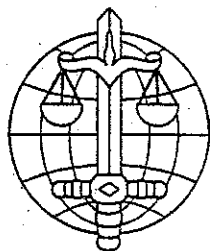


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THE INTERNATIONAL CRIMINAL COURT AND THE TRADITIONAL
PRINCIPLES OF INTERNATIONAL COOPERATION IN CRIMINAL
MATTERS*

by
Kai Ambos**

1. INTRODUCTORY REMARKS

Speaking about the ICC and traditional principles of international criminal law appears somewhat contradictory since, at first sight, the newly-founded ICC has nothing to do with these traditional principles. In fact, I believe that the very idea of a permanent International Criminal Court as understood by the like-minded states and the Global Coalition of NGO's (consisting of more than 800 NGOs), i.e. as an efficient judicial instrument for fighting world-wide impunity in cases of serious violations of human rights, as a mechanism to criminalise such human rights violations, is *per definitionem* incompatible with principles of international criminal law in the traditional sense, as these principles, i.e. in particular reciprocity, double criminality, *ne bis in idem*, speciality, non-extradition for certain (political) offences, non-extradition of nationals, are based on the concept of the almost absolute sovereignty of states, a principle which has always constituted a major obstacle to international cooperation in criminal matters and which also runs counter to the very idea of an ICC with universal jurisdiction. It is due to this difference that the traditional inter-national cooperation in criminal matters can be characterised as "horizontal" while the cooperation between an ICC and states is, at least from a structural point of view, "vertical".¹

A closer analysis, however, quickly reveals that this image of an almost exclusive antagonism between international cooperation in a traditional sense and a supranational criminal justice would only be correct in an extreme situation, i.e. if, on the one hand, we were dealing with a strongly sovereignty-orientated law of international cooperation and,

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¹ Cf. Triffterer, "Der ständige internationale Strafgerichtshof", in Gössel & Triffterer, eds., *Gedächtnisschrift für Heinz Zipf* (1999) p. 493 et seq., at pp. 547-48.

on the other hand, with an efficient, universally competent ICC. As will be seen below, this does not reflect the reality created by the Rome Statute. Rather, the Statute confirms the impression that both areas of law have approached each other in recent decades: whereas, particularly in the European context, the law of international cooperation tends to abolish, or at least reduce, the traditional requirements and obstacles of cooperation,² the Rome Statute contains many concessions to state sovereignty. Prof. Plachta has correctly characterised the cooperation regime of the Rome Statute by a triple C: 'Cooperation, coordination and consultation'.³

Let us now take a closer look at the principles established by the Rome Statute in relation to the traditional principles of international cooperation in criminal matters.

Two major concessions as an expression of traditional principles *latu sensu*

2. THE LIMITED FORMAL JURISDICTION OF THE ICC: A FIRST CONSEQUENCE OF A STATE SOVEREIGNTY ORIENTATED APPROACH

The two main positions on the – highly controversial – *formal* jurisdiction of the Court stood at opposite extremes. *States favourable to the Court*, the so called like minded group, in particular Germany, argued on the basis of the principle of universality, that – first – a State is bound by the automatic jurisdiction of the Court as soon as the State becomes a Party to the treaty, and – second – the Court must have universal jurisdiction. On the other extreme, *States sceptical towards the ICC*, in particular the United States, argued that one has to make a distinction between crimes of genocide on the one hand, and crimes against humanity and war crimes on the other. Automatic jurisdiction might be appropriate in the case of *genocide*, but for the other categories specific "jurisdictional links" would be necessary to justify the ICC's jurisdiction.

During discussions on the different proposals in the Conference's Committee of the Whole (COW), the clear majority of States supported automatic jurisdiction and the so called South-Korea proposal.⁴ According to this proposal which – as a compromise – was closest to the German proposal of universal jurisdiction, the Court would have jurisdiction if the State in which the crime took place (hereinafter "territorial State"), the State of nationality of the perpetrator (better: suspect) or of the victim, or the custodial State is

² For the differentiation between requirements and obstacles of cooperation see Schomburg & Lagodny, *Internationale Rechtshilfe in Strafsachen* (1998) at p. 14 et seq.

³ Speech given at the Conference mentioned *supra*.

