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10. State cooperation in the enforcement of sentences

Göran Sluiter

1. INTRODUCTION

It is a truism that international criminal tribunals cannot function without cooperation from States. This cooperation has many different dimensions and is subject to legal regimes that may vary per tribunal, per State and per form of cooperation.

State cooperation is also required to execute sentences that are imposed by international criminal tribunals. It is a dimension of cooperation and the functioning of international criminal tribunals that does not receive a great deal of attention.¹ This is understandable in the sense that holding international criminal trials does not appear directly dependent upon the regulation of enforcement of sentences; the trial can start and go on, even if there could be uncertainties in respect of the enforcement of sentences. That said, enforcement of sentences is a vital component of any criminal justice system; the authority and credibility of the international criminal justice system are ultimately also dependent on the adequate and fair organization of State cooperation in the enforcement of sentences.

The present chapter addresses the question whether cooperation of States in the enforcement of sentences is fair and adequate in the law and practice of international criminal tribunals. A comprehensive answer to this question is not possible in a book chapter. I will therefore have to be selective and concentrate on a number of essential elements of the aforementioned question. Before I move to some vital aspects of State cooperation in the enforcement of sentences, it is first essential to offer some observations on the types of sentences in international criminal justice and the consequences thereof for organizing State cooperation (Section 2). As to the essential elements of State cooperation in the enforcement of sentences of imprisonment, they will be treated in the following order: cooperation in accepting a convicted person (Section 3), cooperation in respecting the rights of the detained person (Section 4), and cooperation in respecting the duration of the sentence (Section 5). A separate section deals with cooperation in the enforcement of sentences other than imprisonment (Section 6). The chapter ends with some concluding observations (Section 7).

The present chapter concentrates on cooperation in the enforcement of sentences imposed by contemporary international criminal tribunals. Within that category there is in principle no attention for enforcement of sentences imposed by internationalized

¹ The literature has however been growing slightly over the years. For elaborate studies see, among others; C. Kress and G. Sluiter, 'Enforcement', in A. Cassese et al (eds), *The Rome Statute of the International Criminal Court – A Commentary* (Oxford University Press 2002) 1723–810; and in a broad manner dealing with execution of sentences: G. Vermeulen and E. de Wree, *Offendér Reintegration and Rehabilitation as a Component of International Criminal Justice?* (Maklu 2014).

criminal tribunals, as these sentences tend to be executed by one State only, the justice system of which the internationalized court can be considered to be embedded in;² or there is not yet any practice in the enforcement of sentences.³ It thus does not raise, at least not yet, issues of State cooperation in the enforcement of sentences. An interesting exception is the SCSL, which has sentences being enforced in Rwanda and the UK, and which will be included in the present chapter. Therefore, the focus will be on the ICTY, ICTR, their successor, the MICT, the SCSL (together also referred to as the *ad hoc* Tribunals),⁴ and the ICC.

2. TYPES OF SENTENCES AND THE ORGANIZATION OF STATE COOPERATION

It is not possible to analyse State cooperation in the enforcement of sentences imposed by international criminal tribunals without some attention being paid to the types of sentences that are available and the inherent consequences thereof for cooperation.

First, as far as subject matter jurisdiction of international criminal tribunals is concerned, one needs to be aware that they may not only convict for the most serious crimes, also referred to as core crimes. They can also convict for a category of procedural crimes, so-called 'offences against the administration of justice', which includes, among others, contempt of court, interference with witnesses or false testimony.⁵ At the ICC, it is in addition possible to impose a fine for misconduct, as referred to in Article 71 ICCSt. This may not be regarded as a punitive sanction, but as an 'administrative measure'. Be this as it may, also for this 'administrative measure' the cooperation of States may be required to have it enforced.

The inclusion of less serious crimes in the practice of international criminal tribunals has an impact on sentences, and thus enforcement; it may mean that the imposition of fines occurs more frequently than anticipated by the drafters.

But since the international criminal tribunals are first and foremost about meting out punishment in respect of core crimes, it is not surprising that imprisonment ranks as the first available form of punishment. This brings us to the types of sentences – or rather categories of punishment – for which cooperation needs to be available. It seems that among the drafters of statutes of international criminal tribunals there has not been much thought beyond the obvious punishment, namely imprisonment. The ICTY and ICTR limited *penalties* to imprisonment; in addition to imprisonment, their Trial Chambers may, as a *measure* following conviction, order the return of any property and proceeds acquired by criminal conduct to their rightful owners.⁶ This return of property

² This is the case with the ECCC and Special Panel for Serious Crimes (SPSC).

³ This is the situation with the STL.

⁴ In respect of the law of the *ad hoc* Tribunals, when there is only reference to the law of the ICTY in this chapter it implies that the law of the ICTR and SCSL contain highly similar, as good as identical, legal arrangements.

⁵ Rules 77 and 91 ICTY RPE penalize contempt of court and false testimony, respectively; Art. 70 ICCSt penalizes a smaller group of offences against the administration of justice.

⁶ Art. 24(3) ICTYSt.

raises many questions as to how it relates to penalties and – not in the least – how it should be enforced via State cooperation. In the practice of the *ad hoc* Tribunals, it has remained a dead letter.⁷

It makes sense that at the ICC the drafters sought to expand the category of available penalties, with (a) fines and (b) forfeiture of proceeds, property and assets derived directly or indirectly from that crime. Forfeiture is part of the provision on penalties in the ICCSt, Article 77, but one may wonder if it can be qualified as such. In addition to penalties, or measures under the heading of 'penalties', the ICC can also in case of conviction order reparation to victims.⁸

The question is whether the available penalties – or measures or orders following a conviction – are properly matched in the organization of State cooperation. For each penalty – or measures following a conviction – one has to anticipate their execution. Or in other words: penalties and measures following a conviction have little credibility or authority without adequate cooperation in their enforcement. This is the more so since it has never been envisaged in the international criminal justice system that penalties would be directly enforced by the international community, for example in the form of a 'UN prison'.⁹

The various contemporary international criminal tribunals have opted for a system in which State cooperation in the enforcement of sentences of imprisonment is of a voluntary nature.¹⁰ At the heart of this choice lies the simple fact that a sentence of imprisonment can be enforced in any State, making it unnecessary to impose obligations more widely. Moreover, it was anticipated that there would be a sufficient number of 'volunteers' among States to receive an anticipated modest number of convicted persons. Matters are different in respect of fines, forfeiture orders and measures following a conviction, such as reparation orders. In relation to these penalties and measures a system of voluntary cooperation would not suffice. To have forfeiture orders effectively enforced, for example, not any State's cooperation would suffice, but the cooperation of the State where the convicted person's assets can be located is particularly needed. As a result, State cooperation in relation to these types of penalties and measures has developed into being obligatory.¹¹ Yet, it remains to be

⁷ In the *Milošević* case, Judge Hunt of the ICTY Trial Chamber ordered the freezing of assets of the suspect. It follows from the decision that the prosecution requested the freezing of the assets with a view to enforce upon a possible conviction the order for return of property as provided in Art. 24(3) ICTYSt. Judge Hunt, however, granted the application with reference only to the assumption that freezing of assets would facilitate the arrest of the suspect: *Milošević* IT-02-54 (Decision on Review of Indictments and Application for Consequential Orders, 24 May 1999) paras 26–29.

