

International Criminal Law and Procedure

Rome Statute of the International Criminal Court (Art. 94)

Art. 94. Postponement of execution of a request in respect of ongoing investigation or prosecution

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

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

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

DIANE BERNARD

Article 94 is one of the three Articles of the Statute allowing a State to postpone compliance with a request from the Court (see Art. 89(2) and 95). It allows a State to delay (not deny) the execution of a request by the Court if the latter might interfere with a case being investigated or prosecuted at the national level that is different from that to which the request of the Court relates. A simple refusal to cooperate is not permitted and an agreement with the Court will have to be found, in particular about the time of postponement (W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 1027, or C. KREß and K. PROST, 'Article 94. Postponement of Execution of a Request in Respect of Ongoing Investigation or Prosecution' in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 1589). In other words, Article 94 is linked to the jurisdictional priority recognised to States by the mechanism of complementarity.

Article 89(2) appears to be dedicated to surrender while Article 94 applies to all other forms of cooperation. The Pre-Trial Chamber in the Libya situation has confirmed this articulation of both Articles (ICC (PTC), *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, Decision on Libya's submissions regarding the arrest of Saif Al-Islam Gaddafi, 7 March 2012, para. 15).

Formulated in the final Preparatory Committee draft and finalised in Rome, this idea of a delayed compliance with a request for cooperation had been discussed since the beginning of the *PrepCom* works (Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, 144; Report of the Working Group in International Cooperation and Judicial Assistance, A/CONF.183/C.1/WGIC/L.11/Add.2, 13 July 1998, 4; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Proceedings of the Preparatory Committee during March, April and August 1996, Vol. 1, A/51/22, para. 317). It is founded on the need for a State to protect its own domestic investigations and prosecutions, without being allowed to refuse to participate to the struggle against impunity (by denying assistance). Article 89(2) appears as its counterpart for cases where a suspect has already been tried for a particular crime and has been either convicted or acquitted.

Article 94 does not block the application of Article 93(1)(j): the Prosecutor may still request the protection of witnesses and victims and the preservation of evidence.

Article 94 is part of the general obligation to cooperate as described by Articles 86 and following. States will consequently have to examine seriously if the national case is of sufficient importance to justify the postponement. While the State has the power to assess the risk of interference between the international case and its internal affairs, the Court has to agree with the definition of this necessity: according to Article 94, 'the postponement shall be no longer than is necessary'. In other words, the ICC holds the ultimate control: 'where the requested State clearly acts unreasonably, the Court may determine so' (as reported by KREß and PROST, 'Article 94. Postponement of Execution of a Request in Respect of Ongoing Investigation or Prosecution' in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 1589. Despite this clear comment, these authors curiously conclude that no automatic priority will be recognised to the Court or the States in the control of the postponement). This may be seen as a sign of primacy of the Court (see W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 1027), and let us consider that the term 'decision' instead of 'agreement to postpone' would have better reflected the reality of this Article.

Art. 95. Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determina-

tion by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

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As discussed and formulated in Rome, this Article allows a State to postpone the execution of a request from the Court while an admissibility challenge is pending before the Court. This illustrates the political nature of the Rome Statute, as such a technical Article may allow States to temper resolutions of the United Nations Security Council.

1. General

Postponement may occur whenever admissibility is challenged according to Articles 18 and 19, i.e. by an individual or another State desiring to exercise jurisdiction. Article 95 thus implements the principle of complementarity, as it gives priority to national proceedings even before the admissibility of the case before the ICC is (un)confirmed (see D. AKANDE, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', *Journal of International Criminal Justice*, 10, 2012-2, p. 316). The permission to suspend co-operation does not include challenges to jurisdiction under Article 19: this 'confirms that the core concern is not so much the general power of the ICC to hear the case but rather the more limited, and perhaps more important, concern that the Court should not interfere with national proceedings and should be subsidiary to national action'.

Unlike Article 94, Article 95 does not require an agreement between the State and the Court about the modalities of the postponement.

