# INTERNATIONAL LAW AS FRAMEWORK OF JUDICIAL COOPERATION IN CRIMINAL MATTERS

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**Abstract:** New forms of crime, mutual connection between perpetrators of criminal offences and the widely present element of foreignness in the commission of criminal offences condition the increasing cooperation of states in the prosecution and extradition of both the perpetrators and cases related to the commission of criminal offences. However, there are a number of criminal offences generally agreed to be international criminal offences. These criminal offences are not within the exclusive jurisdiction of international courts, so the perpetrators can be tried for them before national courts as well according to one of the principles of the establishment of competence. The Hague Tribunal and the Rwanda Tribunal have primacy over national courts, while the International Criminal Court has complementary jurisdiction over the States Parties to the Rome Statute. We can talk about two models of international cooperation: vertical and horizontal, where vertical cooperation is between states and international courts, while the horizontal is cooperation between states.

**Keywords**: international cooperation, the Hague Tribunal, the International Criminal Court, primacy, complementarity.

## INTRODUCTORY REMARKS

Crimes that have occurred throughout history, primarily those stemming from various armed conflicts, proved the need to form international criminal tribunals. The formation of international courts and tribunals has produced an important, primarily procedural problem of competences: who has primacy in deciding on the criminal responsibility of the people accused of committing criminal of-

fences, if it is both international and national courts that have the jurisdiction to adjudicate the same offences? Of course, the problem does not exist where national courts have exclusive jurisdiction for certain criminal offences (e.g. piracy, international terrorism cases which do not constitute crimes against humanity or war crimes, large-scale drug trafficking, etc.) (Cassese, 2005: 410); it rather occurs where there is competition jurisdiction, when one or more states claim the right to criminal jurisdiction for certain criminal offences (under one of the principles of territorial validity of the national criminal law), while at the same time an international tribunal has jurisdiction in the matter (Simović, Blagojević & Simović, 2013: 85-97).

In case there is competition jurisdiction between one or more states, the problem is twofold also because there are neither general international rules nor general customary rules which would give precedence to one principle over the other. On the other hand, when it comes to competition jurisdiction between national courts and international criminal tribunals, this issue is resolved by contract rules or binding resolutions. So, for instance, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have primacy over national courts, while the International Criminal Court (ICC) has complementary jurisdiction, meaning that precedence is given to national courts.

## PRIMACY OF THE ICTY AND ICTR

The ICTY Statute establishes international jurisdiction for a certain type of criminal offences[1] as parallel to the jurisdiction of domestic courts (of successor states of the former SFRY) (Simović, Blagojević & Simović, 2013: 278). Article 9 of the ICTY Statute and Article 8 of the ICTR Statute prescribe that those international tribunals have primacy over national courts and that at any stage of the procedure, the international tribunal may formally request national courts to defer to the competence of the international tribunal in accordance with the statute and the rules of procedure and evidence of the international tribunal.

Provisions of Article 10, paragraph 2 of the ICTY and ICTR statutes also envisage subsidiary jurisdiction. This means that a person who has been tried by a national court for acts constituting serious violations of international humanitarian law will be tried again by the international tribunal only if: a) the act for which he or she was tried was characterised as an ordinary crime, or b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

The ICTY Rules of Procedure and Evidence contain, among other things, rules on the ICTY's primacy. Those rules are contained in the provisions of Article 7*bis*–13.[2] The same rules were upheld by ICTR judges too. These rules do not foresee absolute primacy of international tribunals; on the contrary, competition jurisdiction may also include the precedence of national courts. In addition, the tribunal may abandon the case if it deems it would be better if it were tried by a national court. This is how judges created a mechanism in which a case may be returned to national courts whenever they consider it a better solution (Cassese, 2005: 412). A case may be deferred *proprio motu*[3] or at the request of the ICTY Office of the Prosecutor.

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1 Provisions of Articles 2, 3, 4 and 5 of the ICTY *Statute*.

2 See the full text of the Rules at: *https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/ IT32Rev49bcs.pdf;* 21.12.2019.

3 ICTY, *Prosecutor v. Mile Mrksić et al.*, IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis*, 17 May

According to this rule, a case may be referred to the state in whose territory the crime was committed, in which the accused was arrested, or having jurisdiction and being willing and adequately prepared to accept such a case. The tribunal may request primacy in the cases under Article 10, paragraph 2 of the Statute.

