate to the same person and the same conduct that is the subject of the ICC proceedings. Where domestic proceedings mirror ICC proceedings in this way it will be possible for an admissibility challenge to be made with respect to the ICC case.³⁸ Where there has been such a challenge, there are two provisions of the Statute that explicitly limit or suspend the obligation of cooperation. These provisions are Article 89(2) and 95 of the Statute. Article 89(2) provides that:

Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

38 For application of the same person/same conduct test, see Decision on the Prosecutor's Application for a warrant of arrest, Article 58, *Lubanga Dyilo* (ICC-01/04-01/06-8-US-Corr), Pre-Trial Chamber I, 10 February 2006, §§ 39–40: '[I]t is a *condition sine qua non* for a case... that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.' See also Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Ruto and others* (ICC-01/09-01/11-101), Pre-Trial Chamber II, 30 May 2011, § 55. For a discussion of the same person/same conduct test with regard to complementarity and admissibility, see Stahn, *supra* note 2, section 4 and see further C. Stahn and M.M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011). For criticisms of this test see K.J. Heller, 'A Sentence-Based Theory of Complementarity', 53 *Harvard International Law Journal* (2011) 202; M. Newton, 'The Quest for Constructive Complementarity', in Stahn and El Zeidy (eds), *ibid.*, 304 and E. Mégret, 'Too Much of a Good Thing? Implementation and the Uses of Complementarity', in Stahn and El Zeidy (eds), *ibid.*, 361.

Article 95 states that:

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Where there has been a challenge to the admissibility of a case before the ICC, the intention is to stop the ICC proceedings and it would not be surprising in such a case that a state wishes to suspend an obligation to respond to ICC requests until the question of admissibility is determined. Since the admissibility challenge would be premised on giving priority to domestic proceedings, the state concerned might not wish to take further steps with respect to the ICC proceedings.

Before analysing the effect of Articles 89 and 95, and how they relate to each other, it is probably useful to say a few words about complementarity and admissibility challenges in order to set these provisions into context.

A. Complementarity and Admissibility Challenges

As is well known, the ICC operates on the basis of complementarity with national courts. The Court is only to exercise jurisdiction in circumstances where national courts and national legal systems have failed to investigate and prosecute.³⁹ Cases before the Court are inadmissible where the case is being investigated by a state with jurisdiction over the case or has been investigated by such a state that has decided not to prosecute.⁴⁰ In such cases, the ICC may only act where the state concerned is unwilling or unable genuinely to carry out the investigation or prosecution. Furthermore, cases are also inadmissible where the person has already been tried for the conduct that forms the basis of the case, or more generally where the case is not of sufficient gravity.⁴¹

Questions of admissibility may arise at different stages of the proceedings and the admissibility of a case may be challenged by a number of interested persons.⁴² Under the Statute, the admissibility questions may arise immediately after the Prosecutor determines that there is a reasonable basis to commence an investigation, at the pre-trial stage, at the commencement of trial, or exceptionally after the trial has commenced.⁴³ Moreover, challenges

39 See Art. 17 ICCSt.

40 Art. 17(a) and (b) ICCSt.

41 Art. 17(c)–(d) and 29 ICCSt.

42 Art. 18 and 19 ICCSt.

43 Art. 18(1)–(2) and 19(4) ICCSt.

to admissibility may be made either by the accused person, a state which is exercising jurisdiction over the case, or the state of territoriality or nationality.⁴⁴ Also, the Prosecutor may request a ruling on admissibility.⁴⁵