2. The Questionable Scope of Article 95

On the basis of the structure proposed by the late Working Group on international cooperation (see the proposed location of the Article in the Report of the Working Group on international cooperation and judicial assistance, A/CONF.183/C.1/WGIC/L.11/Add.2, 5), one could consider that Article 95 applies to all forms of requests defined in Part 9 of the Statute (in this sense, See C. KREß AND K. PROST, 'Article 94. Postponement of execution of a request in respect of ongoing investigation or prosecution' in O. TRIFFTERER (ed.) *Commentary on the Rome Statute of the International Court. Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 1589). The Pre-Trial Chamber in the Libya situation has indeed followed the opinion of the Prosecutor and some scholars in considering that Article 95 even includes surrender requests (see e.g. ICC, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, PTC, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Article 95 of the Rome Statute, 1 June 2012, para. 37 and before; see J. OHLIN on his blog, 'Libya's duty to cooperate with the ICC', www.liebercode.org, 23 November 2011, or D. AKANDE, 'Is Libya under an Obligation to Surrender Saif Gaddafi to the ICC? Part I (What does the Rome Statute Say?)', *EJIL-talk*, www.ejiltalk.org, 26 November 2011; D. AKANDE, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', *Journal of International Criminal Justice*, 10, 2012-2, p. 318).

Two arguments nonetheless can be used to challenge this interpretation.

First, an application of Article 95 to surrender requests could make Article 89(2) superfluous. According to Article 89(2), States may postpone the execution of a surrender request if the sought person brings a claim of double jeopardy before a national court, while an admissibility ruling is pending before the Court (the postponement being allowed until the Court makes a decision regarding admissibility). If Article 95 would include requests for surrender, it would subvert Article 89(2). Some confusion during the debates in Rome could explain this overlap but the attention paid to the very delicate issues of cooperation and surrender makes it unlikely. While Article 89 is dedicated to requests for surrender, Article 95 should cover all the *other* forms of requests for cooperation. However, Akande considers that Article 89(2) permits suspension of the surrender in case of a *ne bis in idem* challenge, being specifically dedicated to challenges made in a national court, while Article 95 broadly covers challenges to admissibility made to the ICC (AKANDE, *ibid.*, p. 319). But nothing in the drafting history provides evidence for distinguishing situations in this matter, or giving the principle of *ne bis in idem* such prominence.

Secondly, the English version of Article 95 appears to confirm this narrow interpretation (the French and Spanish versions of the Statute are not clear enough to clarify the issue). Textually, States 'may postpone the execution of a request under this Part (...) unless the Court has specifically ordered that the Prosecutor may pursue the collection of *such* evidence pursuant to Article 18 or 19'. Either 'such' refers to the requests 'under this Part' mentioned in the same sentence, or it refers to Article 93, i.e. the 'other forms of cooperation' (excluding arrest and surrender). This second interpretation is more convincing (see K.J. HELLER, 'Does Libya have to Surrender Saif to the ICC? (Answer: Yes)', www.opiniojuris.org, 23 November 2011 e.a.). Their placement in the final structure of the Statute suggests Articles 94 and 95 as exceptions to Article 93, specifically applying to 'other forms of cooperation' and therefore excluding requests for surrender (in this sense, W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 1027 and 1031).

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Akande proposes a subtle and intricate reading of Article 95. According to him, the first part of Article 95 includes all requests for cooperation, while the second part is narrower because it refers to Articles 18(6) and 19(8) that do not allow the Prosecutor to require such a commitment as surrenders from States. 'The second part of Article 95 creates an exception to the first part, which in turn creates an exception to the obligation of cooperation', writes Akande (D. AKANDE, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', *Journal of International Criminal Justice*, 10, 2012-2, 299-324, p.318). The relevance of this double reading of Article 95 is not confirmed, neither by the drafting history nor by the very structure of Article 95; still it is consistent with the decision of the Pre-Trial Chamber rendered in the Libya situation.