

The States' Duty of Cooperation before the International Criminal Court

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Abstract

Since 2002, the State parties of the Rome Statute are obliged to cooperate with the Court and to take diligence to approve internal laws and rules to determine how this cooperation would happen. That is crucial for the effectiveness of the Court, avoiding international impunity and achieving justice. The main goal of this paper is to analyze the cooperation between states and the Court and how it is constructed. To do that, we divided this study in two main parts. In the first one, we emphasize the history of the Court. The second one deals with the core of this paper, which is the cooperation between states and the Court. We performed bibliographic research on the Rome Statute and international cooperation and adopted the deductive method combined with the historical method, starting from an analysis of the research. We aimed to explain the content of the premises logically constructed and true, as they are based on the specific legislation of the International Criminal Court. They are also based on international documents and the doctrine, of which we performed a literature review for the argumentative construction. In conclusion, the principle of complementarity is the main obstacle to good cooperation. We also noticed that most states do not have a special law that deals with the cooperation between the state and the Court.

Keywords

International Criminal Court, Cooperation, Principle of Complementarity, Sovereignty

1. Introduction

The historical context prior to the consolidation of the International Criminal

Court involved several meetings, discussions and models of previous criminal courts that contributed to the creation of this Court. Since 2002, when the Court entered into force, the States parties are expected to adopt measures that favor cooperation with the Court, which depends entirely on these actions for its proper functioning and for the fight against international impunity to achieve international justice.

Therefore, the success of the International Criminal Court depends on the participation of States through international cooperation, since the Court does not have a police force, military force or territory to carry out the sentence, thus being a challenge to be overcome. The lack of such support by a State party can seriously hamper the progress of investigation and trial proceedings.

The principle of complementarity is one of the bases of the ICC's model of action and permeates the entire system of guarantees provided by the Statute. Considering that the ICC is the first permanent criminal court, it is expected to succeed in holding individuals accountable for the nuclear crimes committed. It turns out that, after 25 years of the Rome conference, the Court still faces enormous challenges to fulfill its role efficiently in the international context. That happens because the ICC still lacks international recognition and the adherence of more countries, as well as the most effective cooperation of the member countries.

Based on this premise, this article aims to analyze the institute of international legal cooperation between States and the Court, as well as the obligation arising from said cooperation. To achieve the proposed objective, the work was divided into two parts. The first addresses the history of creation of the Court to understand its bases and foundations and the second deals with the central theme, which is the model of international cooperation between States and the Court based on the provisions of the Rome Statute and international and national norms about this obligation.

The methodology used was a review of the existing literature, through a bibliographic survey on international legal cooperation, plus a cross-referencing of information obtained from the analysis of relevant legislation. The method, in turn, was deductive, combined with the historical method, starting from an analysis of the research that aims to explain the content of the premises (Lakatos & Marconi, 2003: p. 92) logically constructed and true, since they are based on the specific legislation of the International Criminal Court. They are also based on international documents and the doctrine, of which we performed a literature review for the argumentative construction.

2. Background of the International Criminal Court

After the Second World War, the UN was created in 1945, with the subsequent approval of numerous countries to the Universal Declaration of Human Rights in 1948. That represented an appreciation of human rights. In this scenario, several international organizations and forms of integration were constituted as a

reflection of these shared universal values.

Discussions about the possibility of establishing the International Criminal Court (ICC) arose simultaneously. They were influenced by different factors since the 1950s were the starting point with the publication of the 1949 Geneva Convention and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Subsequently, the Geneva Convention resulted in 3 additional protocols, the I and II of 1977 and the III of 2005¹.

