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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Incorporation of Rules Governing the Enforcement of Prison Sentences Imposed by the International Criminal Court ICC: An African Perspective

Uluslararası Ceza Mahkemesi Tarafından Hükmedilen Hapis Cezalarının İnfazına İlişkin Kuralların İç Hukuka Aktarılması: Bir Afrika Perspektifi

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Abstract

Because of the tumultuous relations between Africa and the International Criminal Court (ICC), the implementation of its Statute by African states remains topical. The author assesses the legislative incorporation of the provisions of Article 106 of the ICC Statute by the laws of eight African states (Burkina Faso, Central African Republic, DRC, Kenya, Mauritius, Uganda, South Africa, and the Union of the Comoros). Since it seems relevant to assess the conformity of national cooperation legislation with the statements of the Rome Statute on cooperation and judicial assistance, the analysis requires both the comparison of the African legislations with the Rome Statute and that of African legislations with each other. He notes the hesitant acknowledgement of the ICC's supervisory power over the enforcement of prison sentences by African laws. He then elaborates on the mixed incorporation of the principle of application of the national legislation to the conditions of detention and related guarantees, that is, the compliance of these conditions with widely accepted international treaty standards on the treatment of prisoners, the equality of treatment of persons sentenced by the ICC and domestic prisoners and, the freedom and confidentiality of communications between the sentenced person and the ICC. Finally, the author argues that since most of the African states' cooperation laws incorporate the requirement of freedom and confidentiality of communications between the sentenced person and the ICC, it can be inferred that the states concerned generally acknowledge the ICC's power of supervision.

Keywords

Incorporation, Prison Sentences, Enforcement, Treatment, Supervision

Öz

Afrika ile Uluslararası Ceza Mahkemesi (UCM) arasındaki çalkantılı ilişkilerden dolayı, Afrika devletlerinin UCM Statüsü'nü uygulaması tartışmalıdır. Yazar, 8 Afrika devletinin (Burkina Faso, Orta Afrika Cumhuriyeti, Demokratik Kongo Cumhuriyeti, Kenya, Mauritius, Uganda, Güney Afrika ve Komor Adaları) hukukuna bakarak UCM Statüsü'nün 106. madde hükümlerinin mevzuata aktarılmasını değerlendirmektedir. İşbirliğine dair ulusal mevzuatın Roma Statüsü'ndeki işbirliği ve adli yardıma ilişkin ifadelerle uyumunun incelenmesi konuyla ilgili görüldüğünden, analiz hem Afrika'daki mevzuatların Roma Statüsü'yle hem de birbirleriyle kıyaslanmasını gerektirmektedir. Yazar, Afrika'daki kanunların, hapis cezalarının infazı üzerinde UCM'nin denetleme yetkisini isteksizce kabul etmelerine dikkat çekmektedir. Ardından, ulusal mevzuatın tutukluluk koşulları ve bununla alakalı güvencelere uygulanması ilkesinin karma bir şekilde birleştirilmesi, yani bu koşulların, mahkûmlara muameleye ilişkin genel kabul gören uluslararası sözleşme standartlarına uygunluğu, UCM tarafından mahkûm edilen kimselerle yerel mahkûmlara eşit muamele edilmesi, mahkûm ile UCM arasında haberleşme hürriyeti ve gizliliğinin sağlanmasını ayrıntılı bir şekilde incelemektedir. Son olarak yazar, çoğu Afrika devletinin işbirliğine dair kanunları cezalandırılan kişi ile UCM arasında haberleşme hürriyeti ve haberleşmenin gizliliği gereksinimini içerdiğinden, ilgili devletlerin UCM'nin denetim yetkisini genel olarak kabul ettikleri sonucuna ulaşılabilineceğini ileri sürmektedir.

Anahtar Kelimeler

Hukuka Aktarma, Hapis Cezaları, İnfaz, Mahpuslara Muamele, Denetim

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I. Introduction

Like the International Criminal Tribunals (ICTs) for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the International Criminal Court (hereafter the 'ICC' or 'Court') is a 'giant without arms or legs', to use the image that the late Professor Cassese gave of the ICTY.[1] Indeed, having neither police forces nor prison facilities, the ICC, like the ad hoc Tribunals, depends on the assistance of the national authorities for the execution of its decisions.

It is with the creation of the ICTs by the UN in 1993 and 1994[2] that one witnessed for the first time the operation of an international legal regime of sentences enforcement. Under the Statutes, the Rules of Procedure and Evidence (RPE) and the headquarters agreements of those tribunals, a UN-administered detention centre was created for each of them: One in Scheveningen, not far from The Hague in the Netherlands and the other in Arusha, Tanzania. These are the first international detention centres dedicated to those awaiting trial or appeal and to those detained by court decision.[3]

Therefore, given the tumultuous relations between Africa and the ICC, it is interesting to analyse African states' laws on cooperation with the ICC; especially with regard to the enforcement of prison sentences imposed by the Court. These are the laws of the following states: Burkina Faso[4], Central African Republic[5], Democratic Republic of Congo[6], Kenya[7], Mauritius[8], Uganda[9], South Africa[10], and the Union of the Comoros[11]. These laws are examined under the prism of Article 106 ICC Statute, which contains the rules for the supervision the enforcement of prison sentences and conditions of detention in the territory of the states. As per Article 106,

1 Antonio Cassese, 'On Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 2, 13.

2 SC Res 827 (27 May 1993) UN Doc S/RES/827; SC Res 955 (8 November 1994) UN Doc S/RES/955.

3 See ICTY's Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, Rev. 9, 21 July 2005; ICTR's Rules Covering the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, 9 January 1996.

4 Law No 052-2009/AN Determining Jurisdiction and Procedure for the Implementation of the Rome Statute of the International Criminal Court by the Burkinabe Courts, 3 December 2009 (promulgated by Decree No 2009-894/PRES, 31 December 2009) (hereafter 'Burkina Faso ICC Law').

5 Law No 10.002 of 06 January 2010 on the Criminal Procedure Code (hereafter 'Central African Republic CPC'). Title XIV of Book III of this Code is entitled 'Cooperation with the International Criminal Court' (Arts. 344 to 363).

6 Law No 15/024 of 31 December 2015 Amending and Supplementing Decree of 6 August 1959 on the Criminal Procedure Code (hereafter 'Democratic Republic of Congo CPC'). This law includes in Chapter II of Decree of 6 August 1959 on the Criminal Procedure Code as amended and supplemented by Law No 06/19, 20 July 2006, Section III *bis* entitled 'Cooperation with the International Criminal Court.'

7 The International Crimes Act 2008, 12 December 2008 (hereafter 'Kenya ICC Law').

8 International Criminal Court Act 2011 (Act No. 27), 26 July 2011 (hereafter 'Mauritius ICC Law').

9 The International Criminal Court Act 2010, 25 May 2010 (hereafter 'Uganda ICC Law').

10 Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act 27), 12 July 2002 (hereafter 'South Africa ICC Law').

11 Law No 11-022/AU 13 December 2011 on the Implementation of the Rome State (promulgated by Decree No 12-022/PR, 04 February 2012) (hereafter 'Comoros ICC Law').

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.'