⁸ See Art. 75 ICCSt. See on victims reparations, C. McCarthy, 'The International Criminal Court's regime of victim redress: non-punitive responses to crimes under the Rome Statute', Chapter 17 in this volume.

⁹ Establishing an international prison has been advocated, however, by Margaret Penrose (M.M. Penrose, 'Lest we fail: the importance of enforcement of international criminal law' (1999) 15 *American University International Law Review* 390). See M.M. Penrose, 'Creating an international prison', Chapter 18 in this volume.

¹⁰ Art. 27 ICTYSt; Art. 103 (1)(a) ICCSt.

¹¹ Compare Art. 109 ICCSt.

seen – and to be addressed in Section 6 – whether this regulation of obligatory cooperation has been done in a satisfactory manner.

Cooperation in the enforcement of sentences has to strike a balance between an obligation of result, i.e. enforcing the sentence, on the one hand, and on the other hand, the rights of convicted persons and – in case of enforcing fines and forfeiture orders – the rights of third parties. In practice this means, for example, respecting the duration of a sentence of imprisonment, but also allowing for early release with a view to the reintegration of the convicted person into society. It may also mean that a forfeiture order may not be enforced if this would infringe the bona fide rights of third parties. It is worth pointing out that international criminal justice does not fully operate on the basis of (mutual) recognition of sentences and a corresponding system of direct enforcement.¹² The execution of sentences is not completely transferred to States by international criminal tribunals, as they continue to exercise substantive supervision in respect of both the duration of the sentence and the treatment of the detained person. In the context of the European Union, however, cooperation in the execution of sentences has, since 2008, been based on mutual trust and mutual recognition.¹³ The result is that EU members are obliged to recognize a judgment of another EU member and are also obliged to directly enforce the imposed penalties. It may be worth considering the EU model of cooperation in the execution of sentences – just like in the execution of arrest warrants – as a point of reference for organizing State cooperation with international criminal tribunals in the future. The consequences of a model of mutual, or at least direct, recognition of sentences for international criminal tribunals is that they will lose control over the execution of the sentence, but this is justified by a high degree of confidence in the State which is executing the sentence. It furthermore carries with it the advantage that it will save international criminal tribunals resources, as they no longer would have any role to play in the execution of sentences after their transfer.

3. COOPERATION IN ACCEPTING A CONVICTED PERSON FOR THE PURPOSES OF ENFORCEMENT OF A SENTENCE OF IMPRISONMENT

The contemporary international criminal tribunals – the ICTY, ICTR and ICC – all provide for voluntary cooperation in accepting a person for the purpose of enforcing a sentence of imprisonment.¹⁴ The ICCSt provides for a safety net in case voluntary

¹² See in more detail on the legal status of an ICC sentence and how this relates to national enforcement, G.A.M. Strijards, 'Article 103', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Verlag C.H. Beck 2008) 1648–54.

¹³ Compare Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

¹⁴ See (n 1).

assistance cannot be obtained; in that scenario, the Netherlands is obliged to execute the sentence of imprisonment.¹⁵

In his report accompanying the creation of the ICTY, the UN Secretary-General ruled out the possibility of having sentences enforced in the States of the former Yugoslavia and refers to the task of finding States which are prepared to execute sentences of imprisonment on a voluntary basis:

121. The Secretary-General is of the view that, given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia. States should be encouraged to declare their readiness to carry out the enforcement of prison sentences in accordance with their domestic laws and procedures, under the supervision of the International Tribunal.

122. The Security Council would make appropriate arrangements to obtain from States an indication of their willingness to accept convicted persons. This information would be communicated to the Registrar, who would prepare a list of States in which the enforcement of sentences would be carried out.¹⁶

In relation to the ICTR, enforcement in the State concerned, Rwanda, was not ruled out – it was even explicitly provided for: 'Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda.'¹⁷

Yet, in practice it was considered that other States were better suited for purposes of enforcement, on account of the risks convicted persons may incur in Rwanda.¹⁸ Vermeulen and De Wree have brought to our attention the fact that Rwanda has consistently objected to ICTR prisoners having their sentences executed elsewhere, which has put quite some strain on the procedure designating a State of enforcement.¹⁹

The internationalized criminal tribunals provide for enforcement of sentences of imprisonment in the State in relation to which the tribunal/court exercises jurisdiction.²⁰ The STL is an exception in this regard. It has followed the approach adopted by the ICTY, meaning that enforcement will take place in a State with which an enforcement agreement has been concluded. In contrast to the ICTY model, however, the State where the crimes have been committed, Lebanon, has not been explicitly excluded as a

¹⁵ Art. 103(4) ICCSt.

¹⁶ Report of the Secretary-General pursuant to Para 2 of SCRes 808 (3 May 1993) UN Doc S/25704 (1993) paras 121, 122.

¹⁷ Art. 26 ICTRSt.

¹⁸ See for detailed account and analysis, D. Abels, *Prisoners of the International Community. The Legal Position of Persons Detained at International Criminal Tribunals* (TMC Asser Press 2012) 478–88.

¹⁹ Vermeulen and De Wree (n 1) 81–5.