## COMPLEMENTARITY OF THE ICC

Unlike the ICTY and ICTR which have primacy over national courts, the ICC takes into account the principle of complementarity, meaning that its jurisdiction is subsidiary. Hence, priority in conducting procedures is given to national courts, while the ICC assumes responsibility when national courts either do not want or are not capable of conducting the procedure adequately. There are generally two reasons why the states parties to the Rome Statute opted for such an approach: a) they did not want to "overwhelm" the court with cases from all over the world, b) respect for sovereignty of the states to the largest extent (Triffterer, 1999).

The ICC has no right to exercise jurisdiction when a national court claims jurisdiction over a certain crime: (i) when the state has jurisdiction by its internal law; (ii) when authorities in a specific case conduct a proper investigation and criminal procedure or, when they adequately made a decision not to conduct proceedings against a person and (iii) when the case is not of sufficient gravity to justify further action by the Court (Article 17). Furthermore, the ICC (iv) may not conduct proceedings against a person who has already been convicted or acquitted of a specific crime, provided that the trial was fair and in order (Article 17 (c) and Article 20). However, the ICC is competent for a crime if it is already prosecuted before national authorities and may gain precedence over national criminal jurisdiction when the state is unwilling or unable to seriously prosecute or punish, or when the state has decided not to prosecute the person concerned because it is unwilling or unable to actually punish the person and when the case has such gravity to require action by the ICC.

Naturally, in this concept, the issue is raised of interpretation of when the state is unable, or unwilling[4] to prosecute the person charged with an international crime. In the former case, it will be a situation when due to problems in its own judicial system, the state is unable to keep the accused or order the competent authorities to keep them in custody, extradite them, gather evidence, or conduct criminal proceedings. On the other hand, there is "a lack of will" when state bodies launch proceedings in order to protect a person from criminal responsibility or when there is "justified delay"[5] or when the case is not prosecuted independently and impartially.

The question is raised whether the principle of complementarity is valid only for the States Parties to the Rome Statute or also for the states which are not parties to it. The answer to this question lies in Article 8, paragraph 1 of the Statute. In conclusion, if the accused find themselves in the territory of a state that is not party to the Rome Statute for a crime under the ICC's substantive jurisdiction, the state concerned shall have precedence over the ICC if it is willing and able to launch proceedings against such person on the basis of the *forum deprehensionis* principle or on the basis of the principle of universality (Wequi, 2006: 87-110).

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2005, paragraph 93.

4 ICC, *Prosecutor v. Katanga and Chui*, ICC01/04-01/07-T-67-ENG, 12 June 2009, 10.

5 ICC, *Prosecutor v. Katanga and Chui*, decision of the Appeals Chamber, the part related to the Bogoro incident.

## MODELS OF COOPERATION

Generally speaking, two possible models of cooperation between states and international courts have developed in practice. In the *Blaškić* case, the ICTY Appeals Chamber dubbed these two models "horizontal" and "vertical".[6]

Inter-state cooperation in criminal matters is characterised to be of "horizontal" nature. The horizontal relationship is based on the sovereign equality of states, resulting in the application of the rule *par in parem non habet imperium*.[7] The nature of the relationship is such that a state does not have jurisdiction over another sovereign state and thus cannot order another state to carry out certain actions (Bassiouni, 2008).

Such cooperation is based on international treaties and as such it is a result of international agreement. One of the common requirements in those treaties is the identity of the norm, or the requirement that the relevant criminal offence be provided for as such in both or all states parties. In addition, treaties often foresee certain exceptions (for a certain kind of criminal offences or for a certain type or amount of punishment). Evidence may be gathered only by the authorities of the requested State, while authorities of a foreign state usually may not come into direct contact with individuals who are subject to the sovereignty of the state they seek help from (Swart, 2002). In summary, the entire cooperation is based on the full respect for sovereignty and agreement, or autonomy of the will.

The other model, the so-called "vertical" or "super-state" is newer and according to some authors "more advanced" (Cassese, 2005: 419). This model stipulates that the international court has significant powers not only over an individual being prosecuted, who is subject to the sovereign authority of the state, but also over the state itself. According to this model, an international court has the power to issue a binding order to states and launch mechanisms for coercion in case of the failure to execute. On the other hand, states may not retain evidence due to the national interests they define themselves, nor reject an arrest warrant or some other order from the court. In short, the international court has power over the states, which differentiates it to a large extent from other international organisations (Cassese, 2005: 408-420).