The legal regime thus established, as a commentator noted, is a '*régime dualiste, basé sur un modèle à la fois national, et international*' (dualist system, based on a national and international model).[12] It emphasises the concern of the negotiators to ensure some balance between two interests of equal validity. On the one hand, given that the prison facilities of the state of enforcement are used, it seems quite natural and logical that its legislation should be the one that governs daily prison life. Without such an option, the ICC would have had to put in place its own prison standards.[13] On the other hand, there is the need for the Court to guarantee the conformity of the conditions of detention of persons sentenced by it with the relevant international standards and thereby to ensure a relative equality of treatment of these prisoners.[14] This system is an innovation in international criminal law. As Professor Schabas pointed out,

> 'the International Military Tribunals took no part in the enforcement of their sentences … When the Security Council established the ad hoc tribunals, it delegated enforcement of sentences to national justice systems, subject to some supervision by the international tribunals … Although the International Criminal Court also assigns detention of sentenced persons to national prison systems, it retains much more direct control over the enforcement than is the case at the ad hoc tribunals.'[15]

It should be noted that the participation of states in the execution of the prison sentences imposed by the ICC is part of what should be called voluntary cooperation, in accordance with Article 103 ICC Statute. Indeed, States are masters of the choice

12 Faustin Z Ntoubandi, 'Article 106, Contrôle de l'exécution de la peine et conditions de détention', in Julian Fernandez and Xavier Pacreau (eds), *Statut de Rome de la Cour pénale internationale, Commentaire article par article* (Pedone 2012) 1975-1979, 1975.

13 See William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 1082.

14 See Kimberly Prost, 'Enforcement' in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational 2001) 673-702, 675; Trevor Pascal Chimimba, 'Establishing an Enforcement Regime' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International 1999) 345-356, 351.

15 Schabas, *The International Criminal Court* (n 13) 1066-1067.

to participate or not in the execution of these sentences.[16]

This article assesses the extent to which the provisions of Article 106 ICC Statute have been incorporated into African states' laws on cooperation with the ICC while explaining the compromise enshrined in the above mentioned provisions. The analysis of the African laws highlights, on the one hand, a hesitant incorporation of the principle of primacy of the Court as for the supervision of the enforcement of prison sentences which it imposes, and on the other hand, a mixed incorporation of the principle of the application of national legislation to the conditions of detention and the guarantees accompanying such application.

II. The Hesitant Acknowledgement of the ICC's Primacy as for the Supervision of Prison Sentences Enforcement

While the ICC, unlike the ICTs, does not enjoy primacy over national courts, its primacy in the enforcement of penalties has been enshrined in its Statute. However, the analysis of the African laws highlights a difficult acknowledgement of the Court's supervision power over the enforcement of prison sentences and conditions of detention. To better understand this reluctance of the legislators concerned, it is necessary to retrace the evolution of the negotiations on the issue. In fact, this history also makes it possible to better understand the very spirit of Article 106 ICC Statute. However, consideration should be given to the supervision of the prison sentences enforcement itself.

A. The Negotiations on the Issue of the ICC's Supervision Power as an Element of African Laws Analysis

The state of African states' legislation as for the ICC's supervision power could be explained by the evolution of negotiations on this issue. The pioneering and decisive role of the International Law Commission (ILC) in drafting the provisions of Article 106 ICC Statute should be noted. Article 59(3) of 1994 ILC Draft Statute stated that the enforcement of sentences should be under the auspices of the Court. In the commentary to Article 59, the ILC reiterated the principle of the Court's supervision, even if one may wonder about the use of the conditional: 'The imprisonment would also be subject to the supervision of the court, the details of which would be elaborated in the rules.'[17] The idea of supervision of the Court was maintained by the ad hoc Committee: '... while custodial and administrative authority over the convicted person should be delegated to the state that accepted responsibility for enforcing the sentence, the

16 See Etienne Kentsa, 'L'incorporation législative du régime d'exécution des peines d'emprisonnement du Statut de Rome de la CPI en Afrique' (2017) 2 Revue du Droit Public 407, 411.

17 UNGA 'Report of the International Law Commission on the work of its forty-sixth session' UN GAOR 49th session Supp No 10 UN Doc A/49/10 (1994) § 2 at 67.

international criminal court should play some role in the supervision of the prisoner, perhaps through an appropriate international organization.'[18]

Within the framework of the Preparatory Committee, a compromise was reached on the principle of the Court's supervision in more complex terms than those used previously. The Preparatory Committee's Report states that:

> 'Concerning the issue of the supervision of a sentence of imprisonment, it was generally agreed that the Court should exercise control in critical areas, in order to ensure consistency and compliance with international norms regarding conditions of incarceration (e.g., the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners), and leaving to the custodial state the day-to-day supervision of the prisoner.'[19]

The distribution of supervisory powers thus achieved remained too vague.[20] The relevance of the wording then used was lacking, with the understanding that there was uncertainty as to the meaning of the terms 'the Court should exercise control in critical areas' and, 'leaving to the custodial state the day-to-day supervision of the prisoner.' Such a wording, if maintained, would have caused '*incertitudes pour la Cour, pour l'État d'exécution mais également pour le condamné*' (uncertainties for the Court, for the State of enforcement but also for the convicted person).[21] It therefore seemed necessary to revise this wording in order to introduce more clarity. This was done through the first paragraph of Article 96(1) of the 1998 draft Statute: 'The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency].'[22] This wording was the most complete, even if it did not specify which body of the Court should exercise supervision over the enforcement of prison sentences. In this regard, it must be said that Article 106(1) ICC Statute is no more specific when it provides that 'the enforcement of a sentence of imprisonment shall be subject to the supervision of the Court.' It is indeed necessary to refer to the ICC RPE to understand that it is the Presidency which has the supervisory jurisdiction.[23] This relative imprecision is not sufficient to explain the reluctance of African legislators to acknowledge the Court's supervision power.

18 UNGA 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court' UN GAOR 50th Session Supp No 22 UN Doc A/50/22 (1995) § 241 at 45.

19 UNGA 'Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol I (Proceedings of the Preparatory Committee during March-April and August 1996)' UN GAOR 51st Session Supp No 22 UN Doc A/51/22 (1996) § 357 at 74.

20 See Evelise Plénet, *Vers la création d'une prison internationale : l'exécution des peines prononcées par les juridictions pénales internationales* (L'Harmattan 2010) 254.

21 Ibid.

22 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June - 17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1, at 153.

23 Rule 211 ICC RPE.

B. The Awkward Acknowledgement of the ICC's Supervision Power by African Laws

An assessment of the cooperation laws of African states highlights the reluctance these states to provide the Court's supervision power over the enforcement of prison sentences. If some laws make no reference to such a power, it must only be deduced from some provisions of those which seem to acknowledge some prerogatives of the Court in this matter. Nowhere in the laws of the Central African Republic, Comoros and Congo does the Court have the power to supervise the enforcement of the sentences imposed by it in the territory of the states concerned. Following the application of the sentenced person for a reduction or at least an amendment of his sentence and, in the event of a negative decision by the Court, Central African and Comorian laws at least provide for the power of the Court to decide on the transfer of the person to another state it has designated.[24] In the same vein, South African and Mauritian laws do not expressly provide for the Court's power of supervision, but rather that which it has to decide on the transfer of persons serving their sentences in the states concerned to another state.[25]

The laws of Burkina Faso, Kenya and Uganda, if they also do not expressly provide for the Court's power of supervision, set themselves apart from other texts by making it possible for Court officials to have free access to prison facilities where persons convicted by the Court serve their prison sentences. Article 48(3) of the Burkinabe cooperation legislation states that 'the Court has access to the place where the convicted person is serving his sentence.' Kenyan and Ugandan laws are more precise when they provide that 'a Judge of the ICC or a member of the staff of the ICC may visit the ICC prisoner for the purpose of hearing any representations by the prisoner without the presence of any other person, except any representative of the prisoner.'[26] Bearing in mind that Burkinabe, Kenyan and Ugandan laws have also enshrined the freedom and confidentiality of communications between the Court and its convicts on the territory of the states concerned, this is sufficient to conclude that these texts acknowledge the Court's power of supervision. Indeed, the free and confidential communications between the Court and its convicts constitute a very important means of monitoring the conditions of their detention in the prisons of the states of enforcement. Therefore, the mere fact that a state provides for the freedom and confidentiality of communications between the Court and the convicted persons presupposes that the state in question accepts the missions of inspection of the conditions of detention which the Court initiates.