⁴ According to the "Monitor", the Conference paper, No 2, 10 July 1998, 79% of the States was in favour of the Korean proposal.

either a State Party or has accepted the jurisdiction of the Court on an *ad hoc* basis. However, the solution which was proposed and, finally, adopted on the last day of the conference provides for a three-level model for jurisdiction (Art. 12) limiting it even further:

At the *first* level, a State automatically accepts jurisdiction when it becomes a party to the treaty (Art. 12, para. 1); however, a State Party can opt out of jurisdiction with respect to *war crimes* for a seven-year period after the Statute has come into force.⁵ Such declaration can be withdrawn at any time (Art. 124).⁶

At the *second* level, the territorial State or the suspect's State are recognised as *alternative* jurisdictional links. The Court's jurisdiction is, therefore, established if either the territorial State or the suspect's State is a State Party (i.e. no special declaration of acceptance is necessary) or has accepted the Court's jurisdiction with respect to a particular case (Art. 12, para. 2).

At the *third* level, a State not party to the treaty but territorial or suspect's State can accept the jurisdiction of the Court on an *ad hoc* basis (Art. 12, para. 3).

Thus, compared with the original demands of the NGO-coalition and the so-called like-minded states, particularly Germany, the ICC's formal jurisdiction suffered considerable restrictions. It is neither universal nor direct, it does not automatically cover all state parties with regard to the crimes within its jurisdiction (genocide, crimes against humanity, war crimes and aggression, subject to a precise definition of the latter). Hans Peter Kaul, the deputy head of the German delegation, has explained in detail how the Korea proposal has been "negotiated away".⁷ He states:

"It is a fact that the Court Statute could have turned out even better, particularly with regard to the compulsory jurisdiction of the Court. Already in Rome and often since then, it has been deeply regretted that the South Korean proposal for an effective jurisdiction, supported by so many, was more or less "negotiated away" at the last minute. It would indeed have considerably improved the effectiveness and scope of the Court, in particular with regard to

⁵ This provision was crucial for France's acceptance of the Statute. In contrast, the opting-in mechanism does not presuppose a State's submission to the jurisdiction of the Court: the State must expressly declare its submission.

⁶ This provision, and the 7-year period in particular, should be reviewed by the Review conference.

⁷ H.-P. Kaul, "Special note: the struggle for the ICC's jurisdiction", 6 *Eur.J.Crime Cr.L. Cr.J.* (1998) p. 364 et seq., at pp. 371-3.

internal armed conflicts taking place in non-States Parties. In civil wars, the most common form of conflict today, the present compromise provision does not allow for any jurisdiction unless the State in question is a Party to the Statute. If, in line with the Korean proposal, it had also applied to the custodial States, this critical loophole could have been avoided. Such a provision would have meant that war crimes, crimes against humanity or even genocide committed during a civil war could have been prosecuted if suspects had been arrested in States Parties."⁸

It is important to note, though, that the prerequisites to the exercise of jurisdiction - practically consent of the territorial or suspect State - only apply where a case is referred to the Court by a State Party or by the Prosecutor *proprio motu* (Art. 13, para. (a) and (c)). In the case of a transfer by the UN Security Council under chapter VII of the UN Charter, the jurisdiction of the Court is established immediately, without any further prerequisite (Art. 13, para. (b)).

As mentioned above, proceedings before the Court can be initiated by the UN Security Council, a State Party or by the Prosecutor's independent investigations (Art. 13, so-called *trigger mechanisms*).

The *Security Council* can refer to the Court peace-threatening situations (which fall within Chapter VII of the UN Charter), in which crimes contained in the Statute were committed (Art. 13, para. (b)). Since this jurisdiction follows directly from the UN Charter, no further prerequisites for jurisdiction or admissibility apply, apart from complementarity (Art. 17, see below). By virtue of Chapter VII, the Security Council also has the power to request the Court not to begin investigatory proceedings or to interrupt them for an (albeit extendable) period of up to 12 months (Art. 16). This possibility constitutes a considerable limitation to the independence of the Court, but it may be diminished somewhat in its practical implications by the fact that it requires a majority decision of the Security Council - and unanimity of its permanent members (Art. 27 III UN Charter).

A *State Party* can always request the Prosecutor to investigate a particular matter. This request must be accompanied by sufficient evidence (Art. 13 (a) in conjunction with 14). In this case, the general prerequisites for jurisdiction and admissibility apply (Art. 11, 12, 17-19).