Further judicial practice without exception focuses on the consolidation and broadening of an effective vertical model of cooperation. The duty of the states to cooperate is confirmed in a series of decisions[8]. At the same time, developing the judicial practice, judges have adjusted certain rules in order to maintain the vertical model of cooperation.

## TWO MODELS OF PROCEDURE IN INTERNATIONAL CRIMINAL LAW

International criminal procedure law encompasses not only a set of rules related to international criminal procedures, but also the rules that exist in national criminal procedure laws, which refer to certain situations with the element of foreignness. That is why, when we talk about models of procedure in international criminal law, we take into account the accusatorial or inquisitorial model or for the most part the variants emerging when they mix, including various forms of mixed procedure, in an attempt to reconcile the differences or make up for the lacks of each one of them individually. Therefore, the

6 Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, *Blaškić* (IT-95-14-T), TC II, 18 July 1997, *Blaškić* (IT-95-14-AR108bis), AC, 29 October 1997.

7 Latin for "Equals have no sovereignty over each other."

8 E.g. Order in *Blaškić* (IT-95-14-T), TC I, 21 July 1998 and *Delalić et al.* (IT-96-21-T) TC II, 16 October 1997.

models discussed here have to be perceived as a kind of "abstract intellectual construction," similar to the "ideal types" advocated by Max Weber, who used this term for categories such as feudalism, asceticism, mysticism, etc. (Weber, 1970).

According to anthropologists, the adversarial system occurred first as a replacement for blood revenge. In such a procedure, the injured party or any individual who has certain interest in a specific case presses charges against the violator for certain conduct. When the person is accused, an arbiter or judge is selected who will then hear both parties and consider evidence. In further stages of the procedure, the parties separately gathered evidence that corroborated their allegations.

The judge took part in the "competition" between the two parties. The main feature of this procedure in the initial stage of the development of this model was that trials were conducted in public places or in places where people gathered regularly. The injured party had the power to press charges. This system marked the period of Greek city-states and the era of the Roman Republic. What followed after these changes was the fact that a public prosecutor became a new party in the proceedings and a jury was introduced, a feature of the inquisitorial system.

The inquisitorial model was taken over from the Catholic Church during the Roman Empire. It flourished in the medieval times when rulers gradually started embracing the methods the Catholic Church used in its trials for questioning and prosecuting persons accused of heresy. In this system, investigation was secret and consisted of questioning the accused, the victims and the witnesses by an authorised person who drafted official minutes. The authorised officer gathered evidence and decided on the guilt of the accused. Over time, a rule was introduced that investigative judges, who initially only gathered evidence and presented them to the court, gave their opinion about the evidence gathered beforehand.[9]

## ELEMENTS OF THE ACCUSATORIAL MODEL OF PROCEDURE IN INTERNATIONAL CRIMINAL PROCEDURE LAW

A case before the ICTY is conducted along the lines of the accusatorial procedure. Hence, it is a legal dispute between two parties (the prosecutor and the accused), where the parties have the power to initiate proceedings, conduct an ongoing case, gather and present evidence. However, it has to be noted that this procedure is not a "pure" accusatorial procedure but rather has elements of the inquisitorial and mixed type procedure as well. In terms of gathering evidence, the prosecutor has the duty to collect evidence incriminating the suspect, and to submit to the defence exonerating evidence, if they find any.

The ICTY Statute in its Article 22 imposes an obligation on the Tribunal to protect victims of crimes and witnesses by special rules of procedure and evidence. The Statute therefore does not precisely define what the protection entails, but does establish that protection measures include conducting the procedure *in camera* and the protection of the victim's identity. In addition, the injured party may address the chamber, if allowed, give a brief presentation, attend hearings and cross examine witnesses. The injured party is not allowed to join an indictment as a private prosecutor, which is a feature of the accusatorial type procedure.

9 This system is characteristic of France, Germany, Spain, Latin America, China, Japan, etc. Today, this system is enriched with some elements taken from the adversarial model.

Also, one of the typical institutions of the Anglo-Saxon legal system, which originates from the *common law* system and is applied by the ICTY too, is *amicus curiae.*[10] This is actually an expert or an organisation that is not party to the dispute, who voluntarily offers the court information about a different legal or other view of the dispute. A report on the topic related to the case is a usual way of cooperation. Apart from natural persons and organisations, the state may also appear as *amicus curiae*. Engaging these actors is optional and depends on an assessment by the court chamber (Damaška: 2012: 3-14). The contribution of the "friend of the court" includes presenting an opinion (verbally or in a motion) about specific issues related to the manner of applying substantive or procedural law.