However, where a law of cooperation with the Court does not provide for neither the power of supervision nor the freedom and confidentiality of communications

24 Art 363(4) Central African Republic CPC; Art 57(4) of Comoros ICC Law.

25 Art 32(3)(b) South Africa ICC Law; Art 39(3)(b) Mauritius ICC Law.

26 Art 136(3)(b) Kenyan ICC Law; Art 69(3)(b) Uganda ICC Law.

between the Court and sentenced persons; this should not, in principle, be a source of concern for the enforcement of sentences and conditions of detention. In fact, the Court may conclude bilateral arrangements with states in order to establish a framework for the reception of persons whom it has condemned, and such arrangements must be in conformity with the ICC Statute.[27] When one looks closely at the enforcement agreements that the Court has concluded to date with some states parties to the ICC Statute, one sees that they allow the parties to better regulate the enforcement of sentences and the conditions of detention. This includes the ad hoc Agreement between Democratic Republic of Congo and the Court.[28] It is certainly this type of agreement that the Central African, Comorian and Congolese laws refer to when mentioning the agreement between the government and the ICC on the transfer of the person concerned.[29] Such an agreement would indeed make it possible to fill the gaps in these laws with regard to the incorporation of the ICC Statute's provisions on the supervision of prison sentences enforcement and conditions of detention.

C. The Silence of African Laws on the Procedures for the Supervision of Prison Sentences Enforcement

The examination of the laws of the African states does not really reveal the scope of the supervisory power of the ICC. The same applies to the relevant legal instruments of the Court. In order to get a better understanding of the concept of 'supervision' of the enforcement of prison sentences, it is necessary to examine, on the one hand, the scope of the Court's power of supervision and, on the other hand, the practical arrangements for such supervision, that is, inspections of the conditions of detention.

1. The Silence of African Laws on the Scope of the ICC's Supervision Power over the Enforcement of Prison Sentences

In the absence of a precise definition by the ICC Statute and hence by the laws under consideration, it is appropriate to rely on the other relevant legal instruments of the ICC and scholarly writings to circumscribe the scope of the Court's power of supervision over the enforcement of prison sentences.

Like the texts of the ad hoc Tribunals[30], the ICC legal instruments provide that the enforcement of prison sentences is subject to the supervision of the Court or a body of the Court. According to Article 106(1) ICC Statute, 'the enforcement of a sentence of

27 Rule 200(5) ICC RPE.

28 Ad Hoc Agreement between the Government of Democratic Republic of Congo and the Court on the Execution of Mr. Germain Katanga's Sentence, ICC-01/04-01/07-3626-Anx, signed at The Hague, 24 November 2015 (hereafter the 'ad hoc Agreement DRC-ICC').

29 Art 362(2) Central African Republic CPC, Art 56(3) Comoros ICC Law; Art 21-26th (2) Democratic Republic of Congo CPC.

30 Rule 104 ICTY RPE; Rule 104 ICTR RPE. As per these rules, the enforcement of any sentence of imprisonment shall be subject to the supervision of the Tribunal or an organ of the Tribunal.

imprisonment shall be subject to the supervision of the Court ...' The idea of a primacy of the Court in matters of supervision is reflected in this paragraph. However, as Plénet aptly pointed out, it is not easy to understand what is meant by 'enforcement of a sentence of imprisonment.'[31] Indeed, the term 'supervision' is not explicitly used in relation to the conditions of detention. But the fact that these conditions are required to 'be consistent with widely accepted international treaty standards governing treatment of prisoners' implies some supervision by the ICC.[32] It is therefore necessary to focus on the interpretative approaches to the statement in question.

The first approach consists in interpreting it in relation to its generic meaning, that is to say by including the enforcement as such and its conditions.[33] Such an extensive approach leads to the apprehension of paragraph 1 of Article 106 in the light of its paragraph 2.[34] In this case, the ICC supervision jurisdiction would be extended to compliance with widely accepted international treaty standards governing the treatment of prisoners. This approach is also reflected in the Regulations of the Court. In fact, Regulation 113(1) states that: 'The Presidency shall establish an enforcement unit within the Presidency to assist it in the exercise of its functions under Part 10 of the Statute, in particular: (a) The supervision of enforcement of sentences and conditions of imprisonment; and (b) The enforcement of fines, forfeiture orders and reparation orders.'

The second approach would be to consider the first two paragraphs of Article 106 separately; this would lead to the exclusion from the jurisdiction of the Court of all aspects relating to the conditions of the enforcement of prison sentences. The jurisdiction over these conditions would then be transferred to the state of enforcement which would exercise supervision under its national law.[35] This second interpretation seems very restrictive and does not reflect the general spirit of the ICC Statute that aims at ensuring the international nature of the prison sentences and, therefore, the primacy of the Court in this matter. Indeed, clearly the reference to international treaty standards in both paragraphs 1 and 2 is a reference to the conditions of the enforcement of the prison sentence.[36] But the ICC Statute is silent on the means at the disposal of the Court to carry out its supervision. However, it will be seen further that the requirement of freedom and confidentiality of communications between the sentenced person and the Court is de facto an important means of supervision for the Court through the sentenced person.

31 Plénet (n 20) 330.

32 See Denis Abels, Prisoners of the International Community: The Legal Position of Persons Detained at the International Criminal Tribunals (PhD thesis, Amsterdam Center for International Law 2012) 594.

33 See Claus Kreβ and Göran Sluiter, 'Imprisonment', in Antonio Cassese, Paula Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 1757-1821, 1804.

34 Plénet (n 20) 330.

35 Ibid.

36 Ibid.

Rule 211 ICC RPE, which sets out the Presidency's supervision prerogatives, reinforces the idea that the approach proposing the extension of the Court's supervision would be the most congruent. As per Rule 211(2),

> '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.'

This provision makes substantial reference to the conditions of imprisonment and to the obligation of the state of enforcement to inform the Court when it so requests. In addition, the RPE specifies the means used by the Court for the exercise of its supervisory function. Indeed, Rule 211(1) states that:

> 'In order to supervise the enforcement of sentences of imprisonment, the Presidency:
>
> (a) Shall, in consultation with the state of enforcement, ensure that in establishing appropriate arrangements for the exercise by any sentenced person of his or her right to communicate with the Court about the conditions of imprisonment, the provisions of article 106, paragraph 3, shall be respected;
>
> (b) May, when necessary, request any information, report or expert opinion from the state of enforcement or from any reliable sources;
>
> (c) May, where appropriate, delegate a judge of the Court or a member of the staff of the Court who will be responsible, after notifying the state of enforcement, for meeting the sentenced person and hearing his or her views, without the presence of national authorities.'

If the communications between the sentenced person and the Court constitute a means of supervising the enforcement of his sentence and the conditions of his detention, the ICC RPE in no way ignores the possibility that the prisoner provides it with inaccurate information. For this reason, Rule 211(1)(d) gives the Presidency the power to 'give the state of enforcement an opportunity to comment on the views expressed by the sentenced person.'

