THE DUALITY OF STATE COOPERATION WITHIN INTERNATIONAL AND NATIONAL CRIMINAL CASES

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INTRODUCTION

This is the first of a series of articles seeking to elaborate responses to challenges to the rule of law. The authors consider certain of the greatest of these challenges to center around illegitimate control of State organs by groups capable of infringing presumptive rights granted under treaty to States that in a systematic and continuous way resort to abuse of process. This Article, dealing with the equality of arms, is therefore only the first of a series exploring both this problem and the manner in which it may be addressed. Whether this concept is dealt with under the theoretical template of the "Dual State" in Europe, or what we have called "State capture" in Latin America, the challenges for defense lawyers will only be heightened in coming years.

I. *THE DUAL STATE AS A NEW CHALLENGE OF STATE COOPERATION WITHIN INTERNATIONAL AND NATIONAL CRIMINAL PROCEEDINGS*

During the last decade, several international criminal tribunals were established, such as the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").[1] In July 2002, the permanent International Criminal Court ("ICC") in the Hague be-

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1. Security Council Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 21, S.C. Res. 808, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].

came operative.[2] In 2002, another category of tribunals also came into existence: The so-called mixed, hybrid, or internationalized criminal courts, such as the Special Court for Sierra Leone ("SCSL" or "Special Court"). The latter category of tribunals consists of national and international judges who administer justice based on rules of procedure, which themselves are a mixture of national and international procedural rules.[3] Within the proceedings before all these types of tribunals, two procedural pillars are of perennial concern and importance.

The first procedural pillar is the element of State cooperation, without which international criminal proceedings cannot effectively function, seen from the perspectives of both the prosecution and the defense.[4] The second procedural pillar is an effective enforcement of the principle of equality of arms, which is decisive for the administration of fair proceedings.[5] It can be said that without the first pillar, State cooperation, the international tribunals can de facto not function. The same goes for the endorsement of the principle of equality of arms. Consequently, that principle should have self-executing effect on the first pillar: State cooperation. In the absence of such self-executing effect, State cooperation cannot proceed in a fair manner; and, thus, fair trials before these tribunals are jeopardized.

This Article focuses on the interrelation between State cooperation and equality of arms as basic pillars of international criminal proceedings. This interaction is analyzed from the perspective of its importance for the effectiveness of the practice of international criminal proceedings. State cooperation before international tribunals, in which procedural equity is fully guaranteed, seems an almost unachievable aim since, as a function of their sovereignty, States apply a form of selectivity thereto. It can be questioned whether such a form of duality indeed occurs within the practice of international tribunals dealing with mat-

2. Rome Statute of the International Criminal Court art. 126, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (noting that the Statute "shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations").

3. For an overview of these tribunals, see GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS 13-20 (M. Cherif Bassiouni ed., 2003).

4. *See id.* at 1.

5. *See id.* at 120-21.

ters of State responsibility. The same goes for national criminal proceedings regarding evidence obtained through State cooperation, such as mutual assistance in criminal matters. In other words, it could be questioned whether State cooperation on both the international and national levels is nothing more than a reflection of the phenomenon of the so-called "Dual State," a concept that was developed by Ernst Fraenkel.[6]

Ernst Fraenkel was a German political theorist who immigrated to the United States in 1939. In 1941, he published *The Dual State*, in which he describes the coexistence of legalism with an illiberal political regime in Nazi Germany.[7] Fraenkel portrays the political system in Nazi Germany as a combination of the "Normative State," defined as a rational State governed according to clearly elaborated legal norms, and the "Prerogative State," defined as a State which exercised power arbitrarily, unchecked by law.[8] The entire legal system was prone to exploitation as an instrument at the disposal of the political authorities, even though "insofar as the political authorities do not exercise their power, private and public life are regulated either by the traditionally prevailing or newly enacted law."[9] The Normative State was to be sustained as a precondition for economic stability, while the coexistence of the Prerogative State preserved the capacity to eliminate or neutralize enemies and perceived threats.[10] Fraenkel notes the growing friction throughout the 1930s between proponents of the Normative State and proponents of increased authoritarianism.[11]

Fraenkel's analysis of the Dual State also describes how the Prerogative State stifled public opinion. The insidious side of the Dual State "thrives by veiling its true face,"[12] and, therefore, public discussion must be reined in. Fraenkel refers to the records of judicial proceedings to demonstrate the creeping dominance of the Prerogative State.[13] His analysis shows that the courts were responsible for assuring the maintenance of

6. *See generally* ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (E.A. Shils et al. trans., 1941).

7. *See id.* at 3-103, 107-49.

8. *See id.* at 46-49.

9. *Id.* at 57.

10. *See id.* at 171-87.

11. *See id.* at 65-101.

12. *Id.* at xvi.

13. *See id.* at 241-44.

"capitalist order," even though the Prerogative State occasionally exercised its ability to deal with specific cases in the interest of expediently achieving its aims. The Prerogative State accepted that the courts were necessary to assure entrepreneurial liberty, the sanctity of contracts, private property rights, and competition; but this did not mean that the courts or the law were inviolable.[14] Indeed, according to Fraenkel, the abolition of the inviolability of law was the chief characteristic of the Prerogative State.[15]

Clearly, there are limits to the application of Fraenkel's theory of the Dual State to modern States: The goals of the Prerogative State in the Third Reich were uniquely horrific. This theory retains value, however, when applied to modern States, and, more relevant for the present analysis, when applied to issues of State cooperation. Although State cooperation is governed by legal rules, this same cooperation can also be used by political authorities as an instrument to influence the underlying legal system.

Transposed to the subject of State cooperation, the concept of the Dual State implies that, despite the normative value and safeguards of certain legal mechanisms in terms of checks and balances, the entire legal system can become or de facto function as an instrument at the disposal of the political authorities. Seen from this legal-philosophical perspective, the issue of State cooperation is subject to *realpolitik* and can serve political authorities to influence the outcome of international criminal trials.

This Article assesses whether and to what extent State cooperation, both before international tribunals as well as within the system of mutual assistance in criminal matters, is vulnerable to these motives of *realpolitik*, while at the same time examining its impact on the principle of equality of arms.

II. *TWO MODELS OF STATE COOPERATION WITHIN INTERNATIONAL CRIMINAL PROCEEDINGS*

Before addressing the interplay between State cooperation and equality of arms, it is important to observe that State cooperation within international criminal proceedings is based on a horizontal model. This model assumes that legal assistance be-

14. *See id.* at 25.

15. *See id.* at 24.

tween States takes place based on the idea that States as entities are equal, and that legal communication and assistance in criminal cases are consensus-based. In other words, particular legal aid actions, such as the rendition of people or providing evidence from one State to another, can be performed only after consent of States.[16] Applying this model to international criminal tribunals implies that these tribunals are not empowered to force sovereign States to provide legal assistance for particular procedures at these tribunals.[17]

Contrary to this horizontal model, the vertical model assumes that international criminal tribunals have a supra-national position authorizing them to force States to cooperate. This includes the power to issue so-called "binding orders" against States, even when this goes against considerations of State sovereignty.[18] The ICTY and ICTR are clearly based on a vertical model of State cooperation.[19] Conversely, the ICC is distinguished by a system of State cooperation with characteristics of both horizontal and vertical models.[20] This is because the ICC is based on a multilateral treaty that has been ratified by over one hundred States.[21] State cooperation, which, at this level, is based on the so-called vertical model, appears essential to the functioning of ICTY, ICTR, and ICC, from the perspectives of both the prosecutor and the defense.

III. *THE MEANING AND SCOPE OF EQUALITY OF ARMS FOR INTERNATIONAL CRIMINAL TRIBUNALS*

Before addressing the above mentioned fundamental questions, it is important to look at the meaning and scope of equality of arms within the procedures before these international tribunals.

16. For a description of this model and its characteristics, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 356 (2003); *see also* GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 309-14 (Deirdre Curtain ed., 2005).

17. *See* CASSESE, *supra* note 16, at 356. **R**

18. *See id.*

19. The foundations of the ICTY and ICTR lie in a Chapter VII Resolution of the United Nations. ICTR Statute, *supra* note 1; ICTY Statute, *supra* note 1. **R**

20. CASSESE, *supra* note 16, at 356. **R**

21. *See* UNITED NATIONS, STATUS OF MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, ch. XVIII § 10, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp.