On the basis of information from any reliable source, including Inter-Governmental Organisations and Non-Governmental Organisations, the *Prosecutor* can initiate investigations *ex officio* (Art. 13 para. (c), in conjunction with 15). If he or she is of the opinion that a reasonable basis for an investigation exists, he or she must apply to the Pre-Trial Chamber for permission to proceed with the investigation. In this respect, victims

⁸ *Ibid.*, at p. 373.

may also make their submissions. Only if the Pre-Trial Chamber is satisfied that there is sufficient basis for an investigation can the Prosecutor actually commence the proper investigations. This judicial decision does not affect later decisions on jurisdiction and admissibility. If, according to the Pre-Trial Chamber, a sufficient basis is lacking, the Prosecutor may only present another request on the basis of other facts or fresh evidence. If, before applying to the Pre-Trial Chamber, the Prosecutor realises that the information is insufficient, he or she must inform the parties concerned. This, too, does not preclude further investigations on the basis of fresh facts or evidence. On the basis of this (Argentinean/German) proposal, the position of like minded States in favour of an independent Prosecutor - who investigates *ex officio* - prevailed. Thus a political control over the Prosecutor, as was advocated by the United States, for instance, was avoided. Nevertheless one must recognise, from a comparative law point of view, that the Prosecutor is thus subjected to a very early pre-trial control - earlier than is usual in national procedures.⁹

3. COMPLEMENTARITY: A SECOND CONSEQUENCE OF A STATE SOVEREIGNTY ORIENTATED APPROACH

Article 17 defines the central principle of complementarity contained already in the Preamble and in Article 1 of the Statute: the Court can only act if the national jurisdiction is unwilling or unable to prosecute a crime falling within the jurisdiction of the ICC. Proceedings before the ICC are, in principle, inadmissible if national proceedings take place or the acts involved are insufficiently severe to justify an intervention of the Court. The difficulty is to determine when it can be assumed that the national jurisdiction is unwilling or unable. A *lack of will* to prosecute should be assumed if a particular State only sets up a show trial in order to protect the person involved from prosecution, if a delay in proceedings occurs which indicates a lack of will to prosecute, or if the proceedings are not carried out independently and in unbiased fashion. The national jurisdiction is considered *unable* to prosecute if, due to its total or substantial collapse, it is incapable of procuring the accused or the necessary evidence.

The principle of complementarity thus constitutes the crucial difference between the ICC and the *Ad hoc* Tribunals: whereas the latter claim priority jurisdiction for acts

⁹ Normally a control of prosecutorial activity - coercive measures aside - will take place once investigations have actually been completed, for instance by the French *Chambre d'Accusation*, the US *Grand Jury* or the German *Zwischenverfahren* (interlocutory proceedings). Cf. K. Ambos, "The Role of the Prosecutor of an International Criminal Court from a Comparative Perspective", No. 58/59 *The Review (International Commission of Jurists)* (1997) p. 45 et seq., at p. 50 et seq., with references.

committed in former Yugoslavia and Rwanda, the ICC can only act as a complement to national jurisdiction. The principle serves to dispel the doubts of States which are particularly conscious of sovereignty, as it is up to them in the end – that is, in concrete terms, it depends on efficient prosecution before their national courts – whether the Court will be able to deal with a case that concerns them. Thus, in conclusion, the principle of complementarity is a clear reference to a traditional concept of sovereignty which in turn is the main obstacle to international cooperation.

Complementarity is also central to Article 18, which concerns preliminary rulings regarding admissibility, and Article 19, which regulates challenges to jurisdiction or admissibility. Article 19 also covers the admissibility issues in Article 18, which explains why States in favour of a Court have always considered Article 18 to be superfluous. The double test for admissibility now existing in Articles 18 and 19 poses the danger of delays or a stalling of proceedings at their very early stage. This danger should be counteracted by a preclusion provision (Article 18 para. 7) adopted on the insistence of States favourable towards the Court. According to this provision, the same State can *only* challenge the admissibility of a matter under Article 19 on the basis of new and significant facts or a substantial change in situation. This provision does not contain the word 'only', but it must be read into it, for its purpose – prevention of delays in proceedings – to be fulfilled. During the negotiations, this explicit limitation was also promoted by the States in favour of a Court, but it was rejected by the United States. The effort to limit as far as possible the procedural opportunities to challenge admissibility at the pre-trial stage is also manifested in Article 19 para. 4, under which admissibility may be challenged only once by a person or a State.