Furthermore, the Court has exclusive jurisdiction over measures relating to the adjustment and reduction of sentences.[37] The domestic rules on pardons and reduction of sentences do not apply to sentences imposed by the ICC. The latter may also, if the conditions of detention in a state do not seem satisfactory, in particular in the light of the relevant international treaty standards, decide on the transfer of the sentenced person to another state of enforcement. All of this points to the extent of the Court's supervisory power. This supervision necessarily includes the enforcement of sentences and conditions of detention.

37 Art 105(2) ICCSt.

The extensive approach to the Court's supervisory jurisdiction is supported by the bilateral agreements it has concluded with some states on the enforcement of the sentences it imposes. All these agreements incorporate very satisfactorily both the provisions of Article 106 ICC Statute and Rule 211 ICC RPE. Beyond the precision of the scope of the Court's supervisory jurisdiction, the bilateral agreements between the Court and states, on the one hand, and especially the one concluded with the International Committee of the Red Cross[38] (ICRC), on the other hand, lay down the arrangements for such supervision, that is, the periodic inspections of the conditions of detention of sentenced persons conducted by the ICRC or the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, shortly Committee for the Prevention of Torture (CPT), as the case may be.

2. The Silence of African Laws on Periodic Inspections of the Conditions of Detention of Persons Serving their Sentence in a State of Enforcement

Periodic inspections of the conditions of detention of sentenced persons are not expressly provided for in the African states' laws under consideration. The silence of the reference texts of the ICC regarding the conditions of visits of the prisoners is a possible explanation of this state of affairs. While Burkinabe legislation simply specifies that the Court has access to the place of detention of the prisoner[39], Kenyan and Ugandan laws are more specific when they provide identically that 'a Judge of the ICC or a member of the staff of the ICC may visit the ICC prisoner for the purpose of hearing any representations by the prisoner without the presence of any other person, except any representative of the prisoner.'[40] The Kenyan and Ugandan laws thus provide for a mechanism for monitoring the enforcement of prison sentences, which presupposes the possibility of carrying out inspection missions in the prison facilities concerned. But the notion of periodic inspections is absent therein.

It is therefore necessary to rely on the agreement reached between the Court and the ICRC on 13 April 2006[41] and the bilateral agreements on the enforcement of sentences to find the idea of periodic inspections carried out by an external entity. The ICC-ICRC Agreement sets out the conditions for visits to persons detained at the Scheveningen Detention Unit in The Hague and to prisoners serving their sentences in the territory of states of enforcement in accordance with bilateral agreements. Indeed, this agreement does not automatically apply to ICC prisoners, but rather in accordance

38 Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, 13 April 2006, ICC-PRES/02-01-06, <https://www.icc-cpi.int/NR/rdonlyres/A542057C-FB5F-4729-8DD4-8C0699DDE0A3/140159/ICCPRES020106_English.pdf> accessed 10 September 2021 (hereafter the 'Agreement ICC-ICRC')

39 Art 48(3) Burkina Faso ICC Law.

40 Art 136(3)(b) Kenya ICC Law; Art 69(3)(b) Uganda ICC Law.

41 Agreement ICC-ICRC (n 38).

with bilateral agreements on the enforcement of sentences.[42] This is in fact a repeat of the practice observed in the enforcement of the sentences imposed by the ICTY. Indeed, most of the bilateral agreements concluded by the latter authorized the ICRC to conduct inspection visits.[43]

With regard to the ICC, the majority of bilateral agreements concluded empower the ICRC to conduct inspection missions.[44] Only the agreement reached between the Court and the United Kingdom designates the CPT as the body responsible for inspections.[45] The ICRC and the CPT are thus the two bodies responsible for monitoring the conditions of detention of prisoners in the framework of the enforcement of the sentences imposed by the ICC. Nevertheless, it should be pointed out that the CPT's jurisdiction is limited for the moment to the United Kingdom's prison facilities, even though the agreement concluded by the Court and Austria implicitly allows the Court to designate the CPT.[46]

The ICC-ICRC Agreement sets out the scope of the supervision and the conditions for the visits carried out by the ICRC. According to its Article 2(1), '... the ICRC shall be authorised to visit all [d]etainees held by the ICC in the [d]etention [c]entre for the duration of their detention.' To do this, the ICRC has unlimited access to the detention centre and in particular the right to move around the institution without restriction. The agreement provides for the possibility for the ICRC to visit persons sentenced and transferred to the state in charge of the enforcement of their sentence in accordance with the bilateral agreements on the enforcement of sentences concluded between the ICC and the states of enforcement. Indeed, the agreement provides for the ICC's obligation to include in the agreements it signs with the states of enforcement 'the possibility of visits by the ICRC according to its standard conditions and procedures.'[47] To make the ICRC's mission possible, the ICC must inform the ICRC in writing of the transfer of a detainee to the state in charge of the enforcement of his sentence,

42 Plénet (n 20) 334.

43 All the bilateral agreements concluded by the ICTR authorize the ICRC carry out inspection visits: See Arts 6 Agreements with Mali, Benin, Sweden, Italy, France, Swaziland, Rwanda and Senegal. The majority of ICTY bilateral agreements also do so: See Arts 6 of the Agreements with Italy, Finland, Norway, Sweden, France, Denmark, Belgium, Estonia and Poland; Art 7 Agreement with Slovakia; Art 5 ad hoc Agreement between the ICTY and Germany on the enforcement of Tarculovski's sentence. See Édith-Farah Elassal, Coupable ! L'exécution des peines prononcées par les instances pénales internationales : (in)égalité de traitement entre les condamnés ? (LLM thesis, University of Laval 2013) 66.

44 Arts 7 Agreements with Belgium, Finland, Denmark and Serbia; Art 4 Agreement with Mali and Art 4 ad hoc Agreement DRC-ICC (n 28).

45 Art 6 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court, ICC-PRES/04-01-07, 8 November 2007, available online at <https://www.icc-cpi.int/NR/rdonlyres/C540B3EF-F3FF-4AD0-93F5-DA85E96B1522/0/ICCPres040107ENG.pdf> accessed 10 September 2021) (hereafter the 'Agreement UK-ICC'). In the context of the ICTs, some bilateral agreements also designated the CPT: See Arts 6 Agreements between the ICTY and the United Kingdom, Portugal, Albania; Art 5 ad hoc Agreement on the enforcement of Galić sentence.

46 Art 7(1) Agreement between the ICC and Austria provides that: 'The competent national authorities of Austria shall allow the inspection of the conditions of imprisonment and treatment of the sentenced person(s) by the Court, or an entity designated by it, at any time and on a periodic basis ...'

47 Art 14(1) Agreement ICC-ICRC (n 38).

providing it details of the institution to which the sentenced person is transferred and the anticipated date of transfer.

The effectiveness and credibility of the inspections conducted by the ICRC are guaranteed by its unlimited access to all inmates and to the entire penitentiary, by the possibility of private interviews with the detained persons of its choice and by the right to renew the visits if it deems it necessary. In addition, the ICRC is assured of having the complete and detailed list of detainees provided by the Registrar or an official of the Court, and must be allowed to draw up such a list during its inspections.[48] The number of delegates and the composition of inspection teams are determined by the ICRC.

The purpose of the international organization's visits is purely humanitarian and is to ensure that all persons deprived of liberty are treated humanely and in accordance with international standards for the treatment of detainees. It is about the supervision of the material conditions of detention and the physical and psychological state of the latter. This may lead the ICRC to ask the ICC, if necessary, to take measures to improve them. If the ICRC is empowered to make suggestions to the Court in relation to compliance with judicial guarantees, it cannot question the validity of the detention ordered by the Court.