²⁰ See for ECCC Rule 113(1) ECCC IR, implying execution of the sentence in Cambodia: '1. The enforcement of a sentence shall be made at the initiative of the Co-Prosecutors.' For the SPSC in East Timor the national enforcement follows from the UNTAET Regulations, especially Regulation 2000/11 on the Organization of Courts in East Timor; Reg. 13 Regulation 2000/11 which deals with supervision of sentences of imprisonment.

possible place for enforcement of a sentence.²¹ The SCSL provides for enforcement of sentences in Sierra Leone, but if circumstances so require sentences may be enforced in a State which has concluded an enforcement agreement with the ICTY and ICTR and which is willing to extend application of such an agreement to a person convicted by the SCSL.²²

The ICTY, ICTR and SCSL have negotiated a substantive number of enforcement agreements.²³ These agreements do not oblige States to accept a convicted person,²⁴ but serve as an additional legal framework governing the transfer of sentenced persons to States which are in principle agreeable to accepting one or more convicted persons. The agreements can be seen as the *trait-d'union* between the applicable law of the relevant international criminal tribunal and the domestic law of States that allow for enforcement of sentences of imprisonment. They have a uniform set-up and contain a strong supervisory role for the sentencing international criminal tribunal. It is even possible – and has occurred in practice – that enforcement of the sentence in the receiving State is terminated and the sentenced person is returned to temporary custody at an international criminal tribunal, with a view to being transferred to another State to serve the remainder of their sentence.²⁵

In the subsequent sections, the duty to respect the duration of the sentence and to respect human rights will be addressed. The process of finding a State for enforcement of the sentence is only in part a legal matter. It can be dissected in two stages. First, States need to be found which are in principle available to accept convicted persons. Second, after conviction, there is a procedure in which a State needs to be selected among the available States.

The first obvious task for each international criminal tribunal is to secure a sufficient number of States which are available to enforce sentences of imprisonment. While beggars cannot be choosers, there are a number of criteria that guide international criminal tribunals in the selection of States for the conclusion of enforcement agreements. There must, first of all, be confidence in the State being able to enforce the sentence and to respect the sentence's duration. Moreover, the State concerned must be in a position to respect the rights of the detained person. It remains uncertain to which degree other factors have played a role in the choice of States for the conclusion of enforcement agreements.²⁶ In this regard one can think of the availability of a

reintegration programme for a convicted person or the distance to the State where family members can be expected to live, with a view to not practically denying family visits.²⁷

The reality is that the majority of enforcement agreements have been concluded with European States; this also applies to the ICC, which will be discussed below. Only in respect of sentences imposed by the ICTR and SCSL have a smaller number of African states been found prepared to conclude enforcement agreements with the relevant institutions.²⁸ It follows from the foregoing that the overwhelming majority of UN members have not concluded agreements for the execution of sentences of imprisonment. The overriding factor appears to be to ensure some degree of proximity to the Tribunal/Court which has imposed the sentence and the place of residence of family members; thus, European countries are a logical choice for the enforcement of ICTY sentences. However, it must also be noted that a number of ICTR and SCSL convicts – coming from Africa – have been sent to West-European countries to serve their sentences of imprisonment. It thus remains uncertain on what basis States are selected and targeted by international criminal tribunals for the conclusion of enforcement agreements. The literature makes mention of the fact that especially for the ICTR it has been quite difficult to find a sufficient number of States which are willing to accept convicted persons.²⁹

The ICC has concluded to date eight enforcement agreements, with Colombia, Serbia, Denmark, Belgium, Mali, Finland, the UK and Austria. More agreements are to be concluded in the future. The number appears at least for now sufficient to ensure enforcement of sentences of imprisonment without having to resort to the residual function of the host State, as provided for in Article 103(4) ICCSt. The content of these agreements are of course modelled on the law of the ICC. Yet, the essential features are as good as identical to the ICTY and ICTR enforcement agreements, which means they contain strict obligations for the enforcing State to respect the rights of the detained person³⁰ and the duration of the sentence,³¹ and a strong supervisory role for the Court to have these obligations enforced.³²

The designation of a State for the enforcement of sentences entails an internal procedure for all of the contemporary international criminal tribunals. This procedure is governed by practice directions (ICTY and ICTR) or the RPE. It is as such not a matter of State cooperation and has been discussed and analysed in detail elsewhere.³³ It is clear that this designation procedure – including the element of taking into account the views of the convicted person and matters such as equitable distribution – gains in strength and importance when there are more States of enforcement to choose from.

²¹ Art. 29(1) STLSt reads as follows: 'Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal.'

²² See Art. 22(1) SCSLSt.

²³ The website of the ICTY mentions 16 enforcement agreements and five *ad hoc* agreements with Germany; the websites of the ICTR and SCSL respectively mention eight enforcement agreements concerning the ICTR and two involving the SCSL.

²⁴ See e.g. Art. 2(4) of the Agreement between UN and Mali concerning the ICTR.

²⁵ See the *Krstić* case discussed further below.

²⁶ Vermeulen and De Wree (n 1) 81: 'Moreover, it is very difficult to discover the policy behind the practice of international transfer of convicted persons by the *ad hoc* Tribunals.'

²⁷ Vermeulen and De Wree adopt the view however that there is very little attention to the position of the convicted person in the course of the designation procedure – Vermeulen and De Wree, *ibid.*

²⁸ These States are Senegal, Rwanda, Swaziland, Benin and Mali.

²⁹ See Abels (n 18) 480–81.

³⁰ See, e.g. Arts 6, 7 of the Enforcement Agreement between the ICC and Finland.

³¹ See, e.g. *ibid.*, Art. 11.

³² See, e.g. *ibid.*, Arts 13, 14.

³³ See, among other, Abels (n 18) 464–500.

In respect of the enforcement of sentences of imprisonment the two core issues of cooperation concern the rights of the detained person and respect for the duration of the sentence. Both matters will be addressed in the two following sections.

4. COOPERATION IN RESPECTING THE RIGHTS OF DETAINEES DURING THE ENFORCEMENT OF A SENTENCE OF IMPRISONMENT

Contrary to the situation of transferring the execution of sentences between States, the international criminal tribunals retain responsibility over the protection of the rights of the convicted and detained person. As was already mentioned, this is not self-evident. The international criminal tribunals could have opted for a system in which the transfer of the execution of the sentence of imprisonment to a State ends every responsibility for the fate of the convicted person. Such a position could have been based on the degree of trust in the receiving State. The latter would then be fully responsible for the protection of the rights of the detained person, as a result of which the detained person would only have recourse to national avenues for review.

The ICTYSt, however, stands in the way of such full transfer, as Article 27 provides: 'Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.'

The reference to supervision of the ICTY appears to imply continuing responsibility for the protection of the rights of the detained person, although on the basis of the text alone one could also argue that the supervisory role is of a more restricted nature and concerns only the imprisonment as such, especially its duration. The Secretary-General, in his report accompanying the creation of the ICTY, did not mention the rights of the detained person or any supervisory role the ICTY should play in that area; his observations were in this regard limited to the issue of pardon and commutation of sentence.³⁴ Yet, it follows from the first enforcement agreement that was concluded with Italy in 1997 that the ICTY saw an important task for itself in ensuring that the rights of the detained person were adequately protected during enforcement at the national level. It did so in two ways.