In *Article 18* proceedings the Prosecutor shall – in the case of a referral by a State (Art. 13 para. (a) in conjunction with 14) or investigations initiated *ex officio* (Art. 13 (c) in conjunction with 15) – first inform (confidentially or limiting the information) all the States Parties and States which would normally be competent. The State concerned can then, within one month, initiate investigations and demand the referral of the matter to its own realm of jurisdiction, if the Pre-Trial Chamber has not (already) approved its investigations. A transfer of the matter back to the State's jurisdiction can be demanded by the Prosecutor of the ICC any time after six months have elapsed, if the situation indicates that the State is unwilling or unable to carry out the proceedings. The Prosecutor can also demand that the State keep him or her constantly informed of the state of the investigations. If the conflict of jurisdiction is pending in appeal proceedings before the Pre-Trial or the Appeal Chamber, the Prosecutor can apply to the Pre-Trial Chamber for approval of important investigatory measures to secure evidence, if there is a unique opportunity to obtain evidence or a considerable risk of its loss.

In the context of *Article 19* the Court shall verify its jurisdiction and the admissibility

of the matter *ex officio*. Furthermore the accused, a person sought by an arrest warrant or a State (which is competent or which must give its *ad hoc* agreement) may make challenges to the Court's jurisdiction or the admissibility of a case. Such a challenge shall, in principle, be brought prior to the commencement of proceedings. Before the confirmation of the accusations, the Pre-Trial Chamber is competent, and afterwards, the Appeals Chamber. In both cases, the appeal stage is the Appeals Chamber. If a dispute is pending, the Prosecutor – as for Article 18 – can apply for the Court's approval of investigations necessary for securing evidence. The challenge proceedings do not affect the validity of investigatory measures issued by the prosecutor before the challenge was made. Once the Court declares a matter inadmissible according to Article 17 (principle of complementarity), the Prosecutor may apply for a reconsideration of the question if new facts arise. If the proceedings are referred to a specific State, the Prosecutor – as with Article 18 – can demand that he or she be regularly informed about the state of the proceedings; conversely, if the matter was referred to the Prosecutor, he or she must, in turn, inform the State concerned of the state of proceedings.

Other traditional principles *strictu sensu*

3.1. Ne bis in idem

According to article 20 of the Rome Statute a defendant can invoke the ne bis in idem principle¹⁰ before any national court or the ICC if he or she has already been convicted or acquitted by the ICC with respect to the same conduct which forms the basis of crimes within the jurisdiction of the ICC (art. 20(1), (2)); *i.e.*, genocide, crimes against humanity, war crimes, aggression (arts. 5-8). Exceptionally, however, a person may be tried before the ICC if a national trial has only shielded him or her from criminal responsibility or was not conducted independently or impartially (art. 20(3)). This exception follows from the rule of complementarity (art. 17). Accordingly, a trial before the ICC is only admissible if the State which has jurisdiction is unwilling or unable to prosecute the person concerned. Article 20(3) set out in essence the principles that are laid down in art. 17(2)(a) and (c) that allow the ICC to exercise jurisdiction even when national courts have judged or are judging the same case. As a consequence, the weakness of art. 20(3) lies in the vagueness of the criteria used by the complementarity principle.¹¹

¹⁰ Edward Wise, "General Principles of Criminal Law", 13 *Nouvelles Etudes Pénales* (1998) p. 39 et seq., at pp. 61-63.

¹¹ See, for example: Zimmermann, "Die Schaffung eines ständigen internationalen Strafgerichtshofs. Perspektiven und Probleme vor der Staatenkonferenz von Rom", 58 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1998) p. 47 et seq., at pp. 97-99.

The recognition of the *ne bis in idem* principle by the Rome Statute implies the universalisation of the principle as was implied by art. 54 et seq. of the Schengen Agreement on a regional level.¹² One should recall, however, that traditional international criminal law did not recognise the principle as such. In Germany, for example, the principle was only recognised concerning German judicial decisions.¹³

3.2. Speciality

The traditional rule of speciality received strong support in Rome. It was included in article 101 of the Statute allowing the sentencing of a person only for "the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered." However, this requirement may be waived by a State Party on the Court's request (Art. 101 para. 2). This shows that the principle is not considered as a right of the individual concerned. As to the scope of application, the rule does not exclude another *legal* evaluation of the same facts (e.g. crimes against humanity instead of war crimes), but refers exclusively to the factual conduct which forms the basis of the request.¹⁴

3.3. Nationality of the accused

The states belonging to the so called civil law family or European continent have been traditionally reluctant to extradite their nationals.¹⁵ This is due to a conception of criminal law and criminal jurisdiction which does not only relate to the territory where the crime has been committed - as the Angloamerican tradition - but also to the community to which the offender belongs.¹⁶ Thus, a ground for refusal of cooperation with regard to the surrender of nationals was highly controversial in Rome.¹⁷ Even states of the like minded

¹² See Schomburg & Lagodny, *supra* note 2, at p. 965 et seq.