The essence of the principle of equality of arms, especially as developed by the European Court for Human Rights ("European Court"), is that a suspect must not be placed in a procedurally disadvantaged position compared to the position of the prosecutor.[22] The European Court's interpretation of this principle is that equality should be guaranteed for both parties, prosecution as well as defense.[23] The international criminal tribunals have adopted the same interpretation.[24] As in the European Convention on Human Rights ("ECHR"), the principle of equality of arms is not explicitly dealt with in the Tribunals' statutes, but follows from the implementation of the notion of "fair trial."[25]

What is the practical meaning of this principle in the trial procedures of all these international criminal tribunals? There are two particular instances where equality of arms has an important role in this context. The first concerns access to evidence that, according to the prosecutor, forms the basis for the charge, the so-called "discovery" process. Such evidence can contain both exculpatory and inculpatory elements, and is necessary for an adequate preparation of the defense case. The second concerns hearing witnesses during the trial under similar conditions as the prosecutor, if necessary, by the tribunal issuing a subpoena to the particular witness involved, the so-called *subpoena ad testificandum*.[26]

Based upon the practice before international and internationalized criminal courts, seen from the perspective of the defense, there appears to be a tension between these two aspects. This tension may affect an effective preparation and presentation of a defense case before international criminal tribunals. This issue is dealt with in the following section.

22. *See* Lizarraga v. Spain, App. No. 62543/00, 178 Eur. Ct. H.R (2004).

23. *See* CASSESE, *supra* note 16, at 395-96; KNOOPS, *supra* note 3, at 125-26. R

24. *See* KNOOPS, *supra* note 3, at 125-26. R

25. *See* Statute of the Special Court for Sierra Leone art. 17, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter SCSL Statute]; Rome Statute, *supra* note 2, art. 67; ICTR Statute, *supra* note 1, art. 20; ICTY Statute, *supra* note 1, art. 21. R

26. *See, e.g.*, Prosecutor v. Kupreskic, Case No. IT-95-16-T, Decision on Defence Motion to Summon Witnesses (Oct. 6, 1998) (quoting Rule 54).

IV. *EQUALITY OF PROSECUTOR AND DEFENSE WITH RESPECT TO EQUALITY OF ARMS: THE POSITION OF ICTY AND ICTR*

Before addressing the question of whether there is de facto such a thing as equality between the position of defense and prosecution with respect to State cooperation, three important judgments by the ICTY and ICTR concerning the interpretation of "equality of arms" merit attention.[27]

The first relevant decision is the ICTR's May 5, 1997 order in *Prosecutor v. Kayishema/Ruzindana*.[28] This order was rendered in response to a request by the defense to the ICTR judges to order the prosecution, based on the principle of equality of arms, "to divulge and limit its number of lawyers, consultants, assistants and investigators working on the case," and to explain "the time spent and resources available to the Prosecution, since the opening of the Kayishema file."[29] The ICTR judges rejected this request, holding:

> [T]he rights of the accused and equality between the parties should not be confused with the equality of means and resources;
> . . . the rights of the accused as laid down in Article 20 and in particular (2) and (4)(b) of the Statute shall in no way be interpreted to mean that the Defence is entitled to [the] same means and resources as [are] available to the Prosecution;
> . . . the Defence Counsel has not proved to [this Tribunal's] satisfaction any violation of the rights of the accused as laid down in Article 20(2) and (4)(b).[30]

The Trial Chamber added that the Directive on the Assignment of Defense Counsel explains extensively which financial means are available to the defense, and the suspect in this case was unable to show that these financial means were not provided.[31]

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27. *See generally* Geert-Jan Alexander Knoops, *The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective*, 28 FORDHAM INT'L L.J. 1566 (2006).

28. Case No. ICTR-95-1-T, Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute of the International Criminal Tribunal for Rwanda (May 5, 1997).

29. *Id.* ¶ 5.

30. *Id.* ¶¶ 18-20.

31. *See id.* ¶ 21. Reference was made to Article 17(a) of the Directive on the Assignment of Defence Counsel that stipulates that costs for legal aid which are reasona-

The second decision relevant in this respect is the ICTY February 4, 1998 decision in the case of *Prosecutor v. Delalic.*[32] Prior to this decision, Judge Lal C. Vohrah rendered a so-called separate opinion on November 27, 1996 in the first ICTY case, the case against Dusko Tadic. In the separate opinion, Judge Vohrah opined that the principle of equality of arms is primarily and fundamentally meant to work in favor of a suspect's procedural rights.[33] Judge Vohrah wrote:

> It seems to me from the above authorities that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused.[34]

In *Delalic*, the ICTY Trial Chamber rejected Judge Vohrah's interpretation for the following reason:

> [T]here is no doubt that procedural equality means what it says, equality between the Prosecution and the Defence. To suggest, as has been done in the above quotation, an inclination in favour of the Defence is tantamount to a procedural inequality in favour of the Defence and against the Prosecution, and will result in inequality of arms. This will be inconsistent with the minimum guarantee provided for in Article 21 para. 4(e) of the Statute. In the circumstances of the International tribunal, the Prosecutor and the Defence rely on State cooperation for their investigation, so *prima facie*, the basis for the inequality argument does not arise.[35]

Based on this consideration, the trial chamber ordered the defense to provide the prosecutors with a list of defense witnesses prior to the trial.

The third relevant decision is the ICTY Appeals Chamber

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ble and functional for the accused will be reimbursed by the tribunal. ICTR Directive on the Assignment of Defence Counsel art. 17(a), Jan. 9, 1996.

32. Case No. IT-96-21, Decision on Prosecution's Motion for an Order Requiring Advanced Disclosure of Witnesses by the Defence (Feb. 4, 1998).

33. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, ¶ 12 (Nov. 27, 1996).

34. *Id.* ¶ 8.

35. Prosecutor v. Delalic, Case No. IT-96-21, Decision on the Prosecution's Motion for an Order Requiring Advanced Disclosure of Witnesses by the Defense, ¶ 49 (Feb. 4 1998).

decision of February 16, 1999 in the case of *Prosecutor v. Aleksovki*.[36] In this decision, the ICTY held that the principle of equality of arms should be explained in favor of both parties in the procedure and not merely in favor of the defendant.[37]

In sum, it could be argued that the ICTY and the ICTR see the principle of equality of arms as a notion in favor of both parties. The question arises as to whether this interpretation is justified in light of current experiences of defense counsel acting before these international criminal tribunals.[38] There, the defense clearly operates from a procedurally disadvantaged position.[39] In line with this, one could argue that Judge Vohrah's vision appears more fair.[40]

V. *CONTEXTUALIZING EQUALITY OF ARMS BY THE ICTY AND ICTR*

Should the principle of equality of arms be defined differently when applied in the context of international criminal tribunals rather than national tribunals? Although from the jurisprudence of the international tribunals it appears that a connection is sought with the vision of the ECHR on this point,[41] the application of this principle by the ICTY Appeals Chamber has indeed been contextualized in order to accommodate the characteristics specific to an international criminal tribunal such as the ICTY.

First, it has been established that the suspect's right to adequate opportunities and facilities to prepare his or her defense, as set forth in Article 21 of the ICTY Statute, should be considered an essential element of the right to a fair trial pursuant to Article 20 of the Statute.[42] This interpretation does indeed give room for some form of "substantive equality."[43]

36. Case No. IT-95-14/1-A, Decision on Prosecutor's Appeal on Admissibility of Evidence (Feb. 16, 1999).

37. *See id.* ¶ 25.

38. *See generally* Knoops, *supra* note 27. **R**

39. *See* KNOOPS, *supra* note 3, at 125. **R**

40. *See* JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 592 (2003).

41. *See supra* Parts III-IV.

42. *See* Prosecutor v. Tadic, Case No. IT-94-1, Appeals Chamber Judgment, ¶¶ 47, 52 (July 15, 1999).

43. *See* RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 269 (2002).

Second, this also means that the ICTY Appeals Chamber accepted a somewhat broader interpretation of equality of arms than the definition formulated by the ECHR with respect to national criminal cases. The ICTY justifies this approach by pointing out that a proper defense before international tribunals experiences problems when evidence must be obtained from States.[44] The Appeals Chamber observed:

> Under the Statute of the International Tribunal[,] the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.[45]

Third, the ICTY Appeals Chamber has summed up the following procedural facilities which, according to the tribunal, should be part of equality of arms from the defense perspective:

- the adoption of protective measures, including the grant of limited immunity from prosecution in the form of safe conduct;
- the taking of evidence by video-link or deposition;
- the issuance of binding orders to States for the production of evidence;
- the compelling of a witness's testimony by asking the court to subpoena witnesses or to call as court witnesses persons who would be reluctant to testify on behalf of the defense; and
- the possibility of conceiving situations where a fair trial is not possible because witnesses central to the defense case do not appear due to the obstructionist efforts of a State, which could eventually lead to a stay of the proceedings.[46]

In contrast to the ICTY's apparent widening of the principle of equality of arms in favor of the defense in its 1999 *Tadic* decision, a more recent judgment by the ICTR Appeals Chamber in fact forms a contraindication. In a judgment from 2001, the ICTR Appeals Chamber considered that:

44. *See Tadic*, Case No. IT-94-1-T, ¶ 51.
45. *Id.* ¶ 52.
46. *See id.* ¶¶ 52-55.