First, the ICTY obliges the enforcing State to ensure that conditions of imprisonment will be compatible with the UNSMR, the UNBOP and the UNBP.³⁵

Second, this obligation to protect the rights of detained persons is followed by an obligation to allow inspections of detention facilities by the ICRC³⁶ (or in later agreements by the CPT³⁷). In addition, the ICTY may at any time decide to terminate the enforcement of the sentence and order the transfer of the convicted person to

³⁴ See Report of the Secretary-General (n 16) para 123.

³⁵ See Art. 3(5) of the Enforcement Agreement with Italy.

³⁶ See *ibid.*, Art. 6(1).

³⁷ See Art. 6(1) of the Enforcement Agreement with Albania. See on inspection of international imprisonment: S. Snacken and N. Kiefer, 'Oversight of international imprisonment: the Committee for the Prevention of Torture', Chapter 14 in this volume.

another State or the ICTY.³⁸ Although it is not explicitly spelled out, it is clear that enforcement may be terminated in case of (serious) violations of the rights of the detained person.

The strong obligations on States to respect the rights of the detained person in the context of the ICTY have been followed in the ICCSt. Article 106 ICCSt provides as follows:

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

One would expect 'international treaty standards governing treatment of prisoners' to require further specification in enforcement agreements and the case law of the Court. But this is generally not the case; the enforcement agreements involving Finland, Serbia, Denmark, Austria, Belgium and Mali merely repeat the yardstick set out in Article 106(1) ICCSt. An interesting variation is the agreement with the UK, in which the standard set out in Article 106(1) ICCSt is said to include obligations under the ECHR. One would assume that 'widely accepted international treaty standards governing treatment of prisoners' would include the instruments to which reference is made in the enforcement agreements concerning the ICTY and ICTR, but there is no basis for this in either the enforcement agreements or the law and practice of the Court. The uncertainty therefore subsists whether the reference to treaty standards in Article 106 – and enforcement agreements – would include non-treaty law standards such as the UNSMR. Clark adopts the view that these standards should be considered to be assimilated in general human rights treaty provisions.³⁹ Moreover, a convicted person could seek to improve his/her protection under Article 106 by having the Court apply additional sources (being not in a treaty) of protection pursuant to Article 21 ICCSt. Article 21 refers to rules and principles of international law more broadly (Art. 21(1)(b)), and, importantly, to internationally recognized human rights (Art. 21(3)). It is, however, uncertain whether the difference in reference to human rights law between Article 21(3) and Article 106(1) – with the latter provision being restricted to treaty standards – will be resolved in favour of applicability of non-treaty law standards such as the UNSMR. Not only may the content of Article 106(1), in its ordinary meaning, take precedence and rule out the applicability of other sources of human rights law than treaty standards; the additional problem, one of continuing debate, is also that

³⁸ See Art. 9(2) of the Enforcement Agreement with Italy.

³⁹ R.S. Clark, 'Article 106', in Triffterer (n 12) 1664.

international standards related to detention may fall short of amounting to obligations under international law and could be – in part – disregarded on that basis.

The reference in Article 106 to supervision by the Court and the right to unimpeded and confidential communication between a sentenced person and the Court give reason to assume that there will be avenues for the detained person to have his rights directly protected by the Court; if need be, termination of enforcement in a certain State is a possibility, which is provided for in Article 104 ICCSt, as further implemented in Rules 209 and 210 ICC RPE.

All in all, the regimes of the *ad hoc* Tribunals and possibly the ICC impose strong obligations on enforcing States in terms of protecting prisoners' rights. One may wonder whether this is realistic. A substantive number of States may not be able to live up to all of the international standards in this area. In this regard, it must be borne in mind that the instruments to which reference is made in the ICTY/ICTR enforcement agreements – and which might also be the standards as meant by Article 106 ICCSt – are not treaties binding States; it is also doubtful whether these standards are part and parcel of customary international law.⁴⁰ It may also result in questionable unequal treatment between national prisoners and prisoners convicted by an international criminal tribunal. In certain African States it was even deemed necessary to build new and separate prisons for ICTR and SCSL convicts.

Be this as it may, it would also be painful if international criminal tribunals would ignore standards that are developed at the international level. By explicitly making the imprisonment conditional upon these standards, the international criminal tribunals make an important contribution to taking these standards seriously.⁴¹

It would be interesting to see how until this day the international criminal tribunals have respected in practice the rights of convicted persons serving their sentence of imprisonment in a State. This practice, as far as enforcement at the national level is concerned, is at present limited to the ICTY, ICTR and SCSL convicts. No person convicted by the ICC (at the time of writing Lubanga and Katanga) has yet been transferred to a State for the enforcement of his sentence.

There is only very limited jurisprudence on the protection of prisoners' rights. Complaints to the ICTY or ICTR about the treatment of detained persons are confidential; it is thus unknown to the present author how many communications dealing with prisoners' rights have been submitted directly to the ICTY or ICTR. It is as a result also unknown how the ICTY or ICTR generally respond to such communications and if, for example, they have developed certain requirements of admissibility. One could imagine, for example, that complaints about alleged violations of the rights of a detained person are only admissible in cases where available national complaint mechanisms have been exhausted.

There is one case that has generated publicly available case law that concerns the enforcement of sentences of imprisonment: Krstić in the UK. His situation has also

⁴⁰ In more detail on this matter, see Abels, who argues, among other things, that some of the norms laid down in the UNSMR reflect customary international law (Abels (n 18) 30–44, especially 33).

⁴¹ For additional reasons to apply 'soft law' to treatment of persons convicted by international criminal tribunals, see Abels (n 18) 763–4.

been reported in the press.⁴² Krstić was attacked and injured in the UK prison where he had been serving his sentence since 2004. On 4 October 2011 the President of the ICTY ordered in a confidential decision the transfer of Krstić to the UNDU pending the designation of another State for the enforcement of the sentence. On 19 July 2013 the President of the ICTY (or rather the MICT) ordered that Krstić serve the remainder of his sentence in Poland.⁴³

Unfortunately, there are no publicly available decisions or filings which deal with the grounds for termination of enforcement of Krstić's sentence in the UK. From the perspective of the obligations incumbent upon States to protect the rights of detained persons, the essential question of course is whether the treatment of Krstić in the UK had in some way been inconsistent with international standards on prisoners' rights and whether on that basis the ICTY deemed it necessary to terminate enforcement of the sentence in the UK. It follows from the enforcement agreements that the ICTY may terminate execution of the sentence in a given State, without specified grounds being required. In other words, there is no basis to assume that Krstić's rights were not properly respected. Attacks on inmates are, regrettably, not uncommon and can be very difficult to prevent. It may thus very well be that Krstić's transfer to Poland is based on other considerations, such as maximizing his personal security.