¹³ BVerfGE 75, p. 1 et seq., at p. 5 et seq.

¹⁴ Cf. C. Kreß, "Penalties, enforcement and cooperation in the International Criminal Court Statute (Parts. VII, IX, X)", in 6 *Eur. J. Crime Cr. L. Cr. J.* (1998) p. 442 et seq., at p. 455.

¹⁵ See for example art. 16 GG and § 2 IRG. See also the recent study by Plachta, "(Non)Extradition of Nationals: A Neverending Story", 13 *Emory International Law Review* (1999) pp. 77-159, in particular p. 92 et seq.

¹⁶ See also Swart, "Human rights and the abolition of traditional principles", in Eser & Lagodny, eds., *Principles and procedures for a new transnational criminal law* (1992) p. 505 et seq., at pp. 531-532.

¹⁷ See Kreß, *supra* note 14, at pp. 452-453.

group referred to constitutional prohibitions of the extradition of nationals. In the end, such a ground for refusal was not included in the Statute for basically three reasons. First of all, it is evident that it would run counter to the very idea of supranational prosecutions of international criminals since the offenders are normally nationals of the state concerned. Secondly, states can easily avoid the surrender on the basis of the complementarity principle if they themselves prosecute the crimes concerned. Finally, the surrender of a person to the ICC has to be distinguished from the extradition between states (see article 102 Rome Statute). As a consequence, states with a constitutional prohibition with regard to the extradition of nationals either consider that this prohibition does not apply to the surrender to the ICC or - for reasons of clarification - amend their constitution. The latter step will be taken by Germany.

3.4. Competing requests in the case of surrender

In the case of competing requests, i.e. a surrender request by the ICC and an extradition request of another State, the former has, in principle, priority (Art. 90).¹⁸ The distinction may then be made as to whether or not the requesting State is a party to the Statute. In the case of a *State Party* the ICC's request will have priority if the ICC confirms the admissibility of the case (Art. 18, 19) in view of the investigations of the requesting State or following the notification of the requested State (Art. 90 para. 2(a) and (b)). As can be seen from Art. 90 para. 3, the requested State can only allow the extradition if the ICC has declared the case inadmissible.

If the requesting State is *not* a State Party the requested State must give the ICC request priority if it is not bound at international law by a duty towards the requesting State and the Court has affirmed the admissibility of the case. If the Court declares the case inadmissible the extradition request must be complied with as above. If the requested State bears a duty at international law towards the requesting State, the requested State must make a decision by weighing up the situation according to certain criteria (such as the requesting State's interest in extradition because the offence was committed on its territory; possibility of a subsequent transfer by the requesting State to the ICC etc.).

In the case of competing requests for assistance *other than surrender* the requested State must try to comply with both requests possibly consecutively (art. 93 para. 9 (a)). If this is not possible the rules on competing requests for transfer as per Art. 90 apply. If information from third party States or international organisations is involved, the Court must turn directly to these authorities (Art. 93 para. 9 (b)).

A further situation may arise if a State Party receives an *extradition request* for an

¹⁸ See also Kreß, *supra* note 14, at p. 454.

offence that is *different* to the one pursued by the Court (Art. 90 para. 7). In this case the above applies: if there is no international law duty of the requested towards the requesting State, the transfer to the Court will have priority. If such an international law duty exists the requested State must decide by weighing up, in particular, the type and severity of the acts concerned.

In urgent cases the ICC can also ask a State to *arrest* a person *conditionally*, pending the submission of the surrender request (Art. 92). Such a request must contain – apart from the personal details of the person – the charges and actual determinations as well as the details of an arrest warrant or a judgment, if one has been issued. Custody may only last for a certain period, which is yet to be specified in the rules of procedure. Afterwards the person must be released from custody if he or she does not – without a surrender request being issued – agree to the surrender. A release from custody does not exclude the possibility of a later surrender.