> The Appeals Chamber concurs with ICTY Appeals Chamber's position expressed in *Tadic* that the principle of equality of arms does not apply to "conditions, outside the control of a court," that prevented a party from securing the attendance of certain witnesses. Consequently, the Appeals Chamber dismisses Kayishema's claim that problems encountered in locating and contacting potential witnesses allegedly constitutes an error in fact and in law under Article 20 of the Statute.[47]

The question therefore arises whether this recent verdict can be seen as abandoning or limiting the principle of equality of arms.

In sum, it could be argued that rather than adopting its regular meaning within national criminal contexts, it is not unreasonable to interpret equality of arms more extensively within international criminal procedures when it concerns the position of the accused with respect to both procedural and substantive law.[48] The Appeals Chamber 1999 *Tadic* decision still offers sufficient support for this view.

VI. *THE APPLICATION OF EQUALITY OF ARMS BY THE ICTY AND ICTR RELATIVE TO STATE COOPERATION*

The first case of the ICTY, the *Tadic* case, provides insight into the question of how the ICTY applied the principle of equality of arms with respect to State cooperation. In the *Tadic* appeal case, the first appeal ground was the argument that: "The appellant's right to a fair trial was prejudiced as there was no equality of arms between the Prosecutor and the Defense due to the prevailing circumstances in which the trial was conducted."[49] More specifically, the defense argued that an effective defense was thwarted as a result of lack of State cooperation, and even obstruction, during the proceedings by the Republic Srpska, (i.e., the local Serbian authorities in Prijedor).

The Appeals Chamber rejected this argument and accepted the prosecutor's reasoning that equality of arms involves equality only in a procedural sense and not in a substantive sense, including when concerning the cooperation of States with the defense before the ICTY.[50] Of importance is the fact that, in this regard,

47. Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Appeals Chamber Judgment (Reasons), ¶ 70 (June 1, 2001).

48. *See* MAY & WIERDA, *supra* note 43, at 267-68. **R**

49. *Tadic*, Case No. IT-94-1-A, ¶ 20.

50. *Id.* ¶ 52.

the ICTY Appeals Chamber primarily based its decision on jurisprudence of the ECHR, stating that "[t]here is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant."[51]

The question remains, however, whether the rejection of the defense argument based on ECHR case law is correct. After all, cases brought before the ECHR usually involve complaints relating to relatively stable States and democracies that have police organizations capable of maintaining law and order and ensuring the appearance of witnesses before local courts.[52] Such circumstances did not exist in the *Tadic* case: The Chief of Police in question from Prijedor was himself indicted by the ICTY for genocide, and, two months after the *Tadic* trial, he was shot by Stabilization Force ("SFOR") troops when he tried to escape his arrest.[53] Clearly, in the *Tadic* case, the Court dealt with a situation where it was not at all certain whether particular witnesses could be brought to the ICTY via the cooperation of local police. Situations such as these are not unique to the ICTY, but also occur before the ICTR and the SCSL.[54]

In view of the particular legal-political context in which criminal cases before international tribunals occur and the complex political and geo-political relations at stake for the State involved, the principle of equality of arms in relation to State cooperation ought to have a specific meaning. In this context, the principle should arguably be applied on a teleological basis in that it should predominantly work in favor of the defense and less in favor of the prosecutor who, after all, operates from a less

51. *Id.* ¶ 49.

52. *See* JONES AND POWLES, *supra* note 40, at 591. R

53. *See A Case by Case Analysis of Recent Crises Assessing 20 Years of Humanitarian Action* 76 n.74 (Médecins du Monde, International Conference, Protecting People in Times of War, Working Paper) (Florence Trintignac ed.), *available at* http://www.reliefweb.int/library/documents/medmonde.pdf.

54. *See* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 A.J.I.L. 510, 529-30 (2003) (noting that the ICTR and ICTY have had difficulty in obtaining State cooperation); *Bringing Justice: The Special Court for Sierra Leone* 39 (Human Rights Watch, Vol. 16, No. 8(A), 2004) (detailing the SCSL's difficulty in apprehending and trying former dictator Charles Taylor).

disadvantaged procedural position. Equality of arms should therefore ensure that the defense has adequate means to prepare and present its case. These means should at least be equal to those available to the prosecutor, who usually has all the advantages of a supportive State apparatus.

The counterargument, that prosecutors before international tribunals, just like the defense, have to rely on the cooperation of States for investigation and prosecution and therefore meet the same problems as the defense,[55] seems unconvincing. After all, the prosecutors not only have more financial means at their disposal to pursue an inquiry in the State concerned,[56] but they can also resort to a legal-political mandate in support of the investigation to persuade or even rely on enforcement measures to ensure that a State hands over evidentiary documents. An example of this is the economic sanctions imposed by the United Nations ("U.N.") on Serbia and Montenegro, which were initiated by the Chief Prosecutor of the ICTY and precluded that State from becoming a European Union member.[57] Such legal-political mechanisms are not at the disposal of the defense before these types of tribunals.

The Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("SCSL Agreement")[58] further illustrates the inequality of positions before international criminal tribunals. Addressing cooperation with the Special Court, Article 17 stipulates the following:

> 1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate *access to the Prosecutor* to sites, persons and relevant documents required for the investigation.
> 2. The Government shall comply without undue delay with

55. Prosecutor v. Tadic, Case. No. IT-94-1-A, Trial Decision on Prosecution Motion for Production of Defence Witness Statements, Separate and Dissenting Opinion by Judge McDonald, ¶ 32 (Nov. 27, 1996).

56. *See* Knoops, *supra* note 27, at 1583. R

57. *See* JONES AND POWLES, *supra* note 40, at 839 (mentioning various reports to the Security Council on non-cooperation of Serbia and Montenegro, including Serbia's refusal to render General Mladic to the ICTY as an obstacle to Serbia's potential membership in the EU). R

58. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 38342 [hereinafter SCSL Agreement].

> any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:
>
> (a) Identification and location of persons;
>
> (b) Service of documents;
>
> (c) Arrest or detention of persons;
>
> (d) Transfer of an indictee to the Court.[59]

A plain reading of Article 17, particularly under Section 1, reveals that only the Prosecution is mentioned with respect to the provision of access to certain locations, persons, and relevant documents for the purpose of the investigation.

Remarkably, Article 17 does not mention the defense, who acts before the Special Court and who should have similar access.[60] In 2004, in one of the cases before the Special Court, the defense asked the Chief Registrar of the tribunal for a more extensive interpretation of Article 17(1), arguing that it should also apply to potential witnesses for the defense who are not accessible to the defense or against the testimony of whom the domestic authorities create obstacles.[61] In this particular instance, the response of the Chief Registrar of the Special Court was negative. Accordingly, the SCSL did not endorse equality of arms, and the argument that the prosecution encounters the same problems as the defense when it comes to State cooperation in procedures before international tribunals certainly does not apply here.[62]

VII. *THE CRITERIA FOR AND LIMITATIONS OF STATE COOPERATION BEFORE INTERNATIONAL CRIMINAL TRIBUNALS*

Having outlined a significant problem with respect to State cooperation before international criminal tribunals, i.e., the unequal position of the defense in comparison to the prosecution, we will review the criteria developed by the ICTY and ICTR for invoking State cooperation.

The system of State cooperation within these criminal tribu-

59. SCSL Agreement, *supra* note 58, art. 17 (emphasis added). R

60. *See* KNOOPS, *supra* note 16, at 321-22. R

61. Prosecutor v. Kanu, Case No. SCSL-2004-16-PT, Decision on Defence Motion in Respect of Santigie Borbor Kanu for an Order Under Rule 54 with Respect to Release of Exculpatory Evidence (June 1, 2004), *available at* http://www.sc-si.org/Documents/SCSL-04-16-PT-091.pdf.

62. *Id.*

nals is mainly "judge-made," meaning that as the statutes of these tribunals are not conclusive with respect to these criteria, the judges before these tribunals ultimately created more clarity through their judgments.[63] In contrast to the ICC system, which is based on a treaty rather than on a Security Council Resolution like the ICTY and ICTR, States are obliged by these tribunals to cooperate with respect to procedures before these fora or risk the imposition of U.N. sanctions.