Although the grounds for challenging admissibility remain the same in all cases, the procedure by which admissibility may be challenged and the consequences of an admissibility challenge will vary depending on how the case is referred to the Court and on who makes the admissibility challenge. For example, under Article 18 a state is entitled to challenge the admissibility of a *situation* as soon as the Prosecutor decides to commence investigation into that situation. However, this right of states to challenge the admissibility of *situations* only applies where the situation has been referred by a state or where the Prosecutor has initiated a case *proprio motu*. Under Article 18(1) and (2), this right to challenge the admissibility of situations does not extend to referrals by the UN Security Council. Moreover, individuals are not entitled to challenge the admissibility of situations at all. Individuals may only challenge the admissibility of *cases*, i.e. only individuals accused of a crime in a specific case are entitled to bring an admissibility challenge. Differences also exist with regard to the consequences of admissibility challenges by states and by accused persons. Where a state challenges the admissibility of a situation or a case, the Prosecutor is required to suspend the investigation into the situation or case,⁴⁶ whilst this is not required in the case of admissibility challenges by an accused person. That the Statute makes special provision for admissibility challenges by states and imbues them with greater effect than admissibility challenges by individuals or those carried out by the Court on its own motion reflects the fact that the principle of complementarity is included in the Statute mainly to protect the interests of states in exercising primary jurisdiction over matters covered by the Statute.

B. Does Article 95 Permit Suspension of Obligations of Arrest and Surrender?

Of the two provisions mentioned above, which permit suspension by a state of the obligation of cooperation, the more general is Article 95. The text of Article 95 makes clear that a state with respect to which the ICC has issued a cooperation request may postpone or suspend the execution of that request where there has been an admissibility challenge at the ICC. It is interesting to note that the permission, granted under Article 95, to suspend the obligation of cooperation is not limited to admissibility challenges brought by the state seeking to suspend the obligation of cooperation. Under that provision, the requested state is permitted to suspend obligations of cooperation whenever an admissibility challenge is made under Articles 18 and 19. This means that the postponement of the execution of a request

44 Art. 18(2) and 19(2) ICCSt.

45 Art. 19(3) ICCSt.

46 Art. 18(2) and 19(7) ICCSt.

for assistance may occur in cases of admissibility challenges brought by the individual or in cases of admissibility challenges brought by another state that claims to be exercising jurisdiction over the case. Thus, Article 95 shows the importance of the principle of complementarity in that it effectively prioritizes national proceedings over the ICC case even when it has not yet been determined that the ICC case is (in)admissible. Although one may regard Article 95 as simply pausing ICC obligations in cases where it may turn out that the ICC does not have the power to hear the case, it is interesting to note that the permission to suspend the obligation of cooperation does not extend to challenges to *jurisdiction* brought under Article 19.⁴⁷ That this is so confirms that the core concern is not so much the general power of the ICC to hear the case but rather the more limited, and perhaps more important, concern that the Court should not interfere with national proceedings and should be subsidiary to national action.⁴⁸

The suspension of the obligation to cooperate when there is an admissibility challenge is consistent (but only somewhat) with the provisions in Article 18 and 19 which require the Prosecutor to suspend investigations where there is a challenge to admissibility under those provisions. When there is an admissibility challenge by a state under those provisions, the Prosecutor is required to suspend investigation until the Court determines the admissibility of the case.⁴⁹ So it appears that in the event of an admissibility challenge (by a state) which occurs before the prosecution begins, the case is frozen. These provisions are only partially consistent with the permission to postpone execution of requests for assistance under Article 95, as the suspension of the investigation under Article 18 and 19 only applies to challenges brought by states (and not by individuals). Also, though Article 95 deals only with admissibility challenges, the requirement that the Prosecutor suspend the investigation applies to both challenges to admissibility and challenges to jurisdiction which may occur under Article 19.

It should be noted that where there is a challenge, by a state, to admissibility (or to jurisdiction) under Articles 18 and 19, the Prosecutor, despite the freeze on investigation, may apply to the Pre-Trial Chamber for authority to take necessary investigative steps for preserving evidence, obtaining witness testimony, or for the authority in coordination with relevant states to take measures to prevent the absconding of persons wanted by the Court.

Returning to Article 95, it is clear that the first part of it provides a broad permission to postpone execution of requests made by the ICC and therefore provides a permission to suspend the obligation that states have to cooperate with the ICC. The second part of that provision limits the permission given to states to suspend the obligation of cooperation in cases where the Court has

47 C. Kress and K. Prost, 'Article 95', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd edn., Beck/Hart, 2008) 1593, at 1594 incorrectly suggest that Art. 95 does apply to jurisdictional challenges. Schabas, *supra* note 34, at 1030, notes that Art. 95 does not apply to jurisdictional challenges.