Historically, since 1947, the UN General Assembly has asked the International Law Commission (ILC) to examine the opportunity and possibility of creating a criminal court to try crimes of genocide and other relevant crimes (Lima & Briña, 2006). In 1951, the Commission drafted the Statute of the International Criminal Court and, in 1954, prepared a revision: only States and the Security Council could file complaints. During the cold war, the project was suspended because there was no agreement on the crime of aggression, which was only possible in 1974 with Resolution 3314² that defined the crime of aggression. In 1978, the Assembly decided to present the projects to the governments again, and in 1981 invited the ILC to resume work. In 1993, the States were invited to submit their observations in writing, and in 1996 a preparatory committee (PrepCom) was created. Between 1996 and 1998, several sessions took place to finalize the text, and on July 17th, 1998, in Rome, the conference for the establishment of the ICC was held, which had 120 votes in favor, 21 abstentions, and 7 votes against.

In compliance with the provisions of article 126³ of the ICC Statute, its entry into force took place on July 1st, 2002, as only on April 11th, 2002, the necessary 60 ratifications were⁴ obtained⁵. The Rome Statute has 128 articles divided into 13 parts. The ones addressed and analyzed more carefully in this article are in part IX, articles 86 to 102. They deal with international cooperation and legal assistance.

The ICC was the first permanent Criminal Court since before its creation,

¹The Geneva Convention entered into force in Brazil in 1957, through Decree 42,121 of 1957, and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, entered into force in Brazil in 1952, with Decree 30,822. Subsequently, the Geneva Convention resulted in 3 additional protocols, the I, and II of 1977, in force in Brazil since 1992, with Decree 849, and the III, of 2005, which entered into force in Brazil in 2010, with Decree 7196. Thus, Brazil has a history of active participation in human rights protection and enforcement and the fight against serious crimes presented in the Rome Statute.

²Available at: [https://undocs.org/en/A/RES/3314\(XXIX\)](https://undocs.org/en/A/RES/3314(XXIX)). Accessed on June 29th, 2021.

³Statute of the ICC. Decree No. 4388/2002. Article 126. "This Statute shall enter into force on the first day of the month following the expiration of a period of 60 days after the date of deposit of the sixtieth instrument of ratification, acceptance, approval, or accession with the Secretary General of the Organization of the United Nations." Available at:

http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm. Accessed on: June 13th, 2021.

⁴In Brazil, the ICC entered into force on September 1st, 2002, through Decree 4388 of 2002.

⁵"123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States." Available at: <https://www.icc-cpi.int/>. Accessed on June 16th, 2023.

there were other Courts, such as the Nuremberg⁶ and Tokyo Courts⁷ and the Ad Hoc Courts⁸. In comparison to the first ones, there were noteworthy innovations. It was the first time that crimes against peace and humanity were characterized, and State officials were held accountable for their actions. But there is also a criticism, as both courts failed to defend the international community by only looking out for the interests of the allied and victorious powers (Lima & Brina, 2006).

The ICC is headquartered in The Hague, Netherlands, with jurisdiction over persons responsible for the most serious crimes of international scope. Its jurisdiction is complementary to national criminal jurisdictions, as written in Article 1 of the Statute. Therefore, the ICC intends to complement, not replace, national criminal systems. It only acts when States are unwilling or unable to do so. It investigates and, if necessary, tries individuals accused of the most serious crimes of concern to the international community, which are genocide, war crimes, crimes against humanity, and the crime of aggression. Up to June 2023, 31 cases have been brought before the Court for review and judgment, with 16 defendants, 14 investigations, and 2 preliminary examinations⁹.

3. International Cooperation between Member States and the International Criminal Court

After this brief history of the creation of the ICC, we can infer that the Nuremberg Court, the *Ad Hoc Tribunals* for the former Yugoslavia and Rwanda, and later the International Criminal Court, contributed to the process of justicialization of human rights in the international order (Piovesan, 2018).