In addition to the Krstić case it is worth paying attention to the endeavours of Charles Taylor to have the enforcement of his sentence in the UK terminated and to be transferred to Rwanda. On 25 June 2014 Charles Taylor, sentenced to 50 years' imprisonment by the SCSL, applied to the SCSL to have the enforcement of his sentence in the UK terminated and to be transferred to Rwanda. On 30 January 2015, the SCSL Trial Chamber denied that application.⁴⁴ Taylor submitted that his human rights and his rights as a detained person were violated on account of his detention in the UK, especially his right to family life. It was also argued that the UK would be unwilling or unable to keep Mr. Taylor in a secure setting that conforms with international standards of detention.⁴⁵ In respect of the key matter, Taylor's inability to receive visits from his family, the Trial Chamber ruled that such inability was not due to an interference with Article 8 ECHR by the UK, but was purely due to his family's failure to comply with visa requirements.⁴⁶

There is, also in light of the available jurisprudence, no basis to question the willingness and ability of States to comply with the obligation imposed on them to ensure that imprisonment is consistent with international standards related to detained persons. That said, further research, including interviews with persons who are at present serving their ICTY/ICTR sentence, or have already done so, will be necessary to verify this assumption of compliance. In particular, it would be worthwhile knowing

⁴² 'Brutal revenge: In a high-security British jail, a Serbian warlord has his throat slashed by three Muslim inmates' (*Daily Mail*, 8 May 2010).

⁴³ *Krstić* MICT-13-46-ES.1/IT-98-33-ES (Order Designating the State in which Radislav Krstić is to Serve the Remainder of His Sentence, 19 July 2013).

⁴⁴ *Taylor* SCSL-03-01-ES (Decision on Public with Public and Confidential Annexes Charles Ghankay Taylor's Motion for Termination of Enforcement of Sentence in the United Kingdom and for Transfer to Rwanda, 30 January 2015).

⁴⁵ *Ibid.*, para 3.

⁴⁶ *Ibid.*, para 90.

whether, and if so under what circumstances and in which ways, detained persons can call upon international criminal tribunals to exercise their supervisory function in respect of protecting the rights of detainees.

5. EARLY RELEASE? COOPERATION IN RESPECTING THE DURATION OF A SENTENCE OF IMPRISONMENT

The second vital element of State cooperation in the enforcement of sentences of imprisonment concerns respect for the duration of the sentence. Obviously, creators of international criminal tribunals want judgments to be recognized and wish to avoid, for example, a situation whereby a sentence is either reduced or increased by a State without authorization or proper procedure.

5.1 The Law of the *ad hoc* Tribunals and the ICC – Divergence in Approaches

The ICTYSt sets out the following procedure:

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.⁴⁷

The approach at the ICC differs, as follows from Article 110 ICCSt:

- 1 The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - (b) The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
 - (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

⁴⁷ Art. 28 ICTYSt. Rules 123–125 ICTY RPE further regulate the matter.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.⁴⁸

The essential difference between the ICTY/ICTR and the ICC is whether or not the starting point for ‘early release’ lies in the *lex loci* or in the law of the court that has imposed the sentence. The drafters of the ICTY and ICTR Statutes have on paper opted for an approach in which a detained person needs to be eligible for early release in the enforcing State before a decision to that end can possibly be taken by the ICTY or ICTR. This carries with it the disadvantage that the national approaches towards early release become decisive; as these approaches may diverge there is the risk of inequality in the treatment of convicted persons. Moreover, especially in the early cases of the ICTY, it defies the demands of legal certainty and the interests of justice that judges have to impose sentences without knowing what percentage of that sentence will eventually be executed in practice.

Conversely, at the ICC both the moment and conditions for early release have been codified in the Statute, and national law does not play a role anymore in this determination. It creates legal certainty about early release and equality among prisoners serving sentences in different States. The downside is that States may be less willing to accept convicted persons because of rigid obligations which may conflict with domestic rules applicable to early release. It remains to be seen in the future practice of the Court to what degree this will be a problem.

The law of the ICTY/ICTR and ICC only appears to deal with early release or in the terminology used by their respective statutes, pardon and commutation of sentence (ICTY/ICTR) and the reduction of sentence (ICC). This substantially affects the execution of the sentence. Matters such as leave from prison, participation in special programmes outside the prison walls are not regulated in the Statutes but have been addressed in enforcement agreements (ICTY/ICTR)⁴⁹ or RPE (ICC).⁵⁰

One may wonder whether this will be an important point of debate in practice between the supervisory court/tribunal and the enforcing State. In this respect it must be borne in mind that certain penitentiary programmes tend to be reserved for nationals or persons residing in the State where they serve their sentence, because they are related to that person’s reintegration into society. Thus, such programmes are not likely to be accessible to persons convicted by international criminal tribunals who come from other countries than the State of enforcement.

⁴⁸ Rules 223 and 224 ICC RPE contain further regulatory provisions.

⁴⁹ See, e.g. Art. 3(4) of the enforcement agreement with Belgium: ‘The Requested State shall notify the International Tribunal if the convicted person is granted a sentence enforcement method other than early release, or if this method is revoked or suspended.’

⁵⁰ See Rule 211(2) ICC RPE:

When a sentenced person is eligible for a prison programme or benefit available under the domestic law of the State of enforcement which may entail some activity outside the prison facility, the State of enforcement shall communicate that fact to the Presidency, together with any relevant information or observation, to enable the Court to exercise its supervisory function.

When we look at the various enforcement agreements related to the ICTY and ICTR one notices in each and every one of these agreements that the enforcing State shall be bound by the duration of the sentence. This was mentioned earlier. However, for certain States it may not be possible to enforce sentences of a certain duration, especially sentences of life imprisonment. There is also an important human rights dimension to this matter. The ECtHR has ruled that the enforcement of a sentence of life imprisonment without the possibility of early release may amount to a violation of Article 3 ECHR.⁵¹ This is case law that should guide international criminal tribunals in their sentencing practice, but it also means that at least European States may not be able to enforce imposed life sentences without possibility of release.⁵²

The conclusion of enforcement agreements opens up the possibility for States refusing to enforce sentences which are incompatible with the demands of the ECHR and even national law. Article 3(2) of the enforcement agreement with Spain, for example, provides that it will only consider enforcement of ICTY sentences where the duration does not exceed the highest maximum under Spanish law. Although this clarifies the cooperation framework for enforcement of sentences between Spain and the ICTY, it was not strictly necessary to put it in the enforcement agreement. As already mentioned, States that have concluded enforcement agreements with international criminal tribunals are not obliged to accept any particular convicted person.