It is clear from the bilateral agreements on the enforcement of sentences and the ICC-ICRC Agreement that inspections conducted by the ICRC are impromptu and periodic, the determination of their frequency being at the discretion of the ICRC. After each visit, the latter must submit to the Presidency and the Registrar a confidential report containing its findings and recommendations, if any. When the visits are carried out in a state of enforcement, the ICRC shall submit its confidential reports to the national authorities concerned and forward the copies to the Presidency of the Court. The principle of confidentiality also applies to the Court where, in accordance with Rule 211(1)(b), it requests the ICRC to provide it with information, reports or experts opinion on the conditions of detention and the treatment of sentenced persons in the states of enforcement where the ICRC is authorised to carry out inspections.

It goes without saying that this international organization today has a proven expertise in the assessment of conditions of detention according to relevant international standards.[49] Plénet says that formalizing this practice in an agreement between the ICRC and the ICC strengthens the ICRC's weight and legitimacy as a reference authority in this matter.[50] This organization seems to be the Court's privileged partner. The choice of the ICRC, an organization widely accepted by states and widely represented in the world, is a guarantee of the effectiveness of inspections. Moreover,

48 Art 4 ibid.

49 Elassal (n 43) 68.

50 Plénet (n 20) 334.

the Court is thus protected against tensions that could arise between the states parties and it if its own organs were to carry out the inspections themselves. The option for a specialized entity has above all the merit of promoting the uniformization of the supervision of the conditions of detention of all sentenced persons.[51] In Professor Manirakiza's view, the only way to avoid unfounded differential treatment in law is to allow an international supervision of the domestic enforcement of international sentences.[52] It is therefore clear that the supervisory power granted to the Court is also a means of supervising the compliance of conditions of detention with international treaty standards on the treatment of prisoners.

III. The Mixed Incorporation of the Principle of Application of the National Legislation to the Conditions of Detention and the Related Guarantees

The analysis of African states' cooperation laws highlights a confirmation (certainly mixed) of the application of national legislation to the conditions of detention and the related guarantees. It should be recalled that the ICC Statute provides that sentenced persons serve their sentence of imprisonment in a state designated by the Court on the list of states which have informed the Court that they are prepared to receive prisoners.[53] Therefore, it is normal for the conditions of detention to be governed by the legislation of the state of enforcement. However, the application of national legislation is counterbalanced not only by the Court's supervision, but above all by guarantees of the protection of the rights of sentenced persons in the state of enforcement. These guarantees include first of all the requirement that detention conditions comply with widely accepted international treaty standards governing the treatment of prisoners. Secondly, such conditions shall be in no case more or less favourable than those available to prisoners convicted of similar offences in the state of enforcement. Finally, there is the obligation for the state of enforcement to ensure the free and confidential nature of communications between the sentenced person and the Court. It is therefore appropriate to assess the incorporation of the application of national legislation to the conditions of detention before focusing on that of the guarantees that accompany it. It should be noted that there is a diversity of African states' laws with regard to the incorporation of the principle of the application of national legislation to conditions of detention. As regards the guarantees of the protection of the rights of sentenced persons in the state of enforcement, those laws make a limited incorporation.

51 Ibid 335.

52 Pacifique Manirakiza, 'La problématique de l'exécution des sanctions pénales internationales' (2006) 11 Canadian Criminal Law Review 27, 42.

53 Art 103(1)(a) ICCSt.

A. The Heterogeneous Incorporation of the Principle of the Application of the Legislation of the State of Enforcement to the Conditions of Detention

Article 106(2) ICC Statute provides that the conditions of detention shall be governed by the legislation of the state of enforcement of the sentence of imprisonment. A careful reading of the cooperation laws of the African states makes it possible to realize that only the texts of the states having in common the English language have expressly provided for the application of the national legislation to the conditions of detention. At this level, the general similarity, on the one hand, between South African and Mauritian laws and, on the other hand, between Kenyan and Ugandan laws, is confirmed. Indeed, South African law specifies that the provisions of the Correctional Services Act 1998 and South African domestic law apply to ICC prisoners[54] while Mauritian law states that the latter are subject to the Reform Institutions Act.[55] It is clear from both laws that they apply subject to the exclusive jurisdiction of the ICC to amend the sentence and, to the freedom and confidentiality of communications between sentenced persons and the Court.[56] In Kenya and Uganda, ICC prisoners are subject to the Prisons Act (Cap. 90)[57] and the Prisons Act[58] respectively, as if they were sentenced in accordance with the domestic laws of those states.

The ICC Statute, by providing for the application of national laws with regard to conditions of detention, essentially takes over the system enshrined in the ICTs Statutes. Indeed, the ICTY Statute provided that the imprisonment is subject to the national rules of the state concerned[59]; whereas the ICTR Statute stated that the sentences of imprisonment shall be enforced in accordance with the laws in force of the state concerned.[60] The same applies to the Special Court for Sierra Leone (SCSL)[61] and Special Tribunal for Lebanon (STL).[62] These provisions are one of the most pronounced manifestations of the decentralization of the enforcement of the sentence. This decentralization was preferred to the creation of an international prison system, which therefore justifies the application of national legislation to the conditions of detention.[63] A different option would have required international criminal courts to create their own prisons. As Corell noted about the ad hoc Tribunals, the creation of an international prison 'would be a very costly enterprise and very inflexible, because

54 Art 32(4)(a) South Africa ICC Law.

55 Art 39(4)(a) Mauritius ICC Law.

56 Art 32(4)(a) South Africa ICC Law; Art 39(4)(a) Mauritius ICC Law.

57 Art 136(2) Kenya ICC Law.

58 Art 69(2) Uganda ICC Law.

59 Art 27 ICTYSt.

60 Art 26 ICTRSt.

61 Art 22(2) SCSL Statute.

62 Art 29(2) STL Statute.

63 Elassal (n 43) 62.

it would be difficult to assess to what extent prison space would be needed.'[64] The exercise of the sovereignty of states is thus recognized in order to encourage them to cooperate in the enforcement of international sentences. In fact, they would probably have refused to allow the enforcement of sentences in their territory to be completely outside their sovereignty. However, as Penrose pointed out, a permanent institution such as the ICC should not depend on a non-viable enforcement system.[65] According to this author,

> 'an international prison would ensure: (1) that each international prisoner has a prison cell available upon conviction; (2) that prisoners would be housed with similar offenders posing similar security risks; (3) that prisoners would be subjected to standard rules and regulations regarding confinement, and, ultimately, a uniform system for commutation; and, (4) perhaps most importantly, that prisoners and the international community would perceive a sense of permanence.'[66]

The application of national law highlights the problem of the application of the programmes available under that law. This issue has been completely ignored in the ICTs system.[67] With respect to the ICC, its RPE outlines its terms and conditions: '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.'[68] This provision, by creating a regime that is advantageous to the ICC prisoners, recognizes the ICC's supervisory power. It must ensure that the programmes or benefits in question, if granted, would not result in unequal treatment between the Court's prisoners and those of the state of enforcement. The history of the negotiations that led to the adoption of this provision by the Assembly of States Parties (ASP) reveals a deep disagreement between the delegations. On the one hand, there were delegations that believed that national programmes should apply to the persons sentenced by the Court and, on the other hand, those for whom this would have created an unacceptable inequality of treatment between persons detained in different states.[69]

> 'From the perspective of the proponents, it was critically important to ensure that a person sentenced by the ICC received equality of treatment to that accorded to domestic prisoners. For these delegations, this was an essential requirement for implementation under domestic law. Other delegations were concerned that the proposals under consideration altered the delicate

64 Hans Corell, 'Nuremberg and the Development of an International Criminal Court', (1995) 149 Military Law Review 87, 97-98.