A landmark decision in this respect is the ICTY Appeals Chamber decision *Prosecutor v. Blaskic*, in which the Court formulated the following four criteria for issuing a binding order to a State to hand over documents to the tribunal.[64] A request should:

(i) identify specific documents and not broad categories;
(ii) set out the relevance of the documents to trial;
(iii) not be unduly onerous; and
(iv) give the State sufficient time for compliance.[65]

For a second reason, the *Blaskic* decision proved important to the aspect of State cooperation with respect to procedures before international tribunals. In contrast to the Trial Chamber, the Appeals Chamber ruled that a subpoena for a certain person to testify (a *subpoena duces tecum*) can be issued against neither a State nor an authority of a State, but only against private individuals.[66] States and State officials can, according to the Appeals Chamber, only be subject to binding orders.[67] This way, the ICTY also ruled that subpoenas cannot be issued against international organizations.[68]

The distinction between subpoenas and binding orders is of importance mainly with respect to sanctions in case of non-cooperation with ICTY procedures. When an individual refuses to cooperate, for example by not appearing in court to testify, a tribu-

63. *See* CASSESE, *supra* note 16, at 357. **R**

64. *See* Prosecutor v. Blaskic, Case No. IT-95-14-AR, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chambers II of 18 July 1997, ¶ 32 (Oct. 29, 1997).

65. *See id.*

66. *See id.* ¶ 38.

67. *Id.* ¶ 39.

68. *See* Prosecutor v. Kovacevic, Case No. IT-97-24, Decision Refusing Defence Motion for Subpoena, ¶ 4 (June 23, 1998) (concerning the question of whether the Organisation for Security and Cooperation in Europe could be summoned to appear before the tribunal).

nal can start contempt of court procedures. These procedures cannot be initiated against a State which ignores a binding order, for example to transfer evidence.[69]

The *Blaskic* Appeals Chamber decision was also important for the development of State cooperation in terms of international criminal law for a third reason. In the *Blaskic* case, the ICTY Appeals Chamber judges left the possibility open that States can refuse cooperation based on national security concerns, but stipulated that a refusal to hand over documents or other evidence to the tribunal is subject to strict limitations and that it is ultimately up to the Court to decide.[70] In other words, an ICTY judge can determine whether claims of national security concerns are unfounded. If the judge so finds, the State will be under the obligation to cooperate despite its claims. If the State does not cooperate, then the Court can report this to the Security Council, which can impose sanctions as a result.[71]

VIII. *THE ICC STATE COOPERATION SYSTEM*

In contrast to the ICTR/ICTY system, where State cooperation is stipulated in only one article in their respective statutes,[72] and which is sometimes described as a "supra-State model,"[73] the ICC Statute takes a "State-oriented approach," which contains elements of the traditional horizontal model with respect to legal aid between States.[74] This gives rise to several important differences.

First, the ICC Statute contains detailed and specific regulations concerning State cooperation in order to define obligations of ICC Member States as precisely as possible with respect to disclosing evidence to the ICC and securing the availability of

69. *See Blaskic*, Case No. IT-95-14, ¶¶ 33, 57-60; *see also* CASSESE, *supra* note 16, at 357-58 (comparing available tribunal action for non-compliance with subpoenas directed toward private individuals with binding orders directed towards States). R

70. *See Blaskic*, Case No. IT-95-14, ¶¶ 61-69; CASSESE, *supra* note 16, at 357. R

71. *See Blaskic*, Case No. IT-95-14, ¶ 68; *see also* CASSESE, *supra* note 16, at 357-58 (discussing the procedure for a State to assert national security concerns as the basis for an exemption to complying with a binding order). R

72. ICTY Statute, *supra* note 1, art. 29; ICTR Statute, *supra* note 1, art. 28. R

73. *See* CASSESE, *supra* note 16, at 356-57 (noting that the tribunals are referred to as "supra-State" due to their basis in a Chapter VII resolution of the Security Council). R

74. *See* CASSESE, *supra* note 16, at 358; *see also* KNOOPS, *supra* note 16, at 181 (noting that the ICC relies on State cooperation). R

witnesses.[75] This curtails judicial discretion, while at the same time the drafters of the ICC Statute intended to implement particular "legislative" safeguards for the Member States.[76] However, the ICC did not address one particular question: Should the collection of evidence and the execution of arrest warrants be assigned to and executed by the authorities of the particular State concerned, or can this be done by the ICC prosecutor? As it is assumed in the statute that this type of action should be executed in accordance with national legislation, the former option may be preferred.[77]

Second, an important characteristic of the ICC system with respect to State cooperation results from the influence of the principle of complementarity. This principle means that a certain situation or case falls under ICC jurisdiction only when an ICC State Party cannot or refuses to investigate or prosecute.[78] In contrast to the ICTY and ICTR, which are based on primacy over national jurisdiction, the relationship between the ICC and national jurisdictions is based on primacy of the latter over the first.[79] In the ICC system it thus follows that State cooperation with the ICC can be stopped or delayed due to the principle of complementarity.

Third, with respect to the issue of "national security interests," the ICC system also has a specific regulation concerning State cooperation, which has been included in the statute and has its own characteristics. Different from the restrictive approach of the ICTY and ICTR as laid down in the *Blaskic* case, the ICC Statute starts from the position that State Parties have considerable room to opt to secure their national security information instead of placing it at the disposal of the ICC.[80] A special exception has been included in Article 93(4) of the statute where State cooperation for disclosure of "evidence which re-

75. *See* Rome Statute, *supra* note 2, arts. 86-102. R

76. *See* CASSESE, *supra* note 16, at 358. R

77. *See id.*; *see also*, Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record, 50-55, 63-65 (Feb. 24, 2006).

78. *See* HÉCTOR OLÁSOLO, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT 145-50 (Martin Nkjhoff ed., 2005).

79. *See id.* at 146.

80. *See* CASSESE, *supra* note 16, at 359-60; *see also* KNOOPS, *supra* note 16, at 173-81 R (noting that the emphasis is placed on the right of States to deny the request for information).

lates to . . . national security" does not have to be granted.[81] Article 72 of the ICC Statute introduces a complex system to try nonetheless to induce State Parties to provide as much information as possible, for example, through consultations with the Court. However, when a State wishes to withhold information for national security reasons, such consultations are time consuming, incriminating, and in practice are not likely to result in a positive outcome.[82]

While the ICTY and ICTR emphasize obliging States to hand over information to these tribunals, the ICC system—as seen under Article 72 of the Statute—emphasizes the right of States to refuse to cooperate with the ICC.[83] Article 87(7) of the ICC Statute provides an arrangement to report such refusals either to the Assembly of State Parties ("ASP") or, in the event the U.N. Security Council referred the case to the ICC, to the Security Council itself.[84]

In conclusion, with the ICC it is more likely that inculpatory or exculpatory evidence against a suspect will not be handed over by a State. For the ICTR and ICTY, this risk is less likely since only in exceptional circumstances can cooperation be refused by a State on the grounds of "State security interests."

IX. *DEFENSE-DRIVEN STATE COOPERATION BEFORE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS: AN EXAMPLE*[85]

Having looked at the criteria and conditions of State cooperation at the ICTY, ICTR, and ICC, this Section examines how the defense before international criminal tribunals can ensure State cooperation in order to discharge its defense duties adequately.

The following case from the SCSL is illustrative. This example pertains to the first case where, within the system of mixed criminal tribunals, the SCSL system of State cooperation was challenged. The case raised the question of whether and how to apply State cooperation criteria as laid down in the *Blaskic* Ap-

81. Rome Statute, *supra* note 2, art. 93(4). R
82. *See* CASSESE, *supra* note 16, at 359. R
83. *See id.* at 360.
84. *Id.*
85. *See* KNOOPS, *supra* note 16, at 319-22. R

peals Chamber decision. On June 1, 2004, in the case of *Prosecutor v. Kanu*, the Trial Chamber of the Special Court adopted the criteria from the *Blaskic* decision,[86] and so acknowledged the importance of the vertical model of State cooperation in the context of mixed criminal tribunals. The SCSL Trial Chamber considered the following:

> Guided persuasively by the principles enunciated by the ICTY in the *Blaskic* Judgment, as Designated Judge, I now proceed to adopt with modifications, if necessary, the test laid down in that case, for the purpose of applications of this type brought before the Special Court. In my considered opinion, Article 17 of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone and section 21 of the Ratification Act together form the doctrinal bedrock of the machinery for cooperation between the Government of Sierra Leone and the Court in the execution of its statutory mandate.
>
> On a level of specificity, articulated in paragraphs 27-29 are the three key principles for future guidance of the Court in determining the merits of applications of this nature. First, the Special Court lacks legal authority to apply any enforcement measures against the State of Sierra Leone, there being no express statutory authority in the founding instruments of the Court for that purpose, nor can it be asserted that the Court's inherent jurisdiction includes such power. Any other view of the law on this theme would amount to a disregard for or encroachment upon the entrenched doctrine of State sovereignty.
>
> Second, predicated upon its founding instruments, the Special Court, not being endowed with enforcement agents of its own, must depend and rely upon the cooperation of the sovereign State of Sierra Leone in order to prosecute persons alleged to bear the greatest responsibility for serious violations of international humanitarian law during the hostilities which took place during the rebel war. In essence, under the statutory cooperation scheme, there devolves upon the State of Sierra Leone an international contractual obligation, which is treaty-based, to assist the Special Court effectively in-

86. Prosecutor v. Kanu, Case No. SCSL-2004-16-PT, Decision on Defence Motion in Respect of Santigie Borbor Kanu for an Order under Rule 54 with Respect to Release of Exculpatory Evidence, ¶¶ 25-29 (June 1, 2004).