All of them are part of the institute of international responsibility, which is necessary when there is a breach of international obligations and treaties to validate and maintain the norms of international law and the obligations established by the countries that are part of the international community. In this context, individual responsibility arises, which has evolved since the creation of the ICC. In this context, one of the challenges to implementing international justice,

⁶Nuremberg Court: There were 4 titular judges and 4 substitute judges from each country that won the 2nd world War (Great Britain, France, USA, and the Soviet Union). They tried crimes against peace, war crimes, and crimes against humanity. There were 12 death sentences by hanging; 3 life sentences; 2 sentences to 20 years in prison; 1 sentence to 15 years in prison; 1 sentence to 10 years in prison and 2 acquittals. In: LIMA, Renata Mantovani de; BRINA, Marina Martins da Costa. O Tribunal Penal Internacional. Belo Horizonte: Del Rey, 2006, p. 28 and 29.

⁷Tokyo Court: 11 judges were appointed by a US commander, and they tried crimes against peace, war crimes and crimes against humanity. In all there were 6 death sentences. In: LIMA, Renata Mantovani de; BRINA, Marina Martins da Costa. O Tribunal Penal Internacional. Belo Horizonte: Del Rey, 2006. p. 29 and 30.

⁸Ad Hoc Tribunals: The UN Security Council, based on Chapter VII of the UN Charter, created a commission to investigate the magnitude and gravity of humanitarian crises arising from violations of norms of humanitarian law and considered that they were threats to peace and for international security and from there, created the Tribunal for the former Yugoslavia through resolution 827 of the UN Security Council of May 25th, 1993, and the Tribunal for Rwanda, with resolution 955 of the UN Security Council November 8th, 1994. In: LIMA, Renata Mantovani de; BRINA, Marina Martins da Costa. O Tribunal Penal Internacional. Belo Horizonte: Del Rey, 2006, p. 35.

⁹Available at: <https://www.icc-cpi.int/>. Accessed on June 16th, 2023.

especially for individuals, is the lack of cooperation from Member States of the Rome Statute. For the proper functioning of the ICC, the cooperation of the States is an essential element. Under Article 86, there is a General Obligation to Cooperate. This obligation implies that States Parties must cooperate fully with the Court in investigating and prosecuting crimes within its jurisdiction. Regarding that,

All in all, the system of cooperation under the Rome Statute may be regarded as a compromise and as a hybrid system. It contains a mix of elements of vertical and horizontal criminal cooperation of both the supra-national and inter-state model of cooperation” (Kaul, 2016: p. 87).

Therefore, the Court and the Member States sign bilateral cooperation agreements¹⁰ to demonstrate their support for the Court and encourage other States to also enter into such agreements to strengthen the Court’s role in the investigative and trial spheres by establishing clear procedures and detailed reciprocal obligations. For these reasons, these agreements are essential to regulate the institute of cooperation foreseen in the Rome Statute. Among these obligations, we can mention the protection of victims and witnesses, execution of sentences, release of persons, and provisional release.

Regarding the first type of cooperation agreement carried out, which is the protection of victims and witnesses, the legal provision is in Article 68 of the Statute, combined with rule 16 of the Manual of Rules, Procedure and Evidence (RPE) and¹¹ according to this provision, one of the Court’s responsibilities is the relocation of victims and witnesses to guarantee the safety and physical and psychological well-being of those affected. This reallocation aims to remove the person from the place where the threat occurred. It can be temporary or permanent and, for that, the Court can establish agreements with the countries that will receive these people, but this is a last resort¹². Until 2019, 21 States had cooperation agreements for witness protection¹³, including the United Kingdom, which signed such an agreement in 2004.

The second obligation is the execution of sentences, foreseen in article 103 of the Statute, governed by three principles: the sentenced person will serve it in the executing State, subject to observing the national laws of his country of origin; the executing State must comply exactly with the parameters of the sentence, and the Court is responsible for supervising the execution of the sentence and

¹⁰International Criminal Court, ICC, Cooperation Agreements. Available at: https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf. Accessed on June 17th, 2023.

