THE COOPERATION WITH THE ICC – THE ONLY POSSIBLE WAY TO JUSTICE?[1]

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The International Criminal Court

The need to punish the perpetrators of the crimes is not a new one. The fight against impunity has been lying in the foundations of the international criminal law for several centuries. There are even some mentions of the 13th century and one of the first international prosecutions when a person was sentenced to death for treason by a king. But, as Babaian pointed out, the precedent was in year 1474 in the Breisach trial. A governor was convicted for committing crimes such as confiscation of private property, murder, rape, and pillage. This trial took place in front of an *ad hoc* tribunal which we may declare as the first international one, because it consisted of Germanic and Swiss judges. Later, in the World War I aftermath, there was the *ad hoc* "Allied High Tribunal". But it was only an attempt, since the Netherlands did not extradite the former German Kaiser Wilhelm II, nor did Germany extradite any of the accused (Babaian, 2018: 7-9). The doctrine and the international community above all have a different perspective on the international criminal law ever since the International Military Tribunals at Nuremberg in 1945 and Tokyo in 1946. The joined Allied forces decided to form tribunals that were supposed to convict those guilty of crimes in the Second World War. The Charter of the Nuremberg Tribunal did not contain any provision regarding cooperation of the states and the tribunal, but it was not really necessary, since the Tribunal had a police force and most of the accused were on the Allies' territories, so it was easier to arrest them. When it comes to the Tokyo Tribunal, Japan had already surrendered and made it easier for the Allies to go there and arrest the accused (Mutyaba, 2012: 938-939). Of course, only several states were involved in the creation of these tribunals, which were the Allied powers, so we cannot say that this was a universal project. Nevertheless, it had a huge impact on the development of the international criminal law. The importance of these tribunals is mentioned even nowadays.

After the Second World War, the Cold War followed. When it ended, two *ad hoc* tribunals were formed – The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal of Rwanda, based on the Chapter VII of the United Nations Charter. These tribunals had a provision regarding the mandatory cooperation, so the States had to cooperate and comply with requests of the tribunals. Their jurisdictions were territorially and temporarily limited to certain time and place. That is why, similarly, we cannot address them as the universal project, but at the time that they were founded, they were supposed to play a big role in peacekeeping and in fight against impunity.

These tribunals had primary jurisdiction, as opposed to the ICC that is based on complementarity jurisdiction. This practically means that the state where the crime occurred is obliged to either prosecute the criminal or to surrender him to the ICC. This complementarity would also require that both States and the ICC function and that if the state jurisdiction fails to punish the perpetrator, the ICC would

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have to intervene (Sarkin, 2020: 29-30). Furthermore, this is the exact reason why the cooperation is so desirable and necessary for the ICC functioning.

When it comes to further development of the international criminal jurisdiction, the creation of the International Criminal Court was supposed to be the final step. In the summer of 1998, the General Assembly of the United Nations gathered States at the Rome Conference. Around 160 states were involved in negotiations. So, on July 17, 1998, the Rome Statute was adopted by 120 states. After that, the Preparatory Commission wrote the Rules of Procedure and Evidence and the Elements of Crimes (Kirsch, 2007: 541). It is interesting to mention that Trinidad and Tobago proposed the establishment of the ICC. Firstly, the African states were interested in establishing the court, but the relationship later on changed, which we will discuss in the later part of this paper.

The International Criminal Court does not have the universal jurisdiction. The ICCs' efficiency depends on the states. The reason why the cooperation is so important for the ICC to function is that there is no enforcement power and whole procedure actually depends on the States and their willingness to cooperate with the ICC. The ICC will not have any power if the states decide not to help.

Speaking of the cooperation with the ICC, there are many reasons why the States decide whether or not they should cooperate. The States might be in the fear of sanctions if they do decide not to cooperate. Furthermore, every State makes decision in the international community based on the national interests. The States are often concerned about what their reputation is and how domestic courts will react. There is another factor that is often mentioned in the doctrine. It is the reputational cost of non-compliance. This is related to the reputation that the ICC has in the international community, i.e. the more efficient and legitimate the ICC seems, the bigger reputational cost the States that do not comply will have (Jones, 2016: 194).