> vestigate crimes, collect evidence, summon witnesses and have indictees arrested and delivered to the Special Court.
>
> Third, as emphasized in *Blaskic* in respect . . . [to] . . . Article 29 of the ICTY Statute, the power granted to the ICTY to issue orders to sovereign States is exceptional and novel, one not hitherto recognized under customary international law. To the same extent, analogically, does Article 17 of the Special Court's Statute create the unique power authorizing the Special Court to issue orders to the sovereign State of Sierra Leone. It follows, therefore, that the contractual obligation created under the bilateral arrangement between the United Nations and the Government of Sierra Leone specifically applies to cases where the State of Sierra Leone is required to produce documents in possession of its officials.[87]

The adoption of the *Blaskic* standard acknowledges the importance of the vertical model of State cooperation within the context of a mixed or hybrid criminal court. In essence, the judges of the Special Court applied the *Blaskic* principles by analogy to their own cases. Based on the bilateral agreement between the U.N. and the government of Sierra Leone with respect to the establishment of the SCSL, the Court imposed a contractual obligation on Sierra Leone and its agents to endorse State cooperation with the SCSL.[88] Therefore, for the first time, a mixed criminal court adopted the criteria for State cooperation from an international criminal court. Accordingly, this decision could set a precedent for the scope of State cooperation for other and future criminal tribunals. After all, the reasoning of the Trial Chamber of the SCSL was that, in the absence of enforcement agents of its own, tribunals such as the SCSL have to rely on State cooperation.[89] Despite the existence of the doctrine of State sovereignty, which implies a potential limitation for State cooperation, the mentioned international contractual obligation supersedes this doctrine when it concerns collecting evidence and other State cooperation modalities.

One could say that this rather innovative approach is primarily based on respect for mutual obligations that arise when in-

87. *Id.*

88. *See* SCSL Agreement, *supra* note 58, art. 17. R

89. *See* Prosecutor v. Kanu, Case No. SCSL-04-16-PT, Decision on Defense Motion for an Order under Rule 54 with Respect to Release of Exculpatory Evidence, ¶¶ 27-29 (June 1, 2004).

ternational organizations such as the U.N. enter an agreement with a certain government with the aim to set up a tribunal. According to the Trial Chamber, this brings about a binding obligation for a sovereign State to cooperate with an international or mixed criminal tribunal.[90] The legal force of this obligation is derived mainly from Article 17 of the aforementioned SCSL Agreement, which is in fact identical to the formulation in the *Blaskic* Appeals Chamber decision.[91] On this point, the SCSL Trial Chamber based its decision on an analogous interpretation of Article 29 of the ICTY Statute.[92] It is this analogy which, according to the Special Court, creates the obligation for the Government of Sierra Leone to hand over documents it has in its possession.

One problem that has not been addressed by the Special Court is State cooperation with respect to third party States, for instance, States other than Sierra Leone. After all, these third parties are not party to the SCSL Agreement. The obligatory judicial character of State cooperation with Sierra Leone, as is currently accepted by the Special Court, does not include such other States. Thus, this remains a problem for both the prosecution and the defense in case either party, for example, wishes to obtain certain evidence from such a State. The same goes for the cooperation of international organizations with internationalized tribunals.

A further issue that is left open is whether the mandatory nature of State cooperation understood in this way also includes arresting individuals or making witnesses available to testify. One may conclude, therefore, that the system of State cooperation at mixed criminal tribunals, from an equality of arms perspective applied to the defense, meets even more fundamental problems than those encountered at international criminal tribunals.

90. *See id.* ¶ 28.
91. *See id.* ¶¶ 19-24.
92. *See id.* ¶¶ 23-24.

X. *DUALITY IN STATE COOPERATION WITHIN NATIONAL CRIMINAL CASES*

A. *The Legitimacy of State Requests for Mutual Assistance Reflecting "Dual State" Notions*

When assessing State cooperation within national criminal cases, one may observe that the notion of the Dual State emerges. Particularly with respect to State requests for mutual assistance in criminal matters, instruments of international judicial cooperation may feature as mechanisms at the disposal of political authorities under the umbrella of the Normative State, while it is clear that the Prerogative State is de facto exercising its powers arbitrarily. This observation raises two separate issues: (1) whether State requests for mutual assistance in criminal matters can be deemed legally valid when these requests are a mere reflection of the Dual State in that they are exponents of the Prerogative State, and (2) whether the requested State, when complying with such requests of the requesting State, can be held responsible for violations of certain international norms.

1. The Prerogative (Requesting) State

As to the first question, it should be observed that all treaties regarding mutual assistance in criminal matters rely upon governments abiding by the rule of law, including norms of due process. The U.N. Model Treaty on Mutual Assistance in Criminal Matters of December 14, 1990 provides in Article 2 that the treaty shall not affect obligations subsisting between the parties, whether pursuant to other treaties or arrangements or otherwise.[93] Consequently, State requests for mutual assistance which have no bona fide basis or are administered ultra vires, i.e., in order to circumvent the rule of law by seeking assistance in criminal cases within which human rights are not upheld, could be qualified as null and void.[94] It can be argued that, if it is to be established that such requests for mutual assistance in criminal matters are de facto instruments of the Prerogative State, hiding its true face behind legitimate institutions and laws, these requests could and should be challenged within a court of law.

93. Model Treaty on Mutual Assistance in Criminal Matters, G.A. Res. 45/117, art. 2, U.N. Doc. A/RES/45/117 (Dec. 14, 1990).

94. *See id.* art. 4 (describing conditions upon which a party may deny a request for mutual assistance).

Inevitably, compliance with such requests can undermine the rule of law, which also governs inter-State relations, in view of the fact that individuals are no longer objects of international law, but constitute independent subjects, inhering self-executing rights deriving from fundamental norms of international human rights.

The qualification that such requests for mutual assistance could be deemed null and void finds support in the doctrine of abuse of process, which is upheld by international criminal tribunals and applies to cases where the fundamental human rights of the suspect or accused have been grossly infringed by the investigating or prosecuting authorities.[95] Based upon the case law of the mentioned tribunals, this doctrine can be seen as a general principle of international law, closely intertwined with the rationale that it would be illogical and inconsistent to proclaim a fundamental human right without having remedies in case such a right is violated. No valid reason exists to exclude the phenomenon of mutual assistance in criminal matters from the development of this general principle of international law. Importantly, when misconduct of law enforcement agents is related to the unlawful gathering of evidence, an international court, and *a fortiori* also a national court, may suppress or exclude the particular evidence.[96] Also, under various domestic laws, courts are endowed with considerable discretion in choosing the most appropriate remedy against serious abuses of process.[97] This can also be derived from Article 13 of the ECHR, which mandates that States should provide for effective remedies in case of violation of human rights.[98]

95. *See* Prosecutor v. Barayagwiza, Case No. ICTR-95-1, Appeals Chamber Decision, § IV(B) (Nov. 3, 1999); *see also* Prosecutor v. Nikoliæ, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality Of Arrest, ¶¶ 29-30 (June 5, 2003) (finding that a court may refuse to exercise jurisdiction in cases where serious international human rights violations involved in the case would jeopardize court integrity).

96. *See* Prosecutor v. Blaskic, Case No. IT-95-14, Decision on the Defense Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules Of Procedure And Evidence," ¶ 21 (Apr. 29, 1998).

97. *See, e.g.*, Ugolovno-Protsessual'nyi Kodeks ("UPK") [Criminal Procedure Code] art. 125(5) (Russ.) (describing judicial authority to decide remedies in Russian criminal proceedings).

98. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 213 U.N.T.S. 232 [hereinafter European Convention on Human Rights].