¹¹Available at: <https://www.icc-cpi.int/sites/default/files/2023-02/Rules-of-Procedure-and-Evidence-Dec-2022.pdf>. Accessed on June 17th, 2023.

¹²International Criminal Court, ICC, Cooperation Agreements. Available at: https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf. Accessed on June 17th, 2023.

¹³International Criminal Court, ICC, Report of the Court on cooperation. Assembly of States Parties Eighteenth session The Hague, December 2019. Available at: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-16-ENG.pdf. Accessed on June 18th, 2023.

whether the conditions of compliance comply with international standards for the treatment of prisoners¹⁴.

To carry out such a bilateral agreement, the interested State must express its willingness to agree with the execution of sentences to accept convicts and may demonstrate its wishes to the Court, if they are compatible with the Statute. After the conclusion of the agreement, the State enters a list of the Court. Then, a person can only be transferred to serve the sentence after the final decision, in a place designated by the Presidency, which must consider the provisions of Article 103 (3)¹⁵. They are the principles of distributional equity, international standards on the treatment of prisoners, and the nationality and will of the convict.

Regarding the member countries that have this agreement for the fulfillment of the execution, “As of 1 May 2017, ten enforcement of sentences agreements have been in force between the Court and, Austria, the United Kingdom, Belgium, Finland, Denmark, Serbia, Mali, Norway and, most recently, Argentina and Sweden.¹⁶” In 2021, France also concluded the sentence compliance agreement¹⁷.

The third obligation refers to the Release of persons, including provisional release, which is a fundamental guarantee of the accused under rule 185 of the RPE. This rule determines the release of the person when the Court has no jurisdiction when the case is not admissible in 3 possibilities: if the State has jurisdiction and understood that the process did not fit in the concrete case; the case is not serious enough to justify the action of the Court, and lastly, the person has already been tried for the crime, or the charges have not been confirmed, or there has been an acquittal or any other reason such as provisional release. The Court can exercise this right at all stages of the process, and the Court must send the released person to a member state that accepts him/her. If this is not possible, the release may not take place. Until the edition of this ICC report, Belgium was the only country with a provisional release agreement with the Court¹⁸.

In other words, there are several ways for a State party to cooperate with the ICC, and “Regarding the aspect of cooperation demanded by the Court, the Rome Statute established international cooperation under three aspects: legislative cooperation, judicial administrative cooperation, and enforcement coopera-

¹⁴International Criminal Court, ICC, Cooperation Agreements. Available at: https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf. Accessed on June 18th, 2023.

¹⁵International Criminal Court, ICC, Rome Statute. Available from: <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>. Accessed on June 18th, 2023.

¹⁶International Criminal Court, ICC, Cooperation Agreements. p. 20. Available at: https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf. Accessed on June 18th, 2023.

¹⁷International Criminal Court, ICC, Report of the Court on cooperation. Assembly of States Parties Twenty-first session The Hague, 5-10 December 2022. Available at: <https://asp.icc-cpi.int/sites/asp/files/2022-11/ICC-ASP-21-24-ENG.pdf>. Accessed on June 18th, 2023.

¹⁸International Criminal Court, ICC, Cooperation Agreements. p. 12. Available at: https://www.icc-cpi.int/sites/default/files/Cooperation_Agreements_Eng.pdf. Accessed on June 17th, 2023.

tion” (our translation) (Miranda, 2010: p. 108).

Understanding cooperation in this triad, the first involves the need for the State party to provide in its internal legal order, rules on cooperation with the Court and the way to carry it out in the face of a possible request made by the Court, as can be seen from article 88 of the Statute. This need should not be confused with obligation. According to the previous article, it is the role of the States to ensure that their internal legal systems contain provisions on all forms of cooperation in the statute and on the procedures capable of fulfilling them.

The second, in turn, is understood as cooperation that takes place between the Court and a State party to collaborate with an investigation or a proceeding and encompasses Chapter IX of the Statute. The third would be for the States of detention, which signed an agreement with the Court to receive individuals to serve the sentences imposed by the Court, contained in Chapter X.