A procedure before the ICC is also considered mixed as it contains elements of both the accusatorial and inquisitorial procedure. The trial is designed as a "party competition" (Simović, Blagojević & Simović, 2013: 432). The parties have the power to gather and present evidence in all stages of the procedure and have a possibility to dispose of the subject of the dispute. There is no investigating judge who would conduct preliminary proceedings and create the case file. The investigation does not have judicial character and falls under the competence of the prosecutor, even though at this stage there is communication between the prosecutor and the chamber.

## ELEMENTS OF THE INQUISITORIAL MODEL OF PROCEDURE IN INTERNATIONAL CRIMINAL PROCEDURE LAW

Even though the procedure before the ICTY is basically closer to the accusatorial model, it contains a series of elements of the inquisitorial or mixed procedure. Among these elements, emphasis is on the division of the procedure into stages. Cumulation of the function of prosecution and investigation is in the hands of the prosecutor - Article 18 of the Statute. It is the right of the prosecutor to question suspects in the investigation (Article 18, paragraph 2 of the Statute) and to examine witnesses in the preliminary hearing (Rule 63). In addition, the trial chamber has an inquisitorial power to take part in the procedure of gathering (Rule 85B) and presenting evidence (Rule 98) upon their own initiative.

Before starting the main hearing before the ICTY and ICTR, the prosecutor gives the chamber a list with the most important information about the case (the so-called pre-trial summary). This is how the court controls the case better, allowing the judges to form a preliminary notion of what will be presented in the hearing, which is not typical of the accusatorial procedure.

The criminal procedure before the ICC is also divided into stages.

During the investigation, the prosecutor has to "establish the truth" so he or she has to investigate "in an equal manner" both the evidence at the expense of, and the evidence in favour *(in favorem)* of the accused, that is, the circumstances "excluding the guilt". The investigation is formally approved by the pre-trial chamber, meaning that it is subject to judicial control, even though it is the prosecutor who is in charge of conducting it. Nevertheless, this kind of control is not a typical inquisitorial element since it is not the "investigating judge" but the limited judicial control that guarantees that prosecution authorities will respect the law and is mainly limited to the control of decisions regarding the encroachment upon human rights (like detention or special investigative actions).

## METHODS OF GATHERING EVIDENCE

In the adversarial procedure, the parties autonomously, independently of each other, gather evidence to corroborate their own allegations before the court. The prosecutor has the duty to collect evidence incriminating the suspect or accused, as well as the evidence in favour of the suspect or accused, if he or she finds any. This system has been adopted by the ICTY Statute too, while the ICC Statute obliges the prosecutor to "establish the truth" and therefore gather evidence in favour of the accused.

In principle, every party is obliged to provide evidence to the other side before the main hearing. This means that the prosecutor must submit evidence to the defence before he or she starts presenting the case, while the defence may be obliged to present their evidence to the prosecutor after the presentation of the charges and before the presentation of the defence.

In the typical inquisitorial model, which we do not find in international criminal procedure law though, the prosecutor submits evidence to the investigating judge on the basis of which the latter concludes whether there are grounds to suspect that the suspect has committed the crime, after which he or she gathers evidence for both parties, after assessing there is sufficient evidence, he or she forwards to the court and parties the full record *(dossier de la cause)*.

When it comes to the procedure before the ICTY, the investigation includes different actions of evidence gathering by the prosecutor. In urgent cases, the prosecutor may request any state to apply temporary measures (provisional detention of the suspect; confiscation of material evidence or taking measures to provide evidence and prevent the escape of the suspect, etc. - Rule 40). In line with Article 21 of the Statute, the requested State must execute it immediately, in line with Article 29 of the Statute.

Before the ICC too, the parties have the power to present evidence, where the trial chamber may order that a piece of evidence be obtained because they are authorised to request the submission of all evidence they consider necessary for establishing the truth. In the procedure conducted before the ICC, the prosecutor shall take "appropriate measures" (Article 54, paragraph 3 of the Rome Statute) in order to provide relevant evidence for the criminal procedure.