2. State Responsibility of Requested State

With respect to the second question, there is a compelling argument that the requested State bears an independent responsibility for its compliance with requests fuelled by the Prerogative requesting State as opposed to those from the Normative requesting State. The case law of the ECHR clearly envisions expanding the responsibility for requested States under international law to uphold fundamental norms of human rights, even when these violations ultimately take place within the territory of the requested State.[99]

A rather underexposed international legal instrument in this area is the Articles on State Responsibility for International Wrongful Acts ("ILC Articles"), adopted by the International Law Commission on August 9, 2001 and included in Resolution 56/83 adopted by the U.N. General Assembly on January 28, 2002.[100]

Articles 1 and 2 of the ILC Articles describe the elements underlying the existence of such an international wrongful act. Violation of an international obligation by a State, which is attributable to that State according to international law, results in such an international wrongful act, triggering international liability for the State in question.[101]

Article 12 provides the definition of a violation of an international obligation. With respect to requests for mutual assistance in criminal matters, it is important to determine that not acting according to customary or treaty rules on human rights can be qualified as "an act of that State . . . not in conformity with what is required of it by that obligation, regardless of its origin or character."[102]

In that respect, it is relevant that, according to Article 16 of the ILC Articles, the aforementioned State responsibility is ex-

99. *See id.* pmbl.

100. Responsibility of States for Internationally Wrongful Acts, G.A. Res. A/Res/56/589/Annex (Jan. 28, 2002); *see also* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) (providing commentary on the Articles on Responsibility of States for Internationally Wrongful Acts).

101. *See* G.A. Res. A/Res/56/589/Annex, *supra* note 100, arts. 2, 28-33; *see also* CRAWFORD, *supra* note 100, at 191-210 (offering commentary on international liability for State violations of international obligations). R R

102. G.A. Res. A/Res/56/589/Annex, *supra* note 100, art. 12; *see also* CRAWFORD, *supra* note 100, at 125-30 (providing analysis of the implications of Article 12). R R

tended to "a State which aids or assists another State in the commission of an internationally wrongful act" if the conditions have been met that the requested State renders this assistance while having knowledge of the circumstances of the existence of this violation of the ECHR, as well as that the act if carried out by the State requested would be "internationally wrongful."[103]

It is important that, based upon the provisions of ILC Articles 28-31, States have the obligation to stop violations[104] and to give guarantees against a repetition of the occurrence of the "internationally wrongful act."[105] Denial of requests for mutual assistance in criminal matters in such situations can therefore be considered "an obligation to make full reparation for the injury caused by the internationally wrongful act," for which national internal law cannot be a justification for non-compliance.[106]

In sum, the phenomenon of the Dual State may serve as a legal threshold in judicial considerations surrounding requests for mutual assistance in criminal matters of States, applied both to the requesting State (abuse of powers) and the requested State (State responsibility based upon the ILC Articles).

B. Realpolitik *Factors within the System of Inter-State Cooperation in Judicial Matters*

Put into a broader perspective, the concept of the Dual State as developed by Fraenkel can serve as a useful backdrop when assessing the interplay between State cooperation and equality of arms within national criminal cases. Similar to State cooperation before international or internationalized criminal tribunals, the question arises whether the phenomena of the Dual State occur with the same intensity in national criminal cases. At first sight, the signalled duality in State cooperation presents itself now that the horizontal model of State cooperation in its traditional sense is also subjected to the imposition of political powers. This is evidenced by the fact that the judicial

103. G.A. Res. A/Res/56/589/Annex, *supra* note 100, art. 16; *see also* CRAWFORD, *supra* note 100, at 148-51 (discussing the potential applications of Article 16). R R

104. G.A. Res. A/Res/56/589/Annex, *supra* note 100, art. 30(a); *see also* CRAWFORD, *supra* note 100, at 196-98 (describing the implications of Article 30(a)). R R

105. G.A. Res. A/Res/56/589/Annex, *supra* note 100, art. 30(b); *see also* CRAWFORD, *supra* note 100, at 198-200 (outlining the provisions of Article 30(b)). R R

106. G.A. Res. A/Res/56/589/Annex, *supra* note 100, art. 32; *see also* CRAWFORD, *supra* note 100, at 207-08 (analyzing the language of Article 32). R R

system of inter-State cooperation, such as extradition and surrender, has several exceptions of a political nature.[107] Within this inter-State system of State cooperation, sovereign States have considerable discretionary powers to refuse to cooperate.[108]

This impact of *realpolitik* on State cooperation within national criminal cases may give rise to violations of the ECHR by the States involved. That the obligations of parties to the ECHR to guarantee that the rights arising from this convention apply to extraterritorial incidents[109] is clear from the functional interpretation of the concept of jurisdiction in the case *Soering v. United Kingdom*.[110] In this case, the European Commission of Human Rights ("ECHR") decided that although contracting States are not held responsible for the possible violations of human rights in other States, they are responsible for the decision to carry out certain cooperative acts that arise from these violations.[111] Clearly, the mere fact that a State has acceded to the ECHR does not guarantee compliance with the human rights norms as laid down in this Convention.[112]

107. *See* CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 79-83 (2001); *see also* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 187-88 (1998) (outlining the political offense exception to international extradition treaties).

108. *See* Dugard & Van den Wyngaert, *supra* note 107, at 189; *see also* Aukje A.H. van Hoek & Michiel J.J.P. Luchtman, *Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights*, 1 UTRECHT LAW REV. 2, 20-22 (2005), *available at* http://www.utrechtlawreview.org/ (describing ways that sovereign States may refuse to cooperate with international endeavors). R

109. This obligation of parties to the European Convention on Human Rights to guarantee the rights and freedoms of each person staying within their jurisdiction is an objective binding obligation. *See* Ire. v. Gr. Brit., App. No. 5310/71, 2 Eur. H.R. Rep. 25, 97-102 (1980); *see also* AALT WILLEM HERINGA, EUROPEES VERDRAG VOOR DE RECHTEN VAN DE MENS: RECHTSPRAAK & COMMENTAAR ¶ 3.1.2 (1998).

110. *See* Soering v. U. K., App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) at 35-36 (1989); *see also* HERINGA, *supra* note 109, ¶ 3.1.3. R

111. *See Soering*, 161 Eur. Ct. H.R. (ser. A) at 35-36; Varas v. Swed., 201 Eur. Ct. H.R. (ser. A) at 28 (1991), Bader v. Swed., App. No. 13284/04, Eur. Ct. H.R., ¶ 41 (2005), *available at* http://www.echr.coe.int/ (discussing Articles 2 and 6, in addition to the (impending) violation of Article 3); *see also* Mamatkulov v. Turk., 41 Eur. H.R. Rep. 494, 518 (2004); Drozd v. Fr., 240 Eur. Ct. H.R. (ser. A) at 38 (1992) (Matscher, J., dissenting).

112. *See* van Hoek & Luchtman, *supra* note 108, at 9-10. R

C. *Contemporary Developments on State Responsibility for Inter-State Cooperation: Transposition of European Union Law onto Mutual Assistance in Criminal Matters by States*

The latter conclusion finds support in the European Court's *Bosphorus v. Ireland* judgment of June 30, 2005.[113] On March 25, 1997, Bosphorus Hava Yollari Turizm, an airline charter company incorporated in Turkey ("the applicant"), lodged an application against Ireland with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedom ("Convention"). Ireland had implemented the sanctions pursuant to Security Council Resolution 820[114] against the former Socialist Federal Republic of Yugoslavia by impounding its aircraft, one of which was in Ireland for maintenance. The applicant (who leased two Boeing 737-300 aircraft from "JAT" Yugoslav Airlines) argued that the impounding was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of Article 1 of Protocol No. 1.[115] The Government of Ireland disagreed, as did the third parties, with the exception (in part) of the *Institut de Formation en Droits de l'Homme du Barreau de Paris*.[116]

The reasoning of the European Court judges is of relevance to States' requests for mutual assistance in criminal matters. The following observations of the Court reflect upon State responsibilities to comply with fundamental human rights within the context of supra-national cooperation in criminal cases, even when the treaties on mutual assistance in criminal matters transfer sovereign powers under the notion that treaty compliance constitutes a legitimate State interest.

First, the Court recognizes the "growing importance of international co-operation and of the consequent need to secure the proper function of international organisations."[117]

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113. *See* Bosphorus v. Ire., App. No. 45036/98, Eur. Ct. H.R., (2005), *available at* http://www.echr.coe.int/.

114. S.C. Res. 820, U.N. Doc. S/RES/820 (Apr. 17, 1993). Security Council Resolution 820 was implemented by European Economic Community Regulation 990/93, which entered into force on April 28, 1993. Council Regulation No. 990/93, O.J. L 102/14 (1993).