5.2 The Increasing Practice in Early Release – Bridging the Gap Between the *ad hoc* Tribunals and the ICC

There is increasing case law dealing with applications for early release; this does not yet concern the ICC. These rulings, as far as they are publicly available, give interesting insights into the *ad hoc* Tribunals' practice and the role of States in cooperating with the tribunals.

At the outset, it is important to point out that there are special Practice Directions at the ICTY, ICTR (and MICT) and SCSL which govern the procedure for early release.⁵³ The Practice Directions provide for a procedure, in accordance with due process. One notices that contrary to what could have been inferred from the Statute, the MICT

⁵¹ See *Vinter and others v UK* App nos 66069/09, 130/10 and 3896/10 (ECtHR, 9 July 2013); however, for possibly nuancing *Vinter*, and taking a step backwards, see *Hutchinson v UK* App no 57592/08 (ECtHR, 3 February 2015).

⁵² See on the problem of life sentences in international criminal justice: D. Van Zyl Smit, 'Determinate and indeterminate sentences of imprisonment in international criminal justice', Chapter 4 in this volume.

⁵³ ICTY: Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal; ICTR: ICTR Practice Direction On The Procedure For The Determination Of Applications For Pardon, Commutation Of Sentence, And Early Release Of Persons Convicted By The International Criminal Tribunal for Rwanda. Both have been replaced by the MICT Practice Direction: The Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism. SCSL (and RSCSL): Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court for Sierra Leone.

Practice Direction does not only allow for notification of eligibility for early release through the enforcing State; it also enables a convicted person to directly petition the President for early release if he or she believes he or she is eligible.⁵⁴ Under the Practice Direction it no longer seems to be a requirement that the convicted person is eligible for early release under the national law of the enforcing State. Moreover, the eligibility for early release under national law is not even mentioned as a relevant factor for deciding on applications for early release, as set out in Rule 151 of the MICT RPE:

In determining whether pardon, commutation of sentence, or early release is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

The practice of the ICTY, ICTR and MICT has thus increasingly developed in the direction of the approach adopted by the ICC in Article 110 MICTSt, in which early release is exclusively a matter for the international criminal tribunal. The role of the State is reduced to informing the President of eligibility for early release under national law; the enforcing State is furthermore reminded of the fact that the President's decision not to allow early release is binding, even if this would be inconsistent with national law.⁵⁵

In their practice, the ICTY and ICTR are keen to maximize equal treatment among convicted persons, but for a long time this was only among persons convicted by the same tribunal. Since 2003 persons convicted by the ICTY have been consistently regarded eligible for early release upon completion of two-thirds of their sentences.⁵⁶ By contrast, the practice for ICTR convicted persons since 2011 is that they are eligible upon completion of three-quarters of their sentences.⁵⁷ In a ruling of 11 December 2012, concerning an application for early release coming from Bisengimana, the President of the successor to the ICTY and ICTR, the MICT, decided this disparity in treatment should come to an end. As of that day ICTR convicts would also benefit from the two-thirds eligibility threshold.⁵⁸ It was made clear, however, that the two-thirds mark is in essence an admissibility threshold, and the relevant factors set out in Rule 151 MICT RPE could still result in denial of early release applications.⁵⁹ In other words, there is no right to early release upon completion of two-thirds of one's sentence.

It has been wise to apply the two-thirds mark for both ICTY and ICTR convicts. It is also consistent with the two-thirds threshold applicable at the ICC and SCSL. It is

⁵⁴ Arts 2 and 3 MICT Practice Direction.

⁵⁵ See Art. 11 MICT Practice Direction.

⁵⁶ See the summary of the ICTY early release practice in *Bisengimana* MICT-12-07 (Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012).

⁵⁷ See *ibid.*, para 18.

⁵⁸ *Ibid.*, para 20: 'Although the two-thirds practice originates from the ICTY, I believe that fundamental fairness and justice are best served if the ICTY practice applies uniformly to the entire prisoner population to be ultimately supervised by the Mechanism.'

⁵⁹ *Ibid.*, para 19.

worth paying attention to the SCSL as far as its law and practice towards early release is concerned.⁶⁰ Its Practice Direction on this matter differs considerably from those related to the ICTY and ICTR.

First, the SCSL Practice Direction sets out clearly the eligibility threshold, placing it at two-thirds of completion of the sentence.⁶¹ Second, the convicted person carries the burden of having satisfied a number of conditions, including that he is not a danger to the community and that he has made a positive contribution to peace and reconciliation in Sierra Leone.⁶² Third, under the SCSL scheme, early release is only of a conditional nature; the Practice Direction contains provisions on review of the conditions and consequences in case of violations. A long list of conditions is attached as Annex C to the Practice Direction. Fourth, the procedure is far more complex, involving significant input from the Registrar and other relevant actors on a wide range of issues concerning both the convicted person's conduct during enforcement, as well as his reintegration into society, possible risks for victims and witnesses, etc.⁶³ In light of the extended and more complex Practice Direction it cannot come as a surprise that the SCSL Decisions on applications for conditional early release are more substantive and address more issues. Yet, the more demanding procedures have not made conditional early release impossible; it has been granted to Fofana.⁶⁴ It has also been granted to Senessie.⁶⁵

In terms of State cooperation, the requirement of compliance with certain conditions may create an additional burden on the State to which the convicted person is conditionally released. That State must, for example, allow a Monitoring Authority to be present on its territory to supervise compliance with the decisions. Although there is no legal basis for any duty to cooperate in ensuring compliance with release conditions, the State of release has until now been restricted to Sierra Leone which may be expected to cooperate with release conditions also on a voluntary basis. However, the more elaborate approach adopted by the SCSL towards early release, including the applicability of conditions, would legally not be possible or would perhaps be too complex in the context of international criminal tribunals which deal with a wider variety of States of enforcement and release.⁶⁶

In sum, on the matter of State cooperation on the duration of the sentence, it can be said that this has proved to be quite unproblematic in practice. The practice of the *ad hoc* Tribunals has evolved to a system in which they unilaterally decide on early

⁶⁰ On the supervision of enforcement of SCSL sentences, especially regarding its duration, see T. Doherty and S.A. Fisher, 'Enforcement of sentences and oversight of prisoners convicted by the Special Court for Sierra Leone', Chapter 15 in this volume.

⁶¹ Art. 2(A) Practice Direction on the Conditional Early Release of Persons Convicted by the SCSL.

⁶² *Ibid.*, Art. 2(B) and (C).

⁶³ Compare *ibid.*, Art. 5.

⁶⁴ *Fofana* SCSL-04-14-ES-836 (Decision of the President on Application for Conditional Early Release, 11 August 2014).

⁶⁵ *Senessie* SCSL-11-01-ES-035 (Decision of the President on Application for Conditional Early Release, 4 June 2014).