48 Schabas, *supra* note 34, 1030–1031. In this regard, see also Art. 94 ICCSt.

49 Arts 18(2) and 19(7) ICCSt.

specifically ordered that the Prosecutor may pursue the collection of evidence pursuant to Articles 18 or 19. This second part is a reference to Articles 18(6) and 19(8) under which the Prosecutor may be authorized to take certain investigative steps despite the general freeze on investigation.

The key question that arises with respect to the interpretation of the first part of Article 95 is whether it permits the postponement by states of their obligation to arrest and to surrender a person wanted by the ICC. On one view, Article 95 only applies to requests for 'other forms of cooperation' provided for in Article 93 and does not apply to a request for arrest and surrender, which is provided for in Article 89. In support of this view is the fact that Article 95 (and 94) is placed immediately after Article 93, which deals with forms of cooperation other than arrest and surrender.⁵⁰ The suggestion may therefore be made that Articles 94 and 95 are exceptions to the obligation in Article 93 to cooperate with the Court with regard to these other forms of assistance.⁵¹ Another reason for suggesting that Article 95 does not extend to obligations for arrest and surrender is because the second part of that provision states that execution of requests for assistance may not be postponed where the Court has ordered that the Prosecutor may pursue the collection of 'such evidence' pursuant to Articles 18 or 19. The reference to 'such evidence'⁵² might suggest that the evidence had been referred to earlier in the provision or indeed that the whole provision is simply about the collection of evidence.⁵³

However, despite these uncertainties regarding the placement and language of Article 95, the text of the first part of that Article is remarkably broad. It does not limit the permission to postpone execution of requests only to requests for 'other forms of cooperation'. Indeed Article 95 explicitly states that in the event of an admissibility challenge, the requested state may postpone the execution of a request 'under this Part'. Since Part 9 deals with all requests for cooperation, including the requests for arrest and surrender, the

50 See Schabas, *supra* note 34, 1031 on the drafting history of these provisions and on the question of the order in which the articles appear. Both Arts 94 and 95 were originally part of the same provision. Instructions were given to the drafting history team to place what became Art. 94 *after* what became Art. 95. However, it was acknowledged even at that point that there was 'need to consider the question of the placement of [Article 95]', with the suggestion being that it was inappropriately placed.

51 It should be noted that the working group responsible for the negotiation of this part of the Statute indicated in its report to the drafting committee that the latter 'should consider the question of the placement of' Art. 95 (then Art. 90(b)). See, Official Records, *supra* note 36, at 334. Art. 95 was then (as now) placed between what is now Arts 93 and 95 and the message of the working group to the drafting committee indicates that the working group thought that the provision should be moved elsewhere. This point is made clearer by the fact that the working group also suggested to the drafting committee that what is now Art. 94 (then 90(a)) should be placed after Art. 93 (then Art. 90: Other forms of cooperation) and before Art. 96 (then Art. 90bis — Contents of request for other forms of assistance under Art. 93). This note makes it clear that the working group thought there was a close relationship between Art. 94 and the other provisions dealing with forms of assistance other than surrender, while the note regarding Art. 95 suggests that the working group did not see Art. 95 as being so related.

52 See Schabas, *supra* note 34, at 1030, noting that 'the syntax of the provision is troublesome'.

53 See Heller, *supra* note 8.

text of Article 95 suggests that all requests under Part 9, including requests for arrest and surrender, can be postponed.⁵⁴

The exception in the second part of Article 95 does not determine the general context of the permission given in that provision to suspend the obligation to cooperate. Rather, that exception simply responds to those parts of Articles 18 and 19 that suggest that a state's cooperation obligations will continue. Although the second part of Article 95 is not well phrased it appears certain that it is intended to cater for those situations in which the Prosecutor is specifically authorized (under Articles 18(6) and 19(8)) by the Pre-Trial Chamber to take investigative steps despite the freeze that arises out an admissibility challenge (by a state). Thus, the second part of Article 95 creates an exception to the first part, which in turn creates an exception to the obligation of cooperation.⁵⁵ That the exception in the second part relates only to situations where a state is obliged to assist with collection of evidence, and is thus narrower than the first part of Article 95, which deals with all requests for cooperation, is a function simply of the purpose of the exception (which is to provide consistency with Articles 18(6) and 19(8)). The exception in the second part of Article 95 does not extend to requiring compliance with the obligation of surrender simply because Articles 18(6) and 19(8) do not appear to provide that the Pre-Trial Chamber can authorize the Prosecutor to compel compliance with such obligation. All that Article 19(8)(c) provides with regard to accused persons is that the Prosecutor can seek authority, 'in cooperation with the relevant States' to prevent the absconding of suspects. The fact that the measure must be taken in cooperation with the relevant state suggests that the state may not be compelled.⁵⁶