115. *Bosphorus*, App. No. 45036/98, ¶ 107.

116. *Id.*

117. *Id.* ¶ 150.

Second, "the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards."[118]

Third, "[i]n the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[119]

Fourth, the Court held that "[i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation."[120]

Finally, the Court concluded that "such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights."[121]

With regard to the analogy with States' requests for mutual assistance in criminal matters, the *Bosphorus* court attached weight to whether the international instruments were freely entered into in order to determine if the European Convention was violated. The Court stated that "[t]he *Matthews* case can also be distinguished: The acts for which the United Kingdom was found responsible were 'international instruments which were freely entered into' by it."[122] The same goes for bilateral or multilateral conventions on mutual assistance in criminal matters, to which States can freely accede. Consequently, the observations

118. *Id.* ¶ 154.
119. *Id.* ¶ 155.
120. *Id.* ¶ 156.
121. *Id.*
122. *Id.* ¶ 157.

of the Court can be transposed onto the phenomenon of State cooperation in criminal cases, and specifically to States' requests for mutual assistance in criminal matters. This conclusion reinforces the existence of State responsibility in this area, presupposing the rebuttable presumption in a specific case that the protection of human rights by the requesting State was manifestly deficient.

D. *A Case Report: The Russian Proceedings Against Mikhail Khodorkovsky and the Yukos Oil Company*

1. General Remarks

The criminal and civil proceedings against Mikhail Khodorkovsky and the Yukos oil company that he headed exemplify the aforementioned transposition of the concept of the Dual State onto inter-State cooperation in criminal cases. These proceedings make clear the existence of the mentioned element of duality within State cooperation, as evidenced by actions undertaken by the Russian authorities. The relevant facts of this case are illustrative.

Since 1996, the Russian entrepreneur Mikhail Khodorkovsky had been the guiding force behind Yukos, a formerly State-owned company privatized in the mid-1990s through its sale to the Menatep Group—a group of Russian investors.[123] Yukos subsequently became one of the world's largest oil producers, and, as a shareholder in Yukos, Khodorkovsky accumulated considerable wealth.[124] Besides this economic power, Khodorkovsky also gained political influence due to his high visibility as a philanthropist and outspoken advocate of civil society. He also provided financial support to Russian political opposition parties. Prior to his arrest, Khodorkovsky was one of the most high-profile political opponents of the Russian executive and one of the most effective competitors to State-owned energy companies. As such, Khodorkovsky was perceived by the Kremlin as challenging the leadership of President Vladimir Putin.[125]

123. *See* Paul Klebnikov, *The Oligarch Who Came in from the Cold*, FORBES, Mar. 18, 2002 *available at* http://www.forbes.com/forbes/2002/0318/110_print.html.

124. *Id.*

125. *See* C.J. Chivers & Erin E. Arvedlund, *Russia Tycoon Given 9 Years on Tax Charge*, N.Y. TIMES, June 1, 2005, at A1; *see also* BBC NEWS, Profile: Mikhail Khodorkovsky, http://news.bbc.co.uk/1/hi/business/3213505.stm (last visited Oct. 4, 2006).

In July 2003, the Russian authorities started the prosecution of the Yukos company and the corresponding confiscation process of the properties of this international company, which resulted in the seizure of Yukos property at the end of 2004, and finally in the sale of the most important oil production branch of Yukos to an oil company controlled by the Kremlin.[126] In October 2003, Khodorkovsky was arrested by heavily armed Russian Special Forces, while on board a plane refuelling at a Siberian airport.[127] He was flown to Moscow and indicted for the alleged fraudulent acquisition and sale of shares in a fertilizer company in 1994, as well as for a series of other alleged frauds.[128] On May 31, 2005, Khodorkovsky was convicted. On September 22, following his appeal, he was sentenced to nine years imprisonment after a patently abusive judicial process.[129] Khodorkovsky is now serving his sentence in a remote Siberian prison camp, essentially a political prisoner.

2. The Element of the "Prerogative State"

As is evident from an examination of the events that unfolded throughout this affair and as concluded by, among others, the Parliamentary Assembly of the Council of Europe ("PACE"),[130] a large number of violations of the Russian Constitution and the ECHR occurred against Khodorkovsky and others. The most fundamental rights of the accused were disregarded in a gross and persistent manner. These violations, including violations of Articles 3 and 6 of the ECHR, included a total lack of independence of the Russian judicial authorities handling the case, the ransacking of and seizure of documents from the offices of one of Khodorkovsky's lawyers in violation of attorney-client privilege, and the restriction of the access of the

126. *See* Profile: Mikhail Khodorkovsky, *supra* note 125. R

127. *See id.*

128. *See* Chivers, *supra* note 125; Steven Lee Myers & Sabrina Tavernise, *In Resigning Oil Post, Jailed Russian Hints at Political Fight*, N.Y. TIMES, Nov. 4, 2003, at A1. R

129. *See* Jeremy Page, *Sent to Siberia: The Oligarch Who Had It All—and Lost It*, TIMES (LONDON), Oct. 29, 2005 *available at* http://www.timesonline.co.uk/article/0,,13509-1847845,00.html.

130. *See* Parliamentary Assembly of the Council of Europe, Resolution 1418, (Jan. 25, 2005) [hereinafter PACE Res. 1418], *available at* http://assembly.coe.int/ ; *see also* Sabine Leutheusser-Schnarrenberger, *The Circumstances Surrounding the Arrest and Prosecution of Leading Yukos Executives*, Committee on Legal Affairs and Human Rights (Nov. 29, 2004).

accused to legal counsel.[131] Both the criminal and tax proceedings were clearly politically motivated, since only Khodorkovsky and Yukos were singled out by the authorities for the alleged offenses, which involved common industry practices under the legal regime existing at the time. Furthermore, Khodorkovsky was transferred in October 2005 to Krasnokomensk, a remote Siberian prison camp where the conditions of detention are abominable, with prisoners suffering from tuberculosis, dysentery, and gangrene, and subject to radioactive contamination from the nearby Priargunskoye uranium mine.[132] In its Resolution 1418, PACE concluded that the findings "including facts pointing to serious procedural violations committed by different law enforcement agencies against Mr. Khodorkovsky call into question the fairness, impartiality, and objectivity of the authorities, which appear to have acted excessively in disregard of fundamental rights of the defense guaranteed by the Russian Criminal Procedure Code and by the ECHR."[133]

During and after the trial against Khodorkovsky, Russia submitted requests to a number of countries for legal assistance in prosecuting him. These countries included the Netherlands, Liechtenstein, and Switzerland.[134] In 2004 and 2005, Russia requested that the Dutch authorities transfer financial and administrative documents regarding several Dutch companies and the interview notes of the management of those companies, pursuant to various searches and seizures.[135] In addition, the Russian authorities requested that Great Britain extradite three co-accuseds of Khodorkovsky, a request that was refused by a British judge, who held that the trials that would await these co-accuseds would be politically motivated in the same way the proceedings against Khodorkovsky had been.[136]

131. *See* Leutheusser-Schnarrenberger, *supra* note 130, ¶¶ 31-39; PACE Res. 1418, *supra* note 130, ¶¶ 6, 8. R R

132. *See* Page, *supra* note 129. R

133. PACE Res. 1418, *supra* note 130, ¶ 7. R

134. *See* Editorial, *Rule of Law Takes a Hit*, BOSTON HERALD, June 3, 2005, at 26.

135. Political Persecution of Mikhail Khodorkovsky, Weekly Highlights on Russia Focusing on Mikhail Khodorkovsky and the Leadership of Group MENATEP, Oct. 13, 2005, http://www.supportmbk.com/update/10_13_2005_briefing.cfm (last visited Oct. 4, 2006).

136. *See* Liz Chang, *Kremlin Extradition Request Turned Down*, TIMES (UK), Mar. 19, 2005, at 15. *See generally British Judge Rejects Russian Yukos Bid*, ASSOCIATED PRESS, Mar. 18, 2005; Jeremy Lorell, *UK Rejects Extradition of Former Yukos Executive*, EPOCH TIMES,

There is wide support for the presumption that the involvement of Khodorkovsky in Russian politics, particularly in connection with the approaching parliamentary and presidential elections, was a direct reason for his arrest and prosecution.[137] In addition, while eliminating Khodorkovsky as a political opponent, the Russian authorities were able to eliminate Yukos as a competitor to State-owned energy companies. The PACE Resolution states:

> [T]he circumstances of the arrest and prosecution of leading Yukos executives suggest that the interest of the State's action in these cases goes beyond the mere pursuit of criminal justice, and includes elements such as the weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets.[138]

PACE referred to the ruling of the European Court of Human Rights in *Gusinskiy v. Russia*, in which the Court decided that the detention of Gusinskiy by the Russian authorities was in violation of Article 5 in conjunction with Article 18 of the ECHR, since this restriction of freedom was not only intended to be brought "before the competent legal authority on reasonable suspicion of having committed an offence," but was also applied for an unlawful purpose, namely to coerce the sale of Gusinskiy's shares of NTV to Gazprom, the State-owned gas monopoly.[139] Ultimately, the elimination of Khodorkovsky as a political opponent and as the corporate head of Yukos, and the eventual confiscation of Yukos itself, were politically engineered, and had little to

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Dec. 23, 2005, http://www.theepochtimes.com/news/5-12-23/36130.html (last visited Nov. 2, 2006).