Intending to comply with this provision, some States have instituted specific legislation in their domestic legal systems that define how this cooperation will take place and how the State must proceed with requests from the ICC. Countries such as Canada, Switzerland, and the United Kingdom have already adopted in their internal orders rules for cooperation in executing sentences with the ICC (Oosterveld, Perry, & Mcmanus, 2001). One example of internal legislation is the agreement of fulfillment of the sentence between the Court and the United Kingdom¹⁹, which determines how the convict will be delivered, how will be the conditions of detention, observing the international norms of treatment of the prisoners, how will be transferred if necessary and how will be the end of the execution.²⁰

On this subject, it is recommended that member states adjust their domestic legislation concerning nuclear crimes, and for this, there are two ways, namely the replication method and the reference method. In the first, the State repeats the wording of Articles 6, 7, and 8 of the Rome Statute²¹; in the second, the State opts to use references to nuclear crimes in the internal order, without completely repeating the articles (Bekou & Miariti, 2017).

As seen previously, the ICC does not oblige member states, as provided for in Article 88, to implement its provisions in the domestic legal order but the existence of an internal law that references or replicates in the domestic order its provisions on nuclear crimes and international cooperation with the Court facilitates this relationship and the procedural progress, with respect for guarantees.

¹⁹Available at: https://www.legislation.gov.uk/ukpga/2001/17/pdfs/ukpga_20010017_en.pdf.

Accessed on June 9th, 2021.

²⁰International Criminal Court, ICC, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court. 2007. Available at:

<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/C540B3EF-F3FF-4AD0-93F5-DA85E96B1522/0/ICCPres040107ENG.pdf>. Accessed on June 18th, 2023.

²¹Examples of countries that have adopted the replication method: South Africa, Kenya, Mauritius, Australia, New Zealand and Malta. In: bekou, olympia; miariti, katerina katsimardou. International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court. Center for International Law Research and Policy (CILRAP). 2017, p. 22. Available at:

<https://www.legal-tools.org/doc/e05157/>. Accessed on June 16th, 2023.

In this sense, this is what can be seen in the report made in 2017 (Bekou & Miariti, 2017), whose wording demonstrates that there are 2 main functions in carrying out the implementation, which is how this incorporation of the provisions of the ICC into the internal order of a State party is known. About that,

The dual purpose of enacting national implementing legislation is 1) to empower States to cooperate with the Court; and 2) to enable States to exercise primary jurisdiction over the core international crimes, thereby giving meaning to complementarity.

By enacting an internal law on international cooperation before the ICC, the State party undertakes to comply with obligations regarding, for example, the surrender of persons sought by the Court and to collaborate with investigations and the collection of evidence. In the specific case of the United Kingdom, nuclear crimes within the competence of the ICC were also incorporated into domestic law²². Another member state that has similar legislation is Uganda, which adopted the International Criminal Court Act of 2010²³, which defines nuclear crimes in the domestic order and addresses several rules brought by the Rome Statute.

When a State chooses to sign and ratify the Rome Statute, it needs to fulfill the obligations contained therein, and considering the principle of complementarity on which the ICC's action is based, as stated in Article 17, it is understood through a²⁴ detailed and expanded analysis that if a State does not legislate internally on the nuclear crimes of the court, there is not, at least in its internal

²²International Criminal Court Act. 2001. Available at:

https://www.legislation.gov.uk/ukpga/2001/17/pdfs/ukpga_20010017_en.pdf. Accessed on June 9th, 2021.

²³International Criminal Court Act 2010. Available at:

<https://ulii.org/akn/ug/act/2010/11/eng@2010-06-25>. Accessed on June 18th, 2023.