The Rome Statute

We could not discuss this topic without pointing out the most relevant articles of the Rome Statute. The Rome Statute is the founding instrument of the International Criminal Court. It is the result of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 that we mentioned, and it entered into force on 1 July, 2002. At the very beginning of the Statute, in the Preamble, it is said that all people are "united by the common bonds, their cultures pieced together in a shared heritage and concerned that this delicate mosaic may be shattered at any time" (Rome Statute of the International Criminal Court – Rome Statute, 1998, Preamble). As we can see, the very first sentence of this important document brings to our attention the importance of all peoples' unity and shared concerns. It is very important to mention that the Rome Statute and the ICC lie on three main principles. Those are - the principle of complementarity, the principle to deal only with the most serious crimes of international concern and the principle of legality.

The entire Part 9 of the Rome Statute is devoted to the international cooperation and judicial assistance. It is very interesting to mention that the negotiations about these provisions of the Rome Statute were very hard. This Part is believed to be the result of the compromise. Moreover, there were several different terms than those that are usually in this kind of legal documents. For example, the term "mutual assistance" was changed to "other forms of cooperation". Likewise, "extradition" is turned into "surrender". It is also engaging to notice how the Article 86 is a great achievement if we compare it to the original draft. From "best efforts" to cooperate, they came to the text that says that State parties "shall cooperate fully" (Babaian, 2018: 92-93).

Let us now take a closer look at those articles. Firstly, the State Parties are invited to cooperate fully with the ICC when it comes to investigation and overall prosecution of the crimes. Article 87 discusses the requests for cooperation which are to be transmitted through the diplomatic channels. Furthermore, the Court may seek the protection of the information and the victims and witnesses together with their families. When it comes to the states that are not parties to the Rome Statute, the request might be made based upon some *ad hoc* agreements. If a State Party did not fulfil the request for cooperation, the Court can refer that matter to the Assembly of States Parties or to the Security Council, if it referred the matter in the first place (Rome Statute, 1998, Article 87). Thus, this article is the general provision and gives the ICC the authority and it relates to the entire Part 9. This final part of the Article 97, the paragraph 7, is perhaps the most important one since it discusses what will happen if there is no compliance. From this Article, we find out that the only response that the ICC can give when it comes to non-cooperation is a judicial finding of non-cooperation and diplomatic pressure through the Assembly of State Parties (Jones, 2016: 188). Here might lie one of the answers to our question of how the cooperation might be improved. We suggest that this Article changes or amends by adding some additional paragraphs. Most importantly, we highlight the absolute need for sanctioning non-cooperative states. It will certainly be more efficient than just pure diplomatic pressure and judicial finding of non-cooperation that are important as well. Only the joined forces of these threats and sanctions can improve the cooperation of the states with the ICC.

When it comes to aspects of procedure in which a State might cooperate with the ICC, it is mostly the surrender of persons to the court. This aspect of cooperation is extremely important because the trials *in absentia* are not allowed in the ICC. The State Parties shall comply with both these provisions and their national law regarding criminal procedure. The Rome Statute specifies what the request for surrender should look like and what facts should it contain, such as a description of the transported person, a brief statement of the facts of the case and their legal characterization and the warrant for arrest and surrender (Rome Statute, 1998, Article 89). It is possible that there are competing requests, which would mean that at the same time when the ICC issued its request, the same did another state for the extradition of the same person. If that occurs, the State Party which received the request is obliged to notify both the ICC and the requesting state. The ICC would have priority if the ICC decided that the case is admissible based on the investigation or prosecution conducted by the requesting State. If the requesting State is not a State party, then the ICC will have priority, if the requested State is not under the obligation to extradite the person to the requesting State (Rome Statute, 1998, Article 90). The Rome Statute also informs us what the request for arrest and surrender are supposed to look like: in writing, containing the information describing the person and its probable location, a copy of the warrant of arrest and any necessary documents (Rome Statute, 1998, Article 91). Article 92 deals with the provisional arrest in urgent cases (Rome Statute, 1998, Article 92).

Article 93 discusses other forms of cooperation. State Parties shall cooperate with the ICC when it comes to the identification and whereabouts of persons, any kind of production of evidence and documents that might be helpful. State Parties shall also provide the examination of sites and provide the protection of witnesses and every sort of evidence. If any of these requests for assistance is denied, the requested State Party should inform the ICC which were the reasons for this denial (Rome Statute, 1998, Article 93). One more aspect of the cooperation is in a form of the consultations. Namely, if the State Party has received a request that may be problematic when it comes to its execution, that State shall consult with the ICC to find a solution. It is usually the situation when there is insufficient information to execute the request if the person cannot be located or if the requested State would have to breach its already existing obligation in respect to another State (Rome Statute, 1998, Article 97).