Therefore, the better interpretation of Article 95 is that it permits a state to which a request for surrender has been made to postpone the execution of that request pending the resolution of any admissibility challenges. Although there has not been detailed consideration of this issue in the literature, the position taken here accords with the dominant view of the literature.⁵⁷

It is important to acknowledge that interpreting the Statute so as to permit states to suspend the obligation to arrest and surrender wherever there is an admissibility challenge would provide a means by which a state that wishes to shield a suspect could delay surrender, i.e. simply by bringing an

54 In the *Informal expert paper*, *supra* note 25, it was stated, at § 47, that 'orders and warrants ordered by the Court prior to the challenge continue to be valid (Article 19(9)) and States Parties continue to be obliged to fulfil requests based on such orders and warrants in accordance with Part 9'. While it is true that orders and warrants issued prior to an admissibility challenge remain valid, this article fails to take into account the fact that Art. 95 modifies the obligation of states parties to cooperate.

55 Ohlin, *supra* note 8.

56 See B. Swart, 'Arrest and Surrender', Cassese, Gaeta and Jones (eds), *supra* note 35, 1639, at 1694.

57 Kress and Prost, *supra* note 47, at 1594: 'While an admissibility or jurisdiction challenge is pending before the Court, the requested State may postpone the execution of a request be it for surrender or for another form of cooperation.' Sluiter, *supra* note 13, at 174: '... there is no need to surrender an accused (yet) if the case's admissibility is still uncertain...'. A contrary view is taken by Swart, *ibid.*, at 1694.

admissibility challenge. While some might regard it as better to require the state to first turn over the suspect, the drafters took the principle of complementarity seriously. It should not be assumed that the overriding goal of the ICC Statute is simply to ensure trial by the ICC. The goal was to have a permanent international institution, which was complementary to national criminal jurisdictions.⁵⁸ The context of the provisions regarding admissibility challenges suggests that there was not the intention that the Court would simply continue with its processes while an admissibility challenge was ongoing. It should be recalled that under Articles 18(2) and 19(7), challenges to admissibility by a state impose an obligation on the Prosecutor to defer investigation of the situation or case (except where otherwise authorized by the Pre-Trial Chamber). This means that an admissibility challenge by a state (at least one before prosecution commences) effectively brings the case to a halt until that admissibility challenge is determined. Also, it is beyond dispute that Article 95 would suspend the state's other obligations to comply with requests for other forms of cooperation. Given this context, it is doubtful that the singular obligation to surrender should continue while everything else is frozen. In any event, though a state acting in bad faith can use the provision to suspend its obligations those obligations are only suspended. The obligation will resume if the admissibility challenge fails. Finally, if the provisions are construed as allowing for the postponement of the execution of all requests for cooperation, this will provide an incentive for the Court to move swiftly.

C. *The Relationship between Suspension of the Obligation of Surrender under Article 95 and the Suspension Arising under Article 89(2)*

One of the strongest arguments against construing Article 95 as permitting the suspension of the obligation to surrender persons in all cases where admissibility is challenged is that such an interpretation could be regarded as rendering redundant Article 89(2), which specifically permits suspension of the surrender obligation where there is a *ne bis in idem* challenge.⁵⁹ Why have specific suspension of the surrender obligation if there is already a general suspension of that obligation under Article 95? However, closer examination of the two provisions reveals that there is no inconsistency between them and that the two provisions deal with slightly different situations. The general suspension under Article 95 applies where there is a challenge to admissibility made *to the ICC* under Articles 18 and 19. However, the situation contemplated in Article 89(2) is different as it relates to a challenge made *in a national court* but related to *ne bis in idem* as provided for in Article 20. In this case Article 95 does not apply on its face as there is no admissibility challenge at the ICC. Although there is nowhere else in the Statute that speaks about such a challenge being made in a national court, that is not to say that the accused,

⁵⁸ Art. 1 ICCSt.