²⁴Statute of the ICC. Decree No. 4388/2002. Article 17: Issues Relating to Admissibility: 1. Taking into account the tenth paragraph of the preamble and Article 1, the Court shall decide on the inadmissibility of a case if: a) The case is the subject of an investigation or criminal prosecution by a State that has jurisdiction over it unless it is unwilling to carry out the investigation or procedure or cannot do so; b) The case has been the subject of an investigation by a State with jurisdiction over it and that State has decided not to proceed with criminal proceedings against the person concerned unless this decision results from the fact that State is unwilling to prosecute or your actual inability to do so; c) The person concerned has already been tried for the conduct referred to in the complaint and cannot be tried by the Court under the provisions of paragraph 3 of Article 20; d) The case is not serious enough to justify further intervention by the Court. 2. To determine whether or not there is a willingness to act in a given case, the Court, regarding to the guarantees of a fair trial recognized by international law, shall verify the existence of one or more of the following circumstances: a) The proceedings have been instituted or is pending or the decision has been rendered in the State to remove the person in question from criminal responsibility for crimes within the competence of the Court, under the provisions of Article 5; b) There has been undue delay in processing, which, given the circumstances, is incompatible to bring the person concerned to justice; c) The proceedings have not been or are not being conducted independently or impartially, and have been or are being conducted in a manner which, given the circumstances, is inconsistent to bring the person concerned to justice; 3. To determine whether there is an inability to act in a given case, the Court will verify whether the State, due to the total or substantial collapse of the respective administration of justice or its unavailability, will not be in a position to bring the accused to appear, to assemble the necessary means of proof and testimonies or will not, for other reasons, be in a position to complete the process (our translation). Available at:

http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm. Accessed on June 8th, 2021.

order, the investigation and judgment of crimes of these natures, which therefore already allows the unrestricted action of the Court, since that there is no state action internally.

It turns out that in practice, there is no way for the Court to act in all crimes of all States that refrained from creating internal legislation on the provisions of the court because there are countless countries and an even greater number of people who commit these crimes.

The Court's model of action is based on the premise that the States have an auxiliary role, and, for that, they remain with the competence to investigate and judge internally the nuclear crimes of the Statute, since there is no provision for the exclusive jurisdiction of the ICC before these criminal types. On the contrary, due to complementarity, there is an inverse relationship of procedures to be considered, giving preference to the national scope. Therefore, by this principle, the role of the International Criminal Court is to complement national criminal jurisdictions. The Court cannot exercise its jurisdiction (or, in other words, the case cannot be admitted) unless the State cannot open an inquiry or initiate proceedings (Kirsch, 2004). In this way, a State party, which fulfills its obligations before the ICC and legislates in its internal order, contributes to the effectiveness of the court that will act only in the cases of Article 17. Thus, the states, before formal ratification, commit themselves to provide for cooperation in their internal order, based on the complementarity, "which states that they are presumed to be responsible for prosecuting suspects found on their own territory. Many must also bring their substantive criminal law into line(...)" (Schabas, 2001: p. 19).

So, in matters of cooperation, a State party must collaborate by legislating on the nuclear crimes of the Statute in its internal orders and cooperate by helping with investigations, arrests, and transfer of suspects. "In other words, the ICC does not have primacy over national courts but should only step in when the competent domestic prosecutors or courts fail or are unwilling or unable to act" (Cassese, 1999: p. 158). In this sense, the prediction of complementarity is positive. It is a way of recognizing that, in general, the national courts can make justice at the domestic level as they are encouraged to investigate and prosecute cases.

But given this ICC admissibility rule, Kai Ambos (1998), points out that the difficulty is to define when the State is unwilling to carry out the investigation or procedure or cannot do so. The first can be identified when a State tries to protect a suspect, or if the trial is not impartial. Incapacity, on the other hand, can be perceived when the State cannot obtain the necessary evidence for the prosecution. Kai Ambos (1999) criticizes the principle of complementarity by claiming that there is a gap in what would be the criteria used to delimit complementarity. Besides, article 20(3) of the Statute is unclear when determining the limits of jurisdiction in the State's incompetence or if the judgment was not impartial.