65 Mary Margaret Penrose, 'No Badges, No Bars: A Conspicuous Oversight in the Development of an International Criminal Court' (2003) 38 Texas ILJ 621, 638.

66 Idem, 'Spandau Revisited: The Question of Detention for International War Crimes' (1999-2000) 16 New York Law School Journal of Human Rights 553, 585.

67 Elassal (n 43) 63.

68 Rule 211(2) ICC RPE.

69 Elassal (n 43) 63-64.

balance struck under article 106, between the application of domestic law and practice and equality of treatment for all prisoners sentenced by the Court. For those delegations, if the emphasis were placed solely on equal treatment within a state, it would create an inequality of treatment between prisoners of different states of enforcement.'[70]

The application of national law to the enforcement of the sentence and to the conditions of detention seems to be a means of counterbalancing the supervision which the Court is empowered to exercise. It can also be inferred that the principle of the application of national legislation here, as on other aspects of Part 10 ICC Statute, requires the adoption of appropriate legislation or at least the adaptation of existing national legislation on the treatment of prisoners. Therefore, if the silence of the cooperation legislation of the French-speaking African states on the application of national legislation is justified by the non-existence or inadequacy of that legislation, the states concerned must adopt or adapt this legislation as soon as possible. In addition, the enforcement regime established by the ICC Statute contains guarantees of the protection of the rights of the person sentenced by the ICC in the territory of the state of enforcement.

B. The Limited Incorporation of the Guarantees Attached to the Regulation of the Conditions of Detention by the Legislation of the State of Enforcement

In order to prevent international prisoners from being mistreated or treated more favourably than domestic prisoners convicted of similar offences, the ICC Statute attaches strong guarantees to the principle of the application of national law to conditions of detention. The incorporation of the requirement of compliance with the relevant international treaty standards, the equal treatment of international and domestic prisoners, and the requirement that communications between the sentenced person and the Court be free and confidential is assessed in the following paragraphs. Such assessment will reveal that the cooperation laws of the African states do not incorporate all the above mentioned guarantees in a uniform manner.

1. The Awkward Incorporation of the Requirement of Compliance of Detention Conditions with Widely Accepted International Treaty Standards

There is a quasi-absence of the requirement of Article 106(2) ICC Rome Statute in the cooperation laws of the African states. Indeed, only the Burkinabe and Congolese laws have incorporated this provision. The first provides that the conditions of detention shall comply with widely accepted international treaty standards on the treatment of detainees and, in accordance with Article 106 ICC Statute.[71] The second states that the conditions of detention shall comply with the treaty rules admitted by international

70 Prost, 'Enforcement' (n 14) 687.

71 Art 47(2) Burkina Faso ICC Law.

law on the treatment of detainees.[72] These two laws are therefore relatively consistent with Article 106(2) ICC Statute, which requires conditions of detention to comply with widely accepted international treaty standards on the treatment of detainees. Article 106(2) also provides that '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.' While Burkinabe and Congolese laws differ from other African texts, it is clear that they remain deficient on this second requirement of Article 106(2). Burkinabe and Congolese texts must therefore incorporate this second requirement in order to fully comply with the ICC Statute on the conditions of detention. The other African states considered here must do more by fully incorporating the two above requirements. In fact, compliance with these requirements would not only raise the level of national standards for detention, but also avoid any difference in treatment between persons sentenced by the ICC and other incarcerated persons.

Although the failure of a national legislation to comply in this respect does not imply a priori that the conditions of detention in the state concerned would not be adequate, it must nevertheless be pointed out that some states have always wanted to have some autonomy in the matter. Indeed, it will be recalled that in Rome there were differences as to the nature of the standards which the state of enforcement should comply with. Some delegations were opposed to proposals that would make it mandatory for the state of enforcement to apply international standards which in reality are just recommendations. These included the United Nations Standard Minimum Rules for the Treatment of Prisoners[73], to which others wanted an explicit reference. The rejection of this second option would have been due to the fact that several prison systems, even those in so-called rich or developed countries, do not always apply these standards.[74] For some authors, the reference to 'international treaty standards' means an exclusion of the Standard Minimum Rules for the Treatment of Prisoners[75], and several other standards of a similar nature. It should be recalled that in Rome, several delegations were not prepared to accept such detailed and ambitious standards whose status as customary international law was not certain.[76] It is clear that all these standards are not enforceable in all places and at all times. The compromise thus found was to exclude any reference to the soft law standards and to require the conformity of the conditions of detention only to the hard law envisaged in Article 106(1) and (2) ICC

72 Art 21-25(2) Democratic Republic of Congo CPC.

73 As adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

74 Schabas, *The International Criminal Court* (n 13) 1082.

75 See in particular Chimimba, 'Establishing an Enforcement Regime' (n 14) 352-353.

76 Michael Stiel and Carl-Friedrich Stuckenberg, 'Article 106 - Supervision of Enforcement of Sentences and Conditions of Imprisonment' in Mark Klamberg (ed), *The Commentary on the Law of the International Criminal Court* (TOAEP 2017) 693-697, 694.

Statute.[77] During the negotiations, the reference to the UN Standard Minimum Rules for the Treatment of Prisoners was rejected 'on the grounds that this would [have] set the enforcement threshold so high, that only a very select club of penitentiary paragons would be fit to be designated for forthcoming decades.'[78]

The international treaty standards envisaged in Article 106 are contained in international human rights instruments, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Regional human rights instruments are also concerned. In Rome, therefore, the conception of the ICTY was deviated. In fact, in *Erdemović* case, the ICTY Trial Chamber presented the international instruments for the enforcement of the sentence as follows:

> 'The Trial Chamber considers that the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons, which have *inter alia* been enshrined in article 10 of the International Covenant on Civil and Political Rights, article 5, paragraph 2 of the American Convention on Human Rights and, as regards penalties more specifically, article 5 of the Universal Declaration of Human Rights and article 3 of the European Convention on Human Rights.
>
> The Trial Chamber would also refer to the following instruments: Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; European Prison Rules and Rules governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal.'[79]

The ICTY thus demanded the compliance of the enforcement of sentences with both the soft law and the hard law.

The presence of the terms 'international treaty' in the text of paragraphs 1 and 2 of Article 106 should lead to a restrictive interpretation that inevitably means the exclusion of Standard Minimum Rules and other similar rules on the treatment of detainees. It is therefore difficult to follow Elassal when she points out that the Standard Minimum Rules, even if it is not part of international treaty law, codify well-established rules of customary international law.[80] But, nothing prevents a state of enforcement to incorporate those Standard Minimum Rules.

Some authors believe that the quintessence of the UN Standard Minimum Rules for the Treatment of Prisoners and other similar instruments has already been assimilated to the interpretation of general provisions of treaties such as the International Covenant

77 Ibid.

78 Gerard A M Strijards and Robert O Harmsen, 'Article 103, Role of States in Enforcement of Sentences of Imprisonment' in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of International Criminal Court, Observer's Notes, Article by Article* (3th edn, Hart 2016) 2173-2186, 2184.

79 *Prosecutor v Erdemović* (Judgement) IT-96-22-T, T Ch (29 November 1996) § 74.