The prosecutor and the defence have the duty to disclose evidence[11], and the prosecutor also has the duty to submit the material that is exonerating, extenuating or having any impact on the credibility of the prosecution's evidence, before the trial begins, as well as a list of witnesses and copies of witness statements. On the other hand, the defence must submit information if they want to base their defence on an alibi, but that does not prevent them from using such evidence even if they do not submit information beforehand.

Both parties are entitled to examining the material before the confirmation hearing as well as during the main hearing. Exceptions to the rules of disclosure are related to confidential information or information whose disclosure would pose a risk for the witnesses, the injured parties and their families.

## RULES OF ACCEPTING AND EVALUATING EVIDENCE

Evidence which may be accepted in a procedure before the ICTY includes the confession of the accused to the prosecutor, testimony in the form of a written statement, questioning a witness, expert witnesses, and various items of material evidence (Neuner, 2002).

If the accused confess to the crime they are charged with during the investigation, it is presumed that such confession is made without duress and voluntarily if the requirements under Rule 63 have been fulfilled. It is a rebuttable presumption so it is possible to prove otherwise.

Testimony in the form of a written statement, without a verbal statement of the witness, is generally not allowed in the Anglo-Saxon law (although there are certain exceptions). Such a statement may be used as evidence before the ICTY, according to Rule 92 *bis*. An obstacle to the application of this rule may be the fact that the accused denies such evidence. If that is not the case and if the witness is not required to be there in person, the court may accept, partially or wholly, the testimony in the form of a written statement or transcript.

The chamber may also accept the evidence which has certain probative value - even though they are not clearly related to the criminal case. Such evidence may be a certain concept of behaviour of a certain person, their affinities, habits, previous behaviour, experience, etc. In terms of generally known facts, the chamber will not request that they be proved, but will formally take cognizance of them.

Similar to the Anglo-Saxon law, a wide range of persons are considered witnesses in a procedure before the ICTY. In addition, the accused themselves may be heard as witnesses in favour of their defence (witness in his/her own case).

The manner of questioning the witness corresponds with the classic model of cross-examination in common law. The rules of procedure and evidence also allow the acceptance of the testimony in the form of a written statement or transcript of the persons who are not available, as well as of the persons that pressure was exerted on.[12]

The ICTY also has special evidentiary rules in cases of sexual assault. The first rule refers to the inability to seek additional corroboration of the victim's testimony.[13] The second rule refers to the exclusion of a certain course of defence of the accused, where they cannot defend themselves by claiming that the victim gave consent to sexual intercourse, if there are certain circumstances formulated in the rule.[14] The third rule allows the accused to invoke the victim's concession, if they persuade the Trial Chamber *in camera* that the evidence they have is relevant and credible.[15] Finally, the fourth rule refers to the prohibition of evidence about the prior sexual conduct of the victim.[16] Here, the victim may neither tacitly nor explicitly renounce the rights from the last rule.[17]

The most important rules of presenting evidence before the ICTY refer to the general regime of evidence (Rule 89), testimony of witnesses (Rule 90), transfer of a detained witness (Rule 90 *bis*), evidentiary value of the accused's confession in the investigation (Rule 92), rule of inadmissibility of using evidence obtained unlawfully (Rule 95), and evidence originating from lawyer-client privilege (Rule 97).

The validity of an independent assessment is sufficiently clearly stated in combination with the principle of fair trial, stipulating that the chamber may admit any relevant evidence which it deems to have probative value [Rule 89 (C)] and exclude the presentation of certain evidence, if the need to ensure a fair trial is significantly higher than the probative value of such evidence. The possibility to change the

12 Rule 92 *quarter* and Rule 92 *quinquies*.
13 Rule 96 (i).
14 Rule 96 (ii).
15 Rule 96 (iii).
16 Rule 96 (iv).
17 ICTY, *Prosecutor v. Delalić et al.*, Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997.

formal assessment of evidence exists to a certain extent on the basis of the rule under which a chamber may request verification of the authenticity of evidence obtained out of court [Rule 89 (E)]. Apart from that, a chamber may receive the evidence of a witness orally, or where the interests of justice allow, in written form [Rule 89 (F)].

## CONCLUSION

The international normative framework of cooperation between states in criminal matters includes a set of mechanisms for a successful fight against crime which often crosses the boundaries of sovereign authority of a state. Formation of international criminal tribunals is a consensus of the international community in convicting the most serious crimes. In order to achieve this goal, it is crucial for the states to cooperate with each other, as well as with such courts.

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