An example where cooperation between the States and the ICC must be effective and coordinated concerns the provisions of article 59 of the Statute, which

deals with the detention procedure in the State party. According to this article, the State must cooperate and adopt the necessary measures to carry out the arrest. Considering that it is a State that has internal legislation on international cooperation, this whole process will be facilitated. However, if it is a State, like Brazil, which does not have this regulation, there may be difficulties in complying with this determination because there are no normative parameters established internally and internationally to be observed.

The lack of court police, which would allow enforcement of coercive measures, makes it difficult to collect evidence from depositions and enforce arrest warrants, and many states do not cooperate as they should and in some cases even ignore court requests (Miranda, 2010). Thus, it appears that agreement with the Statute and signature by a State are not enough for full and satisfactory cooperation, as they involve procedures and steps that must be followed and are not listed in the Statute in detail.

This cooperation, combined with the principle of complementarity, reinforces the notion that the Court needs the States to carry out investigations and punish potential culprits. “Broadly speaking, the duty of cooperation and assistance implies the adoption of postures that enable the progress of different stages of investigation and process (...) (our translation)” (Lima, 2012: p. 74).

Brazil adopts cooperation between peoples for the progress of humanity as one of the principles that govern the country’s international relations. This cooperation regime is also provided for in international instruments to which the State is a party, such as the UN Charter and the Universal Declaration of Human Rights²⁵.

In its internal legislation, the *Civil Procedure Code (CPC)*, in Article 26, defines in general terms that international legal cooperation will be defined by the treaties to which Brazil is a party. In specific terms, the items bring norms such as respect for due legal process; equality between Brazilians and foreigners; procedural publicity, and the existence of a central authority for cooperation, which in the Brazilian case is the Ministry of Justice, according to paragraph 4 of the same law.

Article 27 brings an illustrative list of acts that may be the subject of international cooperation, such as service of process, subpoena, collection of evidence; emergency measure, and finally, “any other judicial or extrajudicial measure not prohibited by Brazilian law (our translation)”. This last open provision allows the provisions of the Rome Statute to be applicable in Brazilian territory as long as they are compatible with national legislation. From these two situations, we can infer some ideas. The first is that, as the country does not have internal legislation on how this specific cooperation with the ICC should work, a legislative gap is evident, which brings legal uncertainty. The second concerns the strengthening of the duty to cooperate and observe a request by the ICC in the processes and procedures that are relevant to the Court.

²⁵Textual provision for cooperation between peoples for the progress of humanity: CF, art. 4th, IX. The UN Charter: art. 1st §3rd and Universal Declaration of Human Rights, item XXVI.

In this way, respect for the country's sovereignty becomes a dead letter because, by not legislating on the subject, the country granted a wide variety of cooperation options to the ICC to demand various forms of cooperation when it assumed the commitment ratifying the Statute. Mainly, if one considers that Article 27 of the CPC allows for other forms of cooperation that are not exhaustively provided there. As such, there is no defined limit in domestic law or the Statute on how this cooperation should take place in practice.

And this becomes even more evident when one verifies the information on the Brazilian Ministry of Justice website, where in the section on 'international legal cooperation in criminal matters', there is no mention of how this will take place when the ICC is involved. There is only information on international legal cooperation between States and therefore, "The first step is to verify the existence of an international agreement between Brazil and the recipient country, as international regulations bring the requirements for sending the request" (our translation).²⁶

There are several obstacles to this implementation of ICC rules in domestic law. According to the guide, (Bekou & Miariti, 2017), the main ones are the type of legal system, constitutional conflicts, and the presence of internal laws on immunities, restrictions, and incompatibilities.

In the Brazilian case, which is a State that does not yet have this internalization, it appears that some conflicts between international and internal norms can make this cooperation difficult.