80 Elassal (n 43) 60.

on Civil and Political Rights and through the decisions of the UN Human Rights Committee.[81] For instance, in *Fongum Gorji-Dinka v Cameroun*, the Committee 'reiterate[d] that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners (1957)' before concluding that '[Gorji-Dinka]'s rights under article 10, paragraph 1 [International Covenant on Civil and Political Rights], were violated during his detention between 31 May 1985 and the day of his hospitalization.'[82]

In addition, most bilateral enforcement agreements signed by the ICC provide that the enforcement of the sentence or conditions of detention must comply with 'international treaty standards generally [in the case of agreements with Belgium and Denmark] or widely [in the case of agreements with Finland and the DRC] accepted' which govern the treatment of detainees.[83] These agreements therefore deviate from the precision of Article 106(2) ICC Statute. Articles 4(1), 6(1) and 6(1) of the Agreements with Mali, Austria and Serbia use the terms 'widely accepted international treaty standards'. These last three agreements confirm the spirit and more or less repeat the letter of Article 106(2) ICC Statute. Finally, the Agreement with the United Kingdom is unique, which provides that '[t]he conditions of imprisonment ... shall be in accordance with relevant international human rights standards governing the treatment of prisoners, including any obligations of the United Kingdom under the Convention for the Protection of Human Rights and Fundamental Freedoms ... '[84]

This variety of statements is a manifestation of the voluntarism that surrounds the system of enforcement of prison sentences imposed by the ICC. It should not call into question the spirit of the ICC Statute in the enforcement of sentences under the said bilateral agreements. Abtahi and Koh noted that 'states may choose to remove the word "treaty" from their enforcement agreement in an effort to encompass soft law.'[85] According to Clark, ' ... a number of delegations at Rome shared a general philosophical antipathy to international customary law. In any event, the reference to international standards was modified in Rome by the word "treaty" so that it is

81 See in particular Schabas, *The International Criminal Court* (n 13) 1082-1083; Abels (n 32) 48, 235. For the relevant decisions of the Human Rights Committee, see in particular UNCHR, 'General Comment No 21' UN Doc A/47/40 at 195 *et seq*, §§ 5 and 13; *Albert Womah Mukong v Cameroon* (1994) Observations, Submission No 458/1991, § 9.3; *Fongum Gorji-Dinka v Cameroon* (2005) Observations, Communication No 1134/2002, § 5.2. It should be noted that Mukong and Gorji-Dinka were arrested and detained because they claimed the autonomy of the English-speaking part of Cameroon. For more details, see in particular Alain Didier Olinga, 'La ''Question anglophone'' devant le prétoire international des droits de l'Homme' in Alain Didier Olinga (ed), *Le Cameroun et le prétoire international* (Afrédit 2015) 321-333, 324-326.

82 *Fongum Gorji-Dinka v Cameroun*, ibid.

83 Art 4(2) Agreement ICC-Belgium (or Art. 6(1) 2010 version); Art 4(2) Agreement ICC-Denmark; Art 6(1) Agreement ICC-Finland; Art 4(1) ad hoc Agreement ICC-DRC.

84 Art 5 Agreement UK-ICC.

85 Hirad Abtahi and Steven Arrigg Koh, 'The Emerging Enforcement Practice of the International Criminal Court' (2012) 45 Cornell ILJ 1, 12.

international treaty standards that apply.'[86] Such a precision clearly means the exclusion of soft law.

Beyond the issue of the content of the applicable international treaty rules, the requirement of compliance of the enforcement of the sentence and the conditions of detention with those rules offers the state of enforcement the opportunity to improve the conditions of detention in force in its territory by incorporating elements of an international regime more protective of the rights of convicted persons.[87] Only this upgrade will enable it to respond serenely to the requirement of equal treatment of persons sentenced by the ICC and domestic prisoners.

2. The Non-Incorporation of the Requirement of Equal Treatment between the ICC and Domestic Prisoners

The cooperation laws of African states are silent on the requirement of Article 106(2) ICC Statute under which 'in no case shall ... conditions [of detention] be more or less favourable than those available to prisoners convicted of similar offences in the state of enforcement.' And if it can be inferred that the cooperation laws that subject persons sentenced by the ICC to national law (the cases of South Africa, Mauritius, Kenya and Uganda) can easily ensure equal treatment, it would be difficult to pronounce on the laws of the other states concerned.

Article 106(2) explicitly imposes on states of enforcement an obligation to refrain from creating enforcement regimes specifically reserved for persons sentenced by the ICC.[88] The purpose of introducing this provision was to ensure that persons sentenced by the Court be not mistreated in national prisons.[89] It was seen as another manifestation of the principle of complementarity. Indeed, while the ICC Statute recognizes the primacy of genuine national prosecutions, under no circumstances should there be discrimination as to the treatment of persons convicted by the Court and subsequently transferred to states for the purpose of serving their prison sentences. The term 'similar offences' must be interpreted in relation to the seriousness of the offence. This implies that differences in treatment for other reasons are not prohibited.[90] It may, however, prove difficult to implement equal treatment in a state which, for example, applies the death penalty, or at least concerning the outcome of detention.[91] A commentator states that '*l'égalité de traitement visé*[e] *n'implique pas une égalité parfaite*' (equal treatment targeted does not imply perfect equality), since equality

86 Roger S Clark, 'Article 106, Supervision of Enforcement of Sentences and Conditions of Imprisonment' in Triffterer and Ambos (eds) (n 78) 2192-2195, 2193.

87 Ntoubandi, 'Article 106' (n 12) 1978.

88 Ibid.

89 Chimimba, 'Establishing an Enforcement Regime' (n 14) 353.

90 Kreβ and Sluiter, 'Imprisonment' (n 33) 1803.

91 Ntoubandi, 'Article 106' (n 12) 1978.

must be assessed in relation to '*un traitement pénitentiaire qui respecte les normes internationales relatives à la condition des prisonniers*' (penitentiary treatment that complies with international standards on the condition of prisoners).[92] In any event, the Court has the power to inquire, in accordance with Rule 211(1) ICC RPE, about the compliance of the conditions of detention with international treaty standards. If the information collected indicates non-compliance with these standards, the Presidency may simply proceed with the designation of a new state of enforcement under Article 104(1) ICC Statute.

While the merit of Article 106(2) is beyond doubt, its application could have this perverse effect in some countries, that is, providing persons sentenced by the ICC with better conditions of detention than those reserved for national detainees who commit petty theft.[93] This risk is real in that the equality requirement only applies to international and national prisoners who commit 'similar offences'. If persons sentenced by the Court were to benefit from more favourable conditions of detention than those reserved for domestic offenders who commit less serious offences, it would be a perversion of justice. Moreover, since the Court's supervisory power only applies to the conditions of detention of persons sentenced by it, some states of enforcement could be tempted to improve the treatment of these prisoners while neglecting domestic prisoners. To counter this injustice, states parties must simply adapt national standards to relevant international standards. It should be noted that Article 106(2) has a significant normalizing potential. In fact, the prohibition of neither more nor less favourable treatment of international prisoners, if strictly adhered to and the relevant international standards are effectively applied, would certainly lead to a marked improvement in living conditions in national prisons. In fact, Smit points out that 'there will be an enormous pressure on countries that take these prisoners to operate their prison system entirely in terms of these international standards.'[94] However, the requirements relating to the treatment of detainees may also discourage some states, rich or poor, from accepting persons sentenced by the ICC.[95] These include those whose national standards are far from being in line with international treaty standards on the treatment of detainees. Abels also believes that '[w]hat may have been a legitimate attempt to make it more attractive for states to accept international prisoners may become an insurmountable obstacle to do so for states with less financial resources, which may in turn have negative implications for reconciliation and rehabilitation processes.'[96]