3.5 Conflicting national interests, particularly regarding national security

As to other forms of cooperation,¹⁹ it was controversial whether the national law of the state concerned could constitute an obstacle thereto. The like-minded states did not accept any reference to national law as such an obstacle as this could endanger efficient cooperation between the ICC and the various states. Thus, cooperation takes place "under procedures of national law" and the States' parties must ensure that such "procedures are available under their national law for all of the forms of cooperation" (art. 88). In principle, the relevant national threshold is the infringement of a "fundamental legal principle of general application" – as opposed to *any* legal norm – of the requested State, i.e. a principle of constitutional character.²⁰ In this case, the requested State must negotiate with the ICC in order to solve the matter amicably, i.e. render the requested judicial assistance in another manner. If this is not possible, the Court must change the request accordingly. Only in case of another "type of assistance" may an ordinary prohibition by national law impede cooperation (art. 93 para. 1 (l)).

The Court must ensure the *confidentiality* of documents and certain information (Art. 93 para. 8). The requested State can place written documents or information at the Prosecutor's disposal confidentially, with the proviso that he or she is only allowed to use

¹⁹ See Art. 93 para. 1: identification and specification of the whereabouts of persons; evidence hearing; serving of judicial documents; support in the summoning of witnesses or experts; house searches and confiscation; measures for the protection of victims and witnesses; confiscation of the proceeds of crime.

²⁰ See Kress, *supra* note 14, at pp. 456–457.

them for the purpose of obtaining new evidence. The requested State may later permit the disclosure of this evidence (Art. 93 para. 8). The requested State must consult with the Court as to the requirements of its national law. These prerequisites also apply *vice versa* with respect to requests for assistance made to the Court (Art. 96 para. 3 and 4).

The Court can also apply – in the context of other forms of judicial assistance – for the temporary *surrender* of a person for the purposes of *identification* or *questioning*, if the requested State agrees and the person voluntarily accepts to do so after being informed of his or her rights. This person must then be placed in custody and, after the foreseen measures have been implemented, led back to the requested State (Art. 93 para. 7).

The Court can, for its part, render *judicial assistance* to States Parties with respect to offences falling within its jurisdiction, e.g. by placing certain evidence at their disposal, if necessary with the agreement of the State concerned and taking into consideration the provisions on the protection of witnesses and victims, or by questioning persons in its custody (Art. 93 para. 10).

Further, a State may refuse to comply with a request for cooperation on the *grounds of national security interests* in accordance with art. 72. This provision is of particular importance as has been seen in the *Blaskic* case before the ICTY.²¹ The solution found in the Statute amounts to a compromise between the ICC's interest in having access to all evidentiary material versus the security needs of particular States.²² The provision is to apply not only to cases involving the disclosure of particular documentary evidence, but also to cases in which a person refuses to give information on grounds of State security interests.

If a State learns of a possible disclosure of particular information or documents which affect its national security interests, it has a right to intervene which triggers *arbitration proceedings*. The conflict should first be resolved by co-operative means, by modifying or clarifying the relevant judicial request, seeking another source of information, or reformulating the information, e.g. by reducing or summarising it, so as to conceal its sensitive content. If this is unsuccessful the State shall inform the Prosecutor or the Court accordingly by presenting its misgivings (once again). If the Court, in turn, insists on the necessity of the evidence for the purpose of determining the guilt or innocence of the

²¹ *ICTY Appeals Chamber, Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108bis, 29.10.1997*; from a comparative law perspective, see A. Eser/K. Ambos, "The power of national courts to compel the production of evidence and its limits. An amicus curiae brief to the International Criminal Tribunal for the Former Yugoslavia", 6 *Eur.J.Crime Cr.LCr.J* (1998) p. 3 et seq.

²² See also H.-J. Behrens, "Investigation, trial and appeal in the ICC Statute (parts V, VI, VIII)", 6 *Eur.J.Crime Cr.LCr.J* (1998) p. 429 et seq., at p. 436: "co-operative procedure".

accused, there are two possibilities: if the request falls within the general *cooperation provisions* (see V. below), the Court can first hold further and, if necessary, confidential consultations with the State. If the Court is of the opinion that the State is not complying with its duty to co-operate, it shall refer the case to the Assembly of States Parties or, as far as it is competent, to the UN Security Council. The Court is quite at liberty to draw certain conclusions as to the presentation or non-presentation of particular facts. In all *other cases*, the Court can either order the disclosure or draw the aforementioned conclusions.