⁶⁶ Also for the SCSL there may be a more complex situation if the time should come that Charles Taylor applied, and would possibly be eligible, for early release, not in Sierra Leone, but in Liberia.

release, upon application by the convicted person. I know of no situation where an enforcing State has not complied with either a decision granting early release or a decision denying early release. It is to be noted that early release granted by the ICTY and ICTR and MICT is not subject to any conditions. The SCSL approach considerably differs in this regard. While the imposition of certain conditions may be desirable for a number of reasons, it would legally be complex, if not impossible, to oblige States to cooperate in having such conditions effectively enforced. For example, the law of the *ad hoc* Tribunals and the ICC does not appear to allow for re-arrest in the case of non-compliance with possible conditions attached to early release. Moreover, receiving States would not be under any legal obligation to comply with this form of arrest warrant.

Yet, there should be serious reflection on developing a system of conditional early release that should not be overly complex and burdensome. But, especially in cases of such serious matters as harassing or intimidating key witnesses once released, there should be grounds for re-arrest and for having the convicted person serve the remainder of their sentence. This possibility alone would hopefully have a deterrent effect and contribute to the continuing protection of vulnerable witnesses.

6. THE BLACK BOX IN ENFORCEMENT – COOPERATION IN THE ENFORCEMENT OF SENTENCES OTHER THAN IMPRISONMENT

It has already been mentioned that the Statutes of the *ad hoc* Tribunals do not provide for sentences other than imprisonment. But Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners, as provided for in Article 24(3) ICTYSt. This possibility has never been applied in practice and needs no further discussion.

The RPE allow for the imposition of sentences other than imprisonment, such as fines, for the crimes of perjury and contempt of court.⁶⁷ There is a rather elaborate Rule, 77bis, which deals with the payment of fines and even allows for the conversion of the fine into a term of imprisonment in the case of failure to pay. Fines have been imposed at the ICTY in the contempt convictions of Florence Hartmann, Haxhiu, Jović, Margetić, Marijacić, Rebić, and Vujin.

What matters in the context of this chapter is whether States have any role in cooperating in the enforcement of fines imposed by the *ad hoc* Tribunals for contempt of court or perjury. There is no basis in the law of the *ad hoc* Tribunals to request State cooperation in the enforcement of fines, let alone that States would have any obligation to that end. If fines are to be converted into sentences of imprisonment, as provided for by Rule 77bis(C), it could be argued that the ordinary cooperation regime related to imprisonment for core crimes applies. It is true that neither the Statute nor the enforcement agreements explicitly rule out the enforcement of imprisonment ensuing from converted fines. Yet, the cooperation related to imprisonment was clearly destined

⁶⁷ Compare Rule 77(G)–(H) and Rule 91 ICTY RPE.

to apply to core crimes only and one has difficulty seeing how States would be ready to cooperate in the enforcement of these particular types of imprisonment. There is certainly no precedent, nor will there ever be in my opinion in the context of the *ad hoc* Tribunals. But maybe all imposed fines have been paid voluntarily and there is no need to consider avenues of enforcement.⁶⁸

It is clear that the ICC has paid slightly more attention to the matter of enforcement of sentences other than imprisonment. The key provision in the Statute reads as follows:

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.⁶⁹

The Rules of Procedure contain a number of additional provisions on this matter, which tend to focus on forfeiture and reparation orders.⁷⁰

The most important element of Article 109 is undeniably the obligation for States parties to give effect to fines or forfeitures ordered by the Court under Part 7. This obligation also exists in respect of reparation orders pursuant to Article 75(5) of the Statute. The obligation to cooperate is however not absolute. States may lawfully refuse cooperation if execution of the Court's orders would prejudice the rights of bona fide third parties.⁷¹

It also needs to be borne in mind that States are obliged to recover value from proceeds, property or assets as ordered by the Court if they are unable to give effect to a forfeiture order.

Whereas there is some attention (including the imposition of obligations on States) in respect of forfeiture orders, this is not the case with the enforcement of fines. States are obliged to give effect to fines, but it is not specified how they should do this. It is impossible to recover a fine through forfeiture as this is restricted under Article 77(2)(b) to proceeds, property and assets derived directly or indirectly from the crime. The law of the ICC furthermore does not provide for substitution of the fine by imprisonment in case of non-payment, as is possible under the law of the ICTY (Rule

⁶⁸ The case information available on the ICTY website does not mention whether or not fines imposed have been fully paid. The first fine imposed was on former counsel of Tadić, Milan Vujin. The fine was imposed in Dutch guilder (15 000) and was confirmed on 2001.

⁶⁹ On fines and forfeitures as penalties see R. Young, 'Fines and forfeitures in international criminal justice', Chapter 5 in this volume.

⁷⁰ Compare Rules 217–222.

⁷¹ In the literature it has been debated whether the rights of third parties under national law, such as the fiscal service, should always enjoy priority over forfeiture for the benefit of victims. See W. Schabas, 'Article 109', in Triffterer (n 12) 1680.

77bis (C) ICTY RPE).⁷² In cases where a person is sentenced to imprisonment and a fine, non-payment of the fine can lead to the extension of the duration of the sentence of imprisonment.⁷³

Conceptually, the fine is very different from the forfeiture order when it comes to State cooperation. Cooperation in forfeiture is essential and rightfully receives attention in the law of the ICC. However, a fine carries with it an obligation for payment by the sentenced person; one can wonder whether there needs to be a general obligation for States to give effect to it. In the case of non-payment, it is for the Court to take further measures, which may include forfeiture of assets, but then this should be the focus of the cooperation obligation.

There is not yet any case law on the practical application of Article 109 or Article 75(5) ICCSt, as no fines have been imposed and no forfeiture and reparation orders involving State cooperation have been issued. Yet, there is some interesting practice and case law related to the essential phase preceding forfeiture. As is the case in national criminal justice systems, there is significant interest in ensuring that the assets of a suspect can be traced and frozen at an early stage, to make sure that possible later forfeiture orders can indeed be effectively executed. To that end, Article 93(1)(k) ICCSt obliges States Parties to comply with requests providing assistance in '[t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties'. The regime of Part 9, including applicable grounds of refusal, is fully applicable to this provision. In the *Bemba* case, Portugal gave effect to a request pursuant to Article 93(1)(k) in 2008, freezing the assets of Mr. Bemba in that country.⁷⁴ The Chamber then ordered that a monthly sum was transferred from the frozen assets to Mr. Bemba with a view to meeting the obligations towards his family and to pay his defence team.⁷⁵ Strictly speaking, this order would not be in keeping with the purposes of freezing assets, which according to Article 93(1)(k) can only be done for 'eventual forfeiture', which is still a matter to be decided upon by the Court.