92 Manirakiza, 'La problématique de l'exécution des sanctions pénales internationales' (n 52) 42.

93 Elassal (n 43) 174.

94 Dirk van Zyl Smit, 'International Imprisonment' (2005) 54 International Criminal Law Quarterly 357, 376.

95 Abels (n 32) 596.

96 Ibid.

The requirement of equal treatment of domestic prisoners and those convicted by the ICC makes it possible to question the issue of the disparity of treatment between the latter when they are in the prisons of several states of enforcement. Indeed, the ICC Statute does not provide for equal treatment of persons sentenced by the Court from one country to another. This standardization enterprise would have been even more credible if a similar principle had been provided for in the treatment of international prisoners from one country or from one international criminal court or tribunal to another.[97] Although the equal treatment of international convicts was not provided for in the ICTs Statutes, the issue has at least preoccupied the judges of the ICTY. In fact, in *Erdemović* case, the following was recommended: 'The Trial Chamber considers it possible to deduce from the principle of equal treatment before the law that there can be no significant disparities from one state to another as regards the enforcement of penalties pronounced by an international tribunal. It therefore recommends that there be some degree of uniformity and cohesion in the enforcement of international criminal sentences.'[98]

But the case law of the ICTs has not been able to establish a principle of equal treatment of detainees that could be invoked by a convicted person of the ICTY or the ICTR.[99] To the silence of the Statutes of the latter followed the inertia of their judges on the issue. Notwithstanding this legal vacuum, Elassal believes that there are legal bases both internally and internationally that justify the implementation of the principle of equal treatment of prisoners from one country or from one international criminal body to another.[100] The feasibility of this enterprise seems very difficult. States must therefore ensure that detainees are treated humanely. In the context of the ICC, states are imposed an additional obligation to facilitate communications between the sentenced person and the Court.

3. The Adequate Incorporation of the Requirement of the Free and Confidential Communications between the Sentenced Person and the ICC by the Majority of African Laws

Article 106(3) ICC Statute, which states that '[c]ommunications between a sentenced person and the Court shall be unimpeded and confidential', has been satisfactorily incorporated by the majority of the laws of African states under consideration.[101] Only Central African, Comorian and Congolese laws are silent on this issue. However, compliance with this requirement in a way conditions the implementation of the

97 For the argument in favour of such a requirement, see Elassal (n 43) 174.

98 *Prosecutor v Erdemović* (Judgement) IT-96-22-T, T Ch (29 November 1996) § 72.

99 Elassal (n 43) 171.

100 Ibid 174.

101 Art 32(4) (c) South Africa ICC Law, Art 48(3) Burkina Faso ICC Law, Art 39(4) (c) Mauritius ICC Law, Art 136(3) Kenya ICC Law and Art 69(3) Uganda ICC Law.

Court's power to supervise the enforcement of prison sentences and conditions of detention. Indeed, it is clear that the Court could effectively exercise its jurisdiction as regards both the revision of the sentence and the supervision of the enforcement of the sentence only if the right of access of the detained person to the Court is guaranteed. The free access of the condemned person to the Court allows not only to protect his rights, but above all to guarantee the effectiveness of the supervision of the enforcement of the sentence of imprisonment by the Court. The fact that the obligation to facilitate communications between the detainee and the Court has been imposed on the state of enforcement is certainly a means of protecting the rights of the detainee during the enforcement of his sentence. If, under the ICC system, the convicted person is entitled to challenge the conditions of his detention and to apply to the Court at any time for his transfer to another state of enforcement[102], this right would be wishful thinking if the states responsible for enforcement were not obliged to facilitate communications between the detainee and the Court. Furthermore, in the event of non-compliance with this obligation, the supervision of the enforcement of the prison sentence by the Court would be very limited. It should be noted that the Court's reference texts make the convicted person the main source of information for the Court in terms of conditions of detention. Consequently, the effectiveness of the supervision exercised by the Court in this matter will be largely dependent on compliance by the state of enforcement with its obligation to guarantee the freedom and confidentiality of communications between the sentenced person and the Court.

According to a commentator, in a way, Article 106(3) represents for the states the greatest constraint.[103] It allows the Court to monitor the enforcement of prison sentences without warning the states of enforcement.[104] Free and confidential communications between the sentenced person and the Court may take place at any time and, apparently, at the initiative of the Court or at the request of the sentenced person.[105] For the effective implementation of this communication requirement, states parties must facilitate communications between the condemned person and the Court as well as respect the confidentiality of such communications.[106] In this regard, Rule 211(1)(a) ICC RPE provides that the Presidency '[s]hall, in consultation with the state of enforcement, ensure that in establishing appropriate arrangements for the exercise by any sentenced person of his or her right to communicate with the Court about the conditions of imprisonment, the provisions of article 106, paragraph 3, shall be respected.'

102 Art 104(2) ICCSt.; Rule 209 ICC RPE.

103 Plénet (n 20) 329.

104 Rule 211(1) ICC RPE.

105 Plénet (n 20) 329.

106 Ntoubandi, 'Article 106' (n 12) 1979.

Stiel and Stuckenberg note that '[a]s proposals for a qualification "subject to overriding security considerations" … were rejected at the Rome Conference, the provision is to be applied without exceptions.'[107] There is no ground to justify the non-compliance with Article 106(3). In fact, it was admitted that 'there is even a positive obligation for the state of enforcement to facilitate communications between the prisoner and the Court'.[108]

It can be said that the fact that most of the African states' cooperation laws incorporate the freedom and confidentiality of communications between the sentenced person and the Court, leads to the conclusion that the states concerned generally acknowledge the Court's power of supervision over the enforcement of sentences or conditions of detention.

IV. Concluding Observations

This article is about the implementation of a specific aspect of the ICC Statute in eight African states, that is, the provisions of Article 106 on the supervision of the enforcement of sentences and conditions of detention. The assessment of the cooperation laws of these African countries reveals an awkward acknowledgement of the ICC's primacy when it comes to the supervision of prison sentences enforcement. These laws are also silent about the procedures for such supervision. It is argued that this silence can be justified by the absence of such procedures within the ICC Statute. In addition, periodic inspections of the conditions of detention of persons sentenced by the Court are not provided for by the ICC Statute neither by African laws. One has to resort to bilateral agreements reached between the ICC and the ICRC, and between the ICC and some states to find the terms and conditions of the periodic inspections missions.

The third section of the article elaborates on the mixed incorporation of the principle of application of the national legislation to the conditions of detention and related guarantees. One notices a heterogeneous incorporation of this principle, on the one hand, and a limited incorporation of the guarantees attached the regulation of the conditions of detention by the legislation of the state of enforcement. However, since the requirement of the free and confidential communications between the sentenced person and the ICC is adequately incorporated by five[109] of the eight laws under assessment, it can be concluded that the five states concerned generally acknowledge the Court's power of supervision. In fact, the free and confidential communications between the sentenced person and the ICC are a good means of supervision of the enforcement of sentences and conditions of detention. Overall, the African states

107 Stiel and Stuckenberg, 'Article 106' (n 76) 696. For a similar argument, see Kreβ and Sluiter, 'Imprisonment' (n 33) 1801; Schabas, *The International Criminal Court* (n 13) 1083.

108 Stiel and Stuckenberg, ibid.

109 That is the laws of Burkina Faso, Kenya, Mauritius, Uganda and South Africa. Cf. (n 101).

considered, with the exception of the DRC, have not yet had the opportunity to apply their legislation in this domain, given the still insignificant number of ICC prisoners. But the implementation of the provisions of Article 106 ICC Statute is likely to improve the conditions of detention in these states.

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