⁵⁹ See Heller, *supra* note 8.

where he has been previously tried, will not seek to make this point in a national court. Indeed, in some national legal systems there might be a constitutional or other right to prevent extradition to foreign jurisdictions in cases where the person has been tried previously for the conduct in question.⁶⁰ While Article 89(2) should not be regarded as authorizing the making of admissibility challenges in national courts, the provision explicitly contemplates this possibility and makes provision for what is to happen if this occurs.⁶¹ Where such a challenge does happen in a national court, Article 89(2) states that the state concerned is to consult with the Court. This raises the question whether that consultation by the state concerned is to be regarded as a challenge to admissibility by the state, which would then bring Articles 19 and 95 into play. There is nothing to suggest that such consultation should be so regarded. At best, it may be regarded as an invitation by the state for the ICC to consider admissibility on its own motion⁶² where there has been no previous challenge at the ICC.⁶³ Indeed it is important (and perhaps preferable) that the consultation under Article 89(2) is not regarded as a challenge to admissibility by the state. This is because, if it were so regarded, then the Prosecutor is required to suspend the investigation (under Article 19(7)) while this does not seem to be required where the Court considers admissibility *proprio motu*.

What is certain is that where Article 89(2) applies and there is an ICC ruling on admissibility pending, the state that is requested to surrender a person may postpone the execution of that request. That this permission to postpone the obligation to surrender is mentioned in this context makes it more, and

60 For a persuasive explanation of the presence of Art. 89(2) in the ICCSt., see comment by Darryl Robinson to D. Akande, 'Is Libya Under an Obligation to Surrender Saif Gaddafi to the ICC? Part I (What Does the Rome Statute Say?)', *EJIL: Talk!*, 26 November 2011, available online at <http://www.ejiltalk.org/is-libya-under-an-obligation-to-surrender-saif-gaddafi-to-the-icc-part-i-what-does-the-rome-statute-say/#comment-14409> (visited 13 March 2012):

Art 89(2) is where a *ne bis in idem* challenge is brought in national courts. Such a challenge is commonly available in extradition legislation, and thus would be available if states use an extradition template, or have something similar in their surrender legislation, or if it is available as a constitutional right. In Canada, for example, a person could always challenge extradition or surrender by claiming 'autrefois acquit/autrefois convict' (it's a Charter right). 89(2) says if such a challenge is made, check if admissibility has been raised at the ICC, and if it has, then let the ICC determination govern. You can't challenge 'admissibility' in a Canadian (or other) extradition hearing because there is no such concept in domestic criminal law. You can however bring a *ne bis in idem* challenge in the extradition laws of many countries, because it is a human right.

61 Kress and Prost, *supra* note 47, at 1543.

62 Art. 19(1) ICCSt. provides that the Court may on its own motion determine the admissibility of a case. However, the ICC Appeals Chamber has held that this power should be used with caution. See Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', *Situation in the Democratic Republic of Congo* (ICC-01/04-169), Appeals Chamber, 13 July 2006, § 52.

63 This would be similar to the situation in the *La Grand* case at the ICJ, where the ICJ was invited by Germany to issue provisional measures *proprio motu*. See *La Grand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports (1999) 9, at § 12.

not less, plausible that Article 95 should be construed as covering the obligation to surrender (and not merely other forms of cooperation and assistance). The presence of Article 89(2) shows that there is express consideration, within the Statute, of the possibility of suspension of the obligation to surrender. There seems to be no reason to consider that this suspension can only take place in the context of admissibility challenges relating to *ne bis in idem* which originate in a national court and that such a suspension should not take place where there is a direct admissibility challenge in the ICC on that or other grounds. Thus, the final sentence of Article 89(2), which speaks of the suspension of the obligation of surrender pending an ICC admissibility ruling should be interpreted in one of two ways. First, it could be interpreted as adding to what is provided for in Article 95. This is because one may take the view that where the admissibility ruling spoken of in the final sentence of Article 89(2) is prompted by the consultation provided for earlier in Article 89(2), there is no 'challenge' to admissibility in the sense of Article 95. This would mean that the matter is technically outside the realm of Article 95 and hence the need for the additional sentence in Article 89(2) allowing for suspension of the obligation of surrender. Alternatively, Article 89(2) can be viewed as making explicit what is already provided for in Article 95 for fear that if not mentioned in Article 89(2) it could be seen as an implicit exception to Article 95.