Another limitation on the admissibility of evidence arises in connection with *information or documents which are provided by a third party*, i.e. another State Party, or an intergovernmental or international organisation (Art. 73).

In this case the Court must first attempt to obtain the approval of the State or the organisation from the sphere of which the information originates (i.e. "the originator"). If a *State Party* does not agree, the Art. 72 procedure described above applies. If a *State not party to the Statute* does not agree, the Court must accept a notification that a duty of confidentiality towards the original informer, which existed already before the request was made, renders a disclosure of the information impossible.

3.6 Investigations on the national territory

As to the execution of requests for assistance one has to distinguish between requests of a compulsory and of a *non compulsory nature*. The latter measures, especially the hearing of a witness and the examination of a public site, have to be distinguished further in that only the hearing of a witness can be made without presence of the state authorities concerned. This follows from the wording of art. 99 para. 4. Further, the Prosecutor may execute such a request "directly" on the basis of consultations with the State concerned if the act in question was committed on the territory of this State and the case is admissible under art. 18 and 19 of the Statute (art. 99 para. 4 (a)). However, a person who is questioned can claim the protection of national security interests as per Art. 72. If the act in question has been committed on *another's state territory* the Prosecutor may execute the request following consultations with this State and "subject to any reasonable conditions or concerns raised by that State Party." (art. 99 para. 4 (b)).

These provision leave room for doubts as to the kind and quality of the required State participation in this procedure. In the case of subparagraph (a), i.e., if the requested State is also the territorial State, the requirement of "consultations" does clearly not entail a prior state consent; but it seems to be equally clear that an explicit refusal to cooperate would impede the execution of the request. On the other hand, in the case of subparagraph (b), i.e., if the crime has been committed elsewhere, there exists a higher threshold although a

State consent does not seem to be required but only a process of participation which goes beyond mere consultations.²³

Art. 99 says nothing about the procedure which applies to requests of a *compulsory nature*, such as arrests or house searches. From this silence one may well conclude – conversely to the aforementioned regulation – that such requests can only be enforced by national authorities themselves. An indication of this is the fact that the on-site powers of the Prosecutor (Art. 99 para. 4) were among the most controversial provisions of the Statute.²⁴

3.7 Other traditional principles

There are quite a few traditional principles which do not apply to the ICC. Firstly, there is no room for the principles of *reciprocity* and *double criminality*. These principles imply the existence of two different national legal orders, whereas a supranational criminal order as established by the Rome Statute does not function on the basis of reciprocity and defines the criminal acts conclusively.

Equally, the principle of *non-extradition for certain (political) offences* is not of relevance in our context. In fact, the Rome Statute contains various crimes which always have been considered as political offenses in the sense of traditional international criminal law. Thus, the Statute confirms the general tendency to restrict or even exclude the concept of a political offence as an obstacle to extradition or cooperation.²⁵

A further obstacle to traditional judicial assistance arises by virtue of the rights of *immunity* of persons belonging to third-party States, or treaty obligations of the requested State towards third-party States (Art. 98). In these cases the requested State – as with the seizure of evidence originating from third-party States (Art. 73) – can only comply with a request for assistance if the third-party State waives its immunity or other rights.

Finally, the *fair trial principle*²⁶ does not constitute an obstacle in the cooperation between states and the ICC since the Rome Statute guarantees the accused a fair trial repeating the basis guarantees of the human rights instruments (art. 66, 67 Rome Statute).

²³ Kreß, *supra* note 14, at p. 453

²⁴ See Kreß, *supra* note 14, at pp. 458-459.

²⁵ See Ch. Van den Wyngaert, Rethinking the law of international criminal cooperation: the restrictive function of international human rights through individual-orientated bars, in Eser & Lagodny, eds., *supra* note 16, p. 489 et seq., at p. 498 et seq.

4. CONCLUDING REMARK

In the light of this overview it seems to be clear that the ICC neither constitutes a mechanism of criminal prosecution in the sense of traditional criminal cooperation nor a clearly supranational mechanism of universally enforceable criminal prosecution. Rather, the Statute opts for a middle ground clearly taking into account, on the one hand, the sovereignty concerns of individual states and, on the other hand, establishing a considerable number of new elements of cooperation *sui generis*, thereby definitely confirming the different nature of cooperation between the ICC and states compared to traditional cooperation between states.