It seems that there are two important issues to be dealt with in the future cooperation practice of the Court in relation to fines, forfeiture orders and reparation orders.

First, Article 109 is an isolated provision in the regime of Part 10. Part 10 deals predominantly with the enforcement of sentences of imprisonment, in respect of which

⁷² Interestingly, conversion of a fine into imprisonment has been provided for in case of the less serious 'offences against the administration of justice'; see Rule 166(5) ICTY RPE. One may wonder, however, whether this rule is in keeping with the Statute as imprisonment is not provided for as a sentence under Art. 70 ICTYSt and appears restricted to the situation provided for in Art. 77 ICTYSt.

⁷³ See Rule 146(5) ICC RPE.

⁷⁴ It follows from litigation, especially the repeated Bemba Gombo defence attempts to lift freezing of assets, that on 27 May 2008 the Chamber issued a request for cooperation addressed to the Republic of Portugal to identify, trace, freeze and seize any property and assets of Mr. Jean-Pierre Bemba Gombo located on its territory, subject to the rights of bona fide third parties. This request was executed by the competent authorities of the Republic of Portugal. See *Bemba Gombo* ICC-01/05-01/08 (Decision on the Defence's Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of Portugal, 10 October 2008).

⁷⁵ *Ibid.*

cooperation is voluntary (with the exception of the situation covered by Article 103(4)). Yet, Article 109 imposes strong cooperation obligations on States in respect of other sentences and measures. This would fit better in Part 9, which also contains cooperation obligations, similar to those in Article 109. Part 9 also sets out a number of obligations of result, such as arresting a suspect or collecting evidence. The question arises whether some of the general rules and principles, including grounds of refusal, contained in Part 9 would on the basis of this conceptual similarity also be applicable (be it by analogy) to requests for cooperation pursuant to Article 109. This matter has not yet been resolved.

Second, at present the Court is traversing a period of activity in regard to Article 70 cases.⁷⁶ At the time of writing, these cases have not yet been finalized. It may be anticipated that a fine would be a very useful and common sentence for less serious offences against the administration of justice.⁷⁷ It needs also to be mentioned that a fine can be imposed for misconduct pursuant to Article 71.⁷⁸ One notices, however, that the fines imposed under Articles 70 and 71 are not within the regime of Articles 77 and 109. Rule 167 of the ICC RPE enables the Court to request the assistance of States in relation to Article 70 crimes, but on a voluntary basis and limited to forms of cooperation set out in Part 9. The need for possible State cooperation in the enforcement of fines has thus been totally overlooked in relation to offences against the administration of justice and misconduct.

7. CONCLUSION

The cooperation of States in the enforcement of sentences, a matter usually dealt with at the end of an often very long international criminal trial, is still a matter that could receive more attention. There is increasing practice in international criminal justice in the enforcement of sentences, and the role of State cooperation therein; the ICTY, ICTR and SCSL especially have enforced, and are enforcing, a substantial number of sentences and, by and large, the issue of State cooperation appears, so far, to be relatively unproblematic.

The starting point is that the issues for enforcing States to consider are quite simplified by restricting sentences – for the ICTY, ICTR and SCSL by law and for the ICC possibly in practice – to imprisonment only. In respect of imprisonment, cooperation is voluntary for States. While this carries with it the risk that not enough States will be prepared to accept convicted persons, the advantage is that those States that do so will cooperate in good faith and can be expected to comply with the high standards of international criminal tribunals in respect of supervision of the sentence of imprisonment. The negotiation process, culminating in the conclusion of enforcement agreements, ensures that a match is achieved between the demands of the international criminal tribunal and the laws and interests of receiving States.

⁷⁶ In the *Bemba* case, five individuals have been prosecuted for Art. 70 ICCSt offences (Offences against the administration of justice); in the Kenya case one person.

⁷⁷ See Rule 166 ICC RPE providing further details in relation to imposition of a fine.

⁷⁸ See Art. 71 ICCSt and Rule 171(4) ICC RPE.

This context of voluntary cooperation has led to relatively high standards and corresponding cooperation obligations for States which have concluded enforcement agreements and which have accepted convicted persons. States have to meet high standards regarding the rights of detained persons and have to fully respect the duration of the sentence imposed and to comply with decisions of the relevant tribunal or court related to early release. As the ultimate remedy in cases of cooperation problems, the tribunal or court is always empowered to terminate the enforcement of a sentence of imprisonment in a certain State. In the practice of the *ad hoc* Tribunals, this has happened to my knowledge only once. In that situation, Krstić and the UK, it seems that termination was not based on any failure on the part of the UK to live up to its cooperation obligations.

State cooperation in the enforcement of sentences of imprisonment is thus essentially unproblematic. Compared with cooperation in the arrest and surrender of suspects and the collection of evidence, this is a positive determination. This can be easily explained by the combined fact that (a) the enforcement of sentences is handled by a relatively small, but highly cooperative, group of States; and (b) in the enforcement of sentences of imprisonment there are for States no important interests at stake, contrary to, for example, the arrest of Heads of States (Bashir) or the collection of sensitive information (military documents).

Although one can thus be positive as far as the enforcement of sentences of imprisonment are concerned, there is definitely room for improvement. One may wonder whether in the longer run it would be worthwhile organising cooperation in the enforcement of sentences of imprisonment along the lines of a different model, namely that of full recognition, as applied in the EU context, without a supervisory role for the court. Another matter worth addressing in the future is the issue of early release, especially whether it would be feasible to attach conditions to this, as has been the case with the SCSL. However, if this is ever to be seriously discussed it is important to realize and anticipate the consequences for cooperation. It is only worthwhile imposing conditions on early release if they can be effectively enforced, including such matters as allowing for the re-arrest and detention of the convicted person in the case of a breach of conditions.

One has to be more reserved as far as the enforcement of sentences other than imprisonment is concerned. There is not yet any State practice in terms of cooperating in the enforcement of such sentences as fines, or measures taken upon conviction such as forfeiture and reparation orders. The reason is that this matter is restricted to the ICC, which does not have any practice in this area yet.

It may seem positive for the effective enforcement of fines that there are obligations in relation to cooperation for all ICC States Parties. However, the nature and scope of the required cooperation, including the question of possible applicable grounds of refusal, should have been better addressed in the law of the ICC. An additional shortcoming of the current ICC cooperation regime in this area is that there is no duty for States to cooperate in the enforcement of fines in the situation where they are most likely to be imposed: conviction for offences against the administration of justice and misconduct (Articles 70 and 71 ICCSt).