D. The Obligation of Cooperation and Domestic Proceedings dealing with Different Conduct and/or Different Persons: Article 94 ICC Statute

Where domestic proceedings may not result in a challenge to the admissibility of the ICC case (perhaps because they do not meet the test for admissibility as they relate to different conduct or perhaps different persons from the ICC case), a state may nevertheless wish to still limit or suspend its obligations of cooperation. In such a scenario, the state may accept that the ICC has jurisdiction and that the ICC case is admissible but might wish to first engage in the domestic prosecution before the ICC prosecution takes place. In short, questions of sequencing of the prosecutions might arise. Or questions might arise as to how ICC prosecutions of one person might impinge on domestic prosecutions of other persons.

Where there is no admissibility challenge at the ICC but domestic proceedings that are somehow related to the ICC proceedings, reliance may be placed on Article 94 of the ICC Statute.⁶⁴ That provision allows the postponement of

64 Art. 94(1) provides that:

If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a

the execution of a request for assistance, in cases where immediate execution of such a request would interfere with an ongoing national investigation or prosecution. However, Article 94 should only be construed as applying to domestic cases involving different conduct or different persons from that being investigated or prosecuted by the ICC, and should not apply in cases of admissibility challenges. First of all, Article 94 states that it only applies to ‘prosecution of a case different from that to which the [ICC] request relates’. Secondly, Article 94 ought to be interpreted in context, i.e. together with Article 95, which deals with suspension of the obligation of cooperation in cases of admissibility challenges. The best way to regard the interaction of the two is that Article 94 deals with a domestic case that deals with *different* conduct while Article 95 deals with a domestic case that deals with the *same* conduct. In the latter case, it is expected that an admissibility challenge will be made and thus the matter will be regulated by Article 95. Any other interpretation would mean that there is too much overlap between the two provisions. Also, to interpret Article 94 as applying to cases dealing with the same conduct as under investigation by the ICC would be to permit the requested state to suspend its obligations without making an admissibility challenge but simply by relying on its domestic investigation.⁶⁵

A further question that arises with regard to Article 94 is whether it may, like Article 95, be used to suspend the obligation of arrest and surrender. Although the text of the Statute is not clear on the point, Article 94 ought not to be interpreted as permitting suspension of the obligation to surrender to the ICC. While Article 95 states that it relates to ‘a request under this Part’, i.e. any request under Part 9, Article 94 ought to be regarded as confined to requests for forms of cooperation other than arrest and surrender. As pointed out above,⁶⁶ the drafting history of Article 94 suggests that the provision was not intended to apply to requests for surrender. One reason for the different interpretation is that Article 94 applies to any national investigation and so would apply to any investigation for even relatively minor crimes (while Article 95 would apply only to serious crimes). Also, while Article 95 might apply in the context of a general freeze of ICC proceedings (where the state challenges admissibility under Articles 18 or 19) and it would seem understandable for the obligation of surrender to also be suspended, with Article

decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

65 Even if Art. 94 applied to a domestic case dealing with the same conduct covered by the ICC case, it does not seem likely that a state would rely on it where it has made an admissibility challenge since reliance on Art. 95 would be the better option. This is because Art. 95, like Art. 94, permits the suspension of the obligation to cooperate with the Court but, unlike Art. 94, does not require agreement of the Court as to the duration of the suspension of the obligation. However, were Art. 94 to be applied, there would be a suspension but the Prosecutor cannot apply to the Court to collect new evidence (as may happen under Art. 95) but can only seek measures to preserve evidence.

66 See *supra* note 55.

94, the ICC proceedings are not frozen and the investigation or prosecution carry on. In that context, there seems to be no reason to allow the state to suspend its obligation of surrender, especially where the national investigation is for a lesser crime.