The cooperation that the Rome Statute provides is a compromise between the horizontal and the vertical cooperation models. The horizontal one is between the states, and it relates to their sovereignty. This kind of approach we can see in the ICTY and the ICTR. Correspondingly, this kind of cooperation aims at the traditional law of the extradition. The vertical cooperation is the cooperation between the states and the ICC and authors describe it as a *sui generis* system. The vertical approach is about the international community and its interest. This cooperation system is weaker than the first one, since the *ad hoc* tribunals were products of the Security Council and their decisions have the binding effect (Smith-van Lin, 2016: 122-123; Kaul & Kreß, 1999: 158). There are authors that believe that this horizontal approach is not useful when it comes to prosecution of the international crimes. It just might seem that it is not in the nature of these crimes. On the other hand, the vertical approach had its critics. It is said that it just is not realistic, because the States need to have the will to cooperate (Kaul & Kreß, 1999: 159).

This differentiation caused certain debate in the opening of the Rome Conference in 1998. The vertical approach had more support. The States that actively supported it were Argentina, Australia, Austria, Belgium, Denmark, Finland, Germany, Italy, Malawi, the Netherlands, New Zealand, Norway, Portugal, Sweden, Switzerland, the United Kingdom, and Canada. The horizontal approach was supported by a number of Arab States, China, India, Israel, Japan, Mexico and the United States (Kaul & Kreß, 1999: 161). As we could see, the Rome Statute adopted the hybrid model, a sort of mixture of the horizontal and vertical approach, since there is "a general obligation of States to comply with the Court's request for assistance" (Mutyaba, 2012: 944).

Nevertheless, this cooperation model is not so easily adopted. In the literature we came across some authors that believed that by supporting the ICC, the States lose their sovereignty. There were even some that were discouraging the States of cooperating with the ICC (Ba, 2020: 91). The state sovereignty is one of the fundamental principles of public international law and even the United Nations Charter points that out (Author, 2022: 213). Our opinion is quite opposite – in order to achieve a higher goal, which is in this case punishing the perpetrators and put a stop on the impunity for the international crimes, the States should be ready to share a part of their power and abilities.

The Case Law

In this part of the paper, we discuss the case law in the ICC, more specifically two famous cases that showed the lack of cooperation between the States and the ICC. These cases highlight the importance of the cooperation of the States in order to achieve interests of the international community – punishing the criminals.

One of the most familiar cases in the ICC practice is the case of Omar Al-Bashir, the former president of Sudan. The situation in Darfur was referred to the ICC by the United Nations Security Council in January 2005. The International Commission of Inquiry in Darfur stated that there were serious violations of human rights and other serious international crimes and that the Government forces and militias were involved. Based on this, the ICC issued two warrants against a sitting Head of State Sudan. The first one was charging him with the crimes against humanity and the war crimes and second one with the genocide The States were supposed to cooperate with the ICC in order to bring Al-Bashir to justice. But the opposite happened. He travelled and visited many countries that refused to arrest and surrender him. This was the first case that the Prosecutor began to investigate and did not have any support of the territorial state, in this case, Sudan. There were many states that did not cooperate, such as Chad, Kenya, Djibouti, Malawi and the DRC. Each time the ICC referred this to the Security Council, but the Security Council never imposed any sanctions on these states (Jones, 2016: 189-190). This

was the practical example of what we mentioned earlier: lack of cooperation, but also lack of sanctions. The outcome of the case might have been different if more attention was brought.

Speaking with the cooperation of the State Parties with the ICC, we must also mention the case of Kenyatta. It is famous because Kenya denied any form of cooperation with the ICC, which led to dismissal of the case. Moreover, this case was famous because it was the first time that the Prosecutor initiated an investigation in a State Party on the approval of the judges (Mutyaba, 2012: 960).