137. *Russian Federation v. Maruev*, (2005) (Bow Street Magistrates' Court) Senior District Judge Timothy Workman and the reports of several reputable experts who have appeared as expert witnesses for the Bow Street Magistrates' Court: Professor William Bowring, dated Jan. 14, 2005, among others ¶ 15, Evgeny Kiselev, dated Feb. 9, 2005, ¶ 17-20, Professor Richard Sakwa, dated Jan. 10, 2005; *see also* Letter from Seven Former Heads of State and Government, All Members of the Club of Madrid to President Putin (Nov. 2005); Anna Neistat, *Russia: Yukos Trial Begins Amid Rights Rollback*, Human Rights Watch, http://hrw.org/english/docs/2004/06/16/russia8852.htm (last visited Oct. 9, 2006); *U.S. Policy Toward Russia*, 109th Cong. (2005) (statement of Sen. Joseph R. Biden, Jr., Ranking Minority Member, S. Comm. on Foreign Relations).

138. PACE Res. 1418, *supra* note 130, ¶¶ 1-14. **R**

139. *Gusinskiy v. Russ.*, App. No. 70276/01, Eur. Ct. H.R. (2004), *available at* http://www.echr.coe.int/.

do with law.[140]

The political interference affecting Khodorkovsky's fundamental human rights and fair trial rights was also recognized in the judgment of Senior District Judge Timothy Workman of the Bow Street Magistrates' Court in Great Britain. This judgment was rendered in the extradition case against two co-accused associates of Khodorkovsky, Dmitry Maruev and Natalya Chernysheva. In this judgment, Judge Workman observed that "President Putin directed that Miss Chernysheva and Mr. Khodorkovsky should be prosecuted;" "Mr Khodorkovsky was seen as a powerful political opponent of Mr. Putin;" and "it is more likely than not that the Prosecution of Mr. Khodorkovsky is politically motivated."[141] Furthermore, the judgment considered that "a fair trial of these two defendants is likely to be prejudiced by their political opinions and the opinions of those associated with them."[142] These observations were reinforced in the later ruling of December 23, 2005, in the case *Russian Federation v. Temerko,* also heard before the Bow Street Magistrates' Court.[143] The British judge again refused to comply with a Russian request for extradition, this time regarding Mr. Alexander V. Temerko, the second-in-command under Khodorkovsky, because the motivation for the criminal proceedings against him was political.[144]

Requests for mutual assistance in criminal matters issued by Russia to other States in relation to politically-motivated prosecutions, such as those of Khodorkovsky and his co-accuseds, may be characterized as an expression of the Prerogative State defined by Fraenkel.[145] Accordingly, the horizontal model of State cooperation within the system of inter-State cooperation in criminal matters is exposed to the same risks as the vertical model of State cooperation, including the risk of being influenced by political motives controlled by States and unchecked by law. States that lend judicial support in politically-motivated criminal matters may find themselves responsible for violations of fundamental human rights set forth in the ECHR.

140. *See generally Rule of Law Takes a Hit*, *supra* note 134. R

141. *See British Judge Rejects Russian Yukos Bid, supra* note 136.

142. *Id.*

143. *See* Lorell, *supra* note 136.

144. Bob Sherwood, *Judge Refuses to Extradite Former Oil Chief*, FIN. TIMES (U.K.), Dec. 24, 2005, at 2.

145. *See* FRAENKEL, *supra* note 6, at 3-56. R

3. State Responsibility of the Requested State

Seen from a perspective of State responsibility of the requested State with respect to a request for mutual assistance in criminal matters, *Yukos* is again relevant. The judgments rendered by the Swiss Supreme Court on January 9, 2006, may be seen as an exponent of the imposition of State responsibility of the requested State to prevent the Prerogative (requesting) State from exercising powers arbitrarily and unchecked by law.[146] Russia filed a request for mutual assistance in criminal matters regarding Yukos, the legitimacy of which was considered by the Swiss court.[147]

On January 9, 2006, the Federal Supreme Court of Switzerland ("Swiss Supreme Court") rendered decisions in three cases for which appeals were lodged against the rendering of legal assistance in response to requests from Russia.[148] In these cases the Russian Embassy in Bern had guaranteed that Russia would respect the ECHR. However, the Swiss Court took the position that "it is possible to question the usefulness" of such guarantees "since the hearings had already ended at the time, and since the judgment of the lower court had been rendered. The affirmations of the requesting authority [the Russian Federation] with regard to respect for rights guaranteed, in particular, by the ECHR, can be considered only with circumspection."[149]

This reasoning of the Swiss Supreme Court may have a more general impact in its acknowledgement that the mere fact that Russia guarantees to respect the ECHR does not ensure that the requesting State will not act unlawfully by rendering the requested assistance. The element of State responsibility for the requested State is evident in the ruling of the Swiss Court where it states that "[a]ll these special circumstances require the Swiss authority to depart, exceptionally, from its usual reserve in the examination of the Statement of facts that is submitted to it by the requesting authority."[150]

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146. *See* N v. Ministère Public de la Confédération, Case No. 1A.216/2005/col, ATF, at 3.2. (Jan. 4, 2006), *available at* http://www.bger.ch/fr/ (Federal Court of Switz.).

147. *See generally Switzerland Refuses to Hand Documents Under "Yukos Affair" Over to Russia*, RUSS. OIL & GAS REP., Feb. 8, 2006.

148. *Id.* § 4.2.

149. *Id.*

150. *Id.* § 3.2.

The *Yukos* case exemplifies that indeed the phenomenon of the Dual State portrayed by Fraenkel may exist within the horizontal model of State cooperation, particularly in connection with State requests for mutual assistance in criminal matters. Although international judicial cooperation conventions are premised on the assumption that each State will comply with the rule of law and fundamental norms of human rights, requests for mutual assistance in criminal cases instigated by a Prerogative State should be scrutinized both on the basis of an extensive interpretation of the abuse of process and the abuse of power doctrines, and with consideration of State responsibility for the requested States.

XI. *CONCLUSIONS: DUALITY AND EQUALITY OF ARMS JUXTAPOSING STATE COOPERATION*

In this Article, the fundamental importance of State cooperation has been analyzed for both international and internationalized (mixed) criminal tribunals. From the perspective of maintaining international criminal justice, it was established that the vertical model of State cooperation is probably the most effective approach. Contrary to inter-State cooperation in judicial matters, it is this model that is predominantly applied by international criminal tribunals.

However, the downside is that the prosecution de facto benefits more than the defense as a result of the imbalance of financial resources and political powers. Consequently, State cooperation in international criminal cases cannot be invoked on the basis of procedural equity. Notwithstanding the observation that in the 1999 *Tadic* case, the ICTY Appeal Chamber judges strove for an extensive application of equality of arms also in relation to State cooperation in favor of the defense, such an extensive application is not effectuated in the practice of international and internationalized criminal tribunals.

It may further be observed that State cooperation is also easily subject to influences of a legal-political nature in the sense that States are still endowed with considerable discretionary powers to refrain from granting State cooperation depending upon whether the request concerns the prosecution or the defense. The normative system that has been developed by the international criminal tribunals regarding State cooperation is to a large

extent open to legal-political discretion and in this sense does not differ from the political influences to which the horizontal and traditional model of inter-State cooperation in criminal matters is subject. An exponent of the latter is illustrated by Russia's requests to various European States for mutual assistance in criminal matters alleged in the *Yukos* case.

Applied in this way, State cooperation simply shields the doctrine of State sovereignty. The perniciousness of the Dual State, wherein the abuses of the Prerogative State are masked by the order and progress of the Normative State, is thereby reinforced. State cooperation becomes an instrument of the Dual State, potentially endangering bedrock principles of justice, including the principle of equality of arms. The risks attendant to this phenomenon are clear. The goals of international criminal justice may be thwarted as long as State cooperation is subject to manipulations driven by the prerogative of a Dual State.