7. Conclusion

This article has argued that the Security Council may, in the context of referrals, choose to impose on states obligations to cooperate with the ICC that are more extensive than those set out in the ICC Statute. However, despite the lack of clarity in the resolutions referring the situation in Darfur and in Libya to the ICC, the better view is that the obligation imposed on Sudan and Libya to 'cooperate fully' with the ICC should be regarded as an obligation to cooperate in accordance with the provisions of the ICC Statute. This means that those states are entitled to benefit from those provisions of the ICC Statute that permit a refusal to cooperate with the Court or permit the state to postpone the execution of a request by the Court for assistance. In particular, Libya would be entitled to rely on the provisions of the Statute dealing with suspension of the obligation of cooperation in the case of a challenge to the admissibility of the ICC cases arising out of the Libyan situation. It has been argued that the permission provided in Article 95 of the Statute to suspend the cooperation obligations in cases of admissibility challenges includes a permission to suspend the obligation to surrender an accused person to the ICC.

If all this is right, then Libya would be entitled to suspend its obligation to surrender Saif Gaddafi, if and when an admissibility challenge is made in that case. However, at the time of writing, it appears that no formal admissibility challenge has in fact been made to the ICC.⁶⁷ Thus, at the time of writing, it may be argued that Libya's obligations to cooperate continue and it has an obligation to surrender Gaddafi.

Furthermore, Libya can only suspend the obligation to surrender by actually making an admissibility challenge. Libya may not suspend this obligation simply by relying on Article 94, which permits the postponement of the execution of a request for cooperation where the immediate execution of the request would interfere with an ongoing national investigation or prosecution.

The question may be asked as to what it means to make an admissibility challenge for the purposes of Article 95. Does a state informing the

67 Although Libya has submitted observations to the ICC Pre-Trial Chamber regarding the arrest of Saif Gaddafi, those observations have been kept confidential by the Court. See Report of the Registrar on Libya's observations regarding the arrest of Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-44), Pre-Trial Chamber I, 23 January 2012. However, the response filed by the Office of the Public Defence Counsel suggests that Libya has not (yet) challenged the admissibility of the case: Public Redacted Version of 'OPCD Observations on Libya's Submissions Regarding the Arrest of Saif Al-Islam' (ICC-01/11-01/11-51-Conf), *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-51-Red), Pre-Trial Chamber I, 2 February 2012.

Prosecutor that it is investigating count?⁶⁸ This would not appear to be the case where the challenge to admissibility is made under Article 19. In such a case, the state would need to make an application or request in writing in which it objects to the admissibility of the case.⁶⁹ However, the matter is different under Article 18 ICC Statute. Article 18(1) and (2) provides that in case of state referral or the Prosecutor initiating investigations *proprio motu*, the Prosecutor is to notify states of the investigations. Where a state, within a month of receipt of that notification, informs the Court that it is investigating the same criminal acts which are within its jurisdiction, the state may request the Prosecutor to defer to the state's investigation and the Prosecutor 'shall' do this (unless the Pre-Trial Chamber decides otherwise). Despite its less formal nature, the procedure set out in Article 18 should be regarded as a challenge to admissibility under Article 95, which not only suspends the investigation but also the obligation of cooperation. However, these provisions (Articles 18(1) and (2)) are inapplicable to the Libyan situation since those provisions do not apply to Security Council referrals and Libya is out of time.

68 On 23 November 2011, the Libyan National Transitional Council wrote a letter to the ICC, stating that: 'The National Transitional Council wishes to affirm that, in accordance with the Rome Statute, the Libyan judiciary has primary jurisdiction to try Saif al-Islam Gaddafi and that the Libyan State is willing and able to try him in accordance with Libyan law.' See ICC-01/11-01/11-34-Anx 07-12-2011 1/2 FB PT, 23 November 2011.

69 See Rule 58 RPE. In Libya's letter of 23 November 2011 (*ibid.*), no specific reference was made to the provisions of the Statute dealing with complementarity or admissibility, nor was there an explicit statement that the case should be regarded by the ICC as inadmissible.