"It will no longer be a question of cooperating by force of international courtesy (*comitas gentium*), but as a result of a legal duty, inscribed in the country's law, and from this to be projected, by force of the international instrument to which we are bound, for Brazil's relations with all other states, with which we have political-legal relations (our translation)" (Accioly, Silva, & Casella, 2012: pp. 38-39).

Another obstacle would be when a State refuses to comply with or ignores an ICC request for cooperation. Article 87, §7th27 lists that in this case, the issue will be taken to the Assembly of States Parties to decide, but there is no provision for any sanction in Article 112, §2th, "f" of the Statute. This Article deals with the competencies of the Assembly. In this sense, it is precise that "Another problem related to the obligation to cooperate established by the Statute is the lack of a specific sanction for the undue failure of a State to comply with a request for cooperation made by the International Criminal Court." (Miranda, 2010: p.

²⁶Request for International Legal Cooperation. In criminal matters. Available at:

<https://www.justica.gov.br/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-penal/formularios-e-modelos>. Accessed on June 19th, 2021.

²⁷Statute of the ICC. Decree No. 4,388/2002. Article 87: Requests for Cooperation: General Provisions (...): (...) 7. If, contrary to the provisions of this Statute, a State Party refuses a request for cooperation made by the Court, thereby preventing it from exercising its powers and functions under this Statute, the Court may prepare a report and refer the matter to the Assembly of States Parties or to the Security Council, when the latter has referred the matter to the Court. Available at: http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm. Accessed on June 8th, 2021.

113).

Article 93, paragraph 4 of the Statute brings the exception of the duty to cooperate, which allows the State party to exempt itself from the obligation imposed when the Court makes a request, upon justification involving national security issues, detailed in Article 72. It is understood, therefore, that the general obligation to cooperate is not absolute, and it is up to the State to justify it only in the concrete case.

In this sense, it is noteworthy that Article 93 addresses other forms of cooperation. If there is an understanding on the part of the State that the Court's request is a threat to national security, intending to comply with the request, there are other ways to solve the situation. In this case, the State would negotiate other forms of cooperation with the Court, or the Court would redo the request to comply with national legislation and not harm principles and national security (Ambos, 1998).

Given the above, we understand that the cooperation contained in the Rome Statute is not a traditional model as it occurs between States. However, there is a concern about maintaining the sovereignty of countries before the Court, bringing new elements to the scenario of international legal cooperation. Just as the Court innovates in being the first permanent criminal court, it also innovates in terms of provisions and the adopted model of cooperation.

4. Final Considerations

The ICC's model of action, based on the international cooperation of States and following the principle of complementarity, favors national sovereignties by expecting them to act in a way that helps the Court, maintaining its internal rules and also acting in nuclear crimes. This cooperation regime guarantees the prevention and punishment of the crimes addressed in the Statute, referring to serious violations of human rights.

International cooperation in the ICC can be understood as having a dual function for the States parties, as the first aspect would be the obligation to cooperate with the Court and, in the second, it would represent a commitment to legislate in their internal orders on the bases and rules of that cooperation and nuclear criminal offenses.

Given this, we verified in this work that, although there is respect for state sovereignty and that this is a crucial factor for the Court to have 123 ratifications so far, that does not reflect in the commitment of States to adopt in their legislation, norms on cooperation, which hinders the Court's investigations and prevents international criminal justice.

Thus, we found that the main obstacle to satisfactory international cooperation between the States and the Court lies in the principle of complementarity, which translates as a clear reference to the traditional concept of the sovereignty of States, which allows States to abstain to adopt norms and laws in their internal legal systems that favor cooperation with the Court.

We conclude, therefore, that the model of cooperation of the Rome Statute has not represented the effectiveness in the active participation of the Member States, as expected with the creation of the Court in 1998, and this can be aggravated due to the lack of sanctions when there is non-compliance by a State concerning a request by the Court.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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