Uhuru Muigai Kenyatta was at the time of summons, in 2011, Deputy Prime Minister and Minister of Finance. He was charged with five counts of crimes against humanity allegedly committed during the 2007-2008 post-election violence in Kenya. Kenyatta was the president of Kenya from 2013 until 2022 and Minister of Finance since 2009 up to 2012. After the presidential elections in Kenya in 2007 and 2008, there were riots on the streets which led to the death of 1200 people and over 300 000 people who were internally replaced. Kenya signed the Rome Statute in 1999 and ratified it in 2005. The ICC prosecutor, Ms Fatou Bensouda, decided to start the investigation *proprio motu*. Based on the Memorandum that Kenya signed 2010, Mr Kenyatta and Mr Ruto, who was also charged, showed up in front of the ICC in the Hague voluntarily in 2011. At that time, Kenyatta was the president of Kenya. In the following year the Pre-Trial Chamber confirmed the charges. But the problems occurred. The ICC had difficulties finding evidence. That was the reason why the charges were withdrawn in 2014. Furthermore, the Chamber had indicated that the principle *ne bis in idem* did not apply here and that it might be possible for the Prosecution to bring new charges later (International Criminal Court, Trial Chamber, ICC-07/09-02/11, 13 March 2015, paras. 1-10).

Kenya was the first State Party in which the Prosecutor acted *proprio motu* and was authorized to open an investigation. This case was the perfect example of non-cooperation. The Kenyan government decided not to cooperate with the ICC which resulted in ending the case.

There are several similarities between the Kenyatta case and the Al-Bashir case. Both of them were sitting Head of State at the time they were charged with serious international crimes and both cases were in favour of the hypothesis that the ICC is a Western court that only judges the African leaders. The main difference is that Sudan is not a State Party of the ICC, and Kenya is.

In both cases the non-cooperation of the States brought many problems to the ICC. A lot of time was spent, as well as a lot of money. The potential perpetrators of international crimes were left unpunished for their deeds because the States did not want to cooperate and contribute to bringing them to justice. It affected the efficiency of the ICC.

These cases perfectly describe one of the most mentioned critics regarding the ICC. It is true that most cases involve African states. In that sense, the ICC is criticized to be racist, neo-colonial and biased towards Africa (Babaian, 2018: 140). This was one of the reasons why there was an African Union conference in 2009 when the heads of African states decided not to cooperate with the ICC. This resolution was response to one specific event. Namely, on 4 March, 2009, the Pre-Trial Chamber issued an arrest warrant against Omar Al-Bashir, the case that we previously mentioned. The African Union held a summit in July 2009 and adopted the Resolution Assembly/AU/Dec.245 (XIII) in Libya stating that they were not going to cooperate in arresting and surrendering Al-Bashir (Nyawo, 2017: 204). Furthermore, in 2014 the Malabo Protocol was adopted. It was the protocol regarding the African Court of Justice and Human Rights that gave immunity to heads of states and other officials from prosecution while they were in office (Sarkin, 2020: 31). This is the way that African states tried to protect their States and officials through the African Union and show their discontent with the way they think they are being treated in the international community.

On the other hand, we cannot but mention the successes that the International Criminal Court achieved. There are 123 ratifications of the Rome Statute, which leads us to believe that countries are decided to put an end to the human right violations. This means that those states also had to rise their standards in the criminal procedure and make perhaps significant changes in their legislature. Of course, it is possible that there was not enough time for States and the ICC to completely raise their standards and that the fight against impunity is still at its beginning. Nevertheless, the ICC is showing some effort in improving cooperation which we will discuss in the next chapter.

The Efforts of the International Criminal Court

One of the biggest problems that the ICC is facing is the cooperation and it disables the ICC from performing its duties. Sarkin says that one of the biggest issues is the effecting of the arrest warrants, which was the example with the Al-Bashir. Not only that, but as we have already mentioned, the African Union and African states decided not to cooperate and called ICC "an impotent European white elephant" (Sarkin, 2020: 30. 34).

It was long ago realized that the cooperation aspect of the ICC is of extreme importance. Therefore, some steps were taken. For example, the Assembly of State Parties adopted number of resolutions dealing with this issue. In 2007 the Resolution ICC-ASP/6/Res.2 was adopted on the topic of the "Strengthening the International Criminal Court and the Assembly of States Parties". The ICC thanked the Secretary-General and the United Nations for their efforts and help in improving cooperation. It also welcomed the implementation of the "Cooperation Agreement between the ICC and the European Union". It encouraged the State Parties to implement in their national legislation the international crimes mentioned in the Rome Statute and emphasized the necessity of State Parties to cooperate "in preserving and providing evidence, sharing information, securing the arrest and surrender to the ICC of persons for whom arrest warrants have been issued and protecting victims and witnesses" (Resolution ICC-ASP/6/Res.2, 2007: 5). This Resolution also included an annex dedicated to the recommendations on cooperation.

Moreover, in 2010 the Assembly of State Parties established a Study Group on Governance in order to achieve the structured dialogue between the State Parties and the ICC and to strengthen the framework and efficiency of the ICC. This Study Group provided a report that recognized some issues and proposed some steps how to deal with them (Jones, 2016: 200).

The State Parties of the Rome Statute have signed cooperation agreements with the ICC. These agreements are believed to be essential for successful cooperation and they address the whole spectre of activities, such as the protection of victims and witnesses, enforcement of sentences, interim release, and release of persons. This is the way that State Parties still use their powers in making decision and form certain rules and procedures in order to fulfil their obligations toward the ICC. Moreover, in this way States share their experiences, case studies, knowledge and show their commitment to help the ICC (International Criminal Court, Cooperation agreements: 5).

Relationship with the Security Council

The United Nations are the most important international organization. The Charter of the United Nations proclaimed the Security Council to be the most important organ due to its functions and powers. The main task of the Security Council is to maintain international peace and security that was achieved after the Second World War (Author, 2021: 164).

The ICC cooperates with the United Nations based on the Relationship Agreement signed in 2004. This Relationship Agreement proposed that the United Nations should give logistical and administrative support to the ICC, but also substantive by providing information and materials. The staff and experts that work for the United Nations will also be available for the ICC, but in order for them to testify, the Secretary-General of the United Nations had to waive their immunity, which often happened in the past (Cummings-John, 2013: 224-225).

In the context of the ICC, the Security Council has the right to refer certain case to the Prosecutor. But Security Council should also have the right to intervene and make cooperation with the ICC more efficient. It is noticeable that the states that are not supporting the ICC, usually abstain when the Security Council is discussing matters that are in the ICC's jurisdiction. Correspondingly, the ICC is referring to the Security Council cases of non-cooperation by states. Unfortunately, the Security Council did not make any significant steps in that matter. The Security Council ought to be more supportive and responsive when these issues arise (Sarkin, 2020: 53, 55).

We mentioned the Darfur situation in Sudan. It was also the moment when the ICC prosecutor Bensouda criticized the United Nations Security Council because it did not support the ICC enough. Later on, Ba commented that the relationship between these two institutions was not good enough, or as he citied, it was "one defined by friction" (Ba, 2020: 93).

Findings

This paper finds that the key component to the effective Rome Statute legal systems is the cooperation between states and ICC, for example with the cooperation agreements that are being signed. Those agreements usually deal with the enforcement of sentences, witness relocation and other forms of judicial assistance. Other important aspect is the diplomatic and public support that is expected from the State parties. It is also important to address the relationship between the ICC and the United Nations.

Conclusion

It has been more than 20 years since the Rome Statute entered into force. So far, the efficiency of the International Criminal Court is very questionable. There are only a few judgments. The ICC is very slow in reaching its decisions.

Based on the previous chapters, we cannot evaluate the cooperation of the States and the ICC as a successful undertaking so far. Even though there are many critics, it would be wrong if the ICC bluntly did everything to make those critics go away. For example, the mentioned critic of only prosecuting the Africans should not be erased by just charging any individual from any other state. In order for the ICC to get and maintain its figure as the world criminal court, it ought to investigate and punish for the most serious crimes in the entire international community. It is necessary to have more non-African trials in the future, which ICC tried to achieve by bringing the charges against Vladimir Putin, the president of the Russian Federation in 2022. The withdrawal of States from the Rome Statute is making this harder. The States should support and encourage the ICC and finally help it, not abandon it.

Of course, this cooperation part depends on the political will of the States, as we can see in the cases described earlier. In order to make them help the ICC, some newer approaches should be tried. Those approaches should be using the channels of diplomacy and persuasion, but also imposing sanctions.

By diplomatic channels, the ICC should try to have more states ratifying the Rome Statute and become more universal in that sense. The Assembly of State Parties should use its powers and address the states that do not cooperate. It is also advisable that there are more conferences, round tables, workshops. The international community and its key subjects ought to be more educated and more aware of the ICC and how important it is to communicate and cooperate. The ICC should invest more time and money in organizing these events and educational seminars. Furthermore, the conferences would be an excellent opportunity for states to share their experiences and for the ICC to hear them and try to improve. The sanctions are also a great way to improve the situation. By threating with sanctions, above all the financial ones, the state might be more inspired to fulfil the cooperation agreements and obligations they have based on the Rome Statute. The Rome Statute should have an annex dedicated specifically to this topic that will declare how the states will be sanctioned together with the Security Council. In this way, the Security Council could show the political support that is much needed.

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