COOPERATION ON CRIMINAL MATTERS: A DEFENCE LAWYER'S PERSPECTIVE

Michail Wladimiroff*

1. Introduction

In this chapter I will comment upon State cooperation in criminal matters[1] from a defence lawyer's perspective. Before touching upon State cooperation with supranational judicial bodies, I would first like to briefly review the European system for inter-State cooperation. The degree of cooperation exhibited in the network of instruments governing these activities is instructive when addressing comparable problems at the next level — State cooperation with international and supranational judicial bodies or even, in some cases, with international organisations. A number of issues arising in the context of bilateral cooperation between States similarly occur during State cooperation with international tribunals.

2. The Network of Inter-State Cooperation in Criminal Matters

2.1 Instruments

Within Europe there is a dense network of conventions and treaties initiated by the Council of Europe to regulate inter-State mutual assistance in criminal matters.[2] The best known example is the 1957 European Convention on Extradition and its Additional Protocols,[3] together with the resolutions and recommendations agreed upon to specify the details of their enforcement.[4] Other well-known examples are the 1959 European Convention on Mutual Assistance in Criminal Matters,[5] as well as the 1972 European Convention on the Transfer of Proceedings in Criminal Matters.[6] The conclusion and implementation of this latter convention depended upon States' willingness to accept the institution of proceedings,

* Senior Partner of Wladimiroff Waling Schreuders, advocates, The Hague, and former Professor of International Economic Criminal Law, University of Utrecht. The author gratefully acknowledges the assistance of Robert Delonis in the preparation of this chapter.

[1] See *infra* in this volume, H-J. Bartsch, Overcoming Obstacles in Achieving Wide Adherence to Multilateral Instruments: Some Comments from the European Perspective.

[2] Paris, 13 December 1957, European Treaty Series no. 24.

[3] (First) Additional Protocol to the European Convention on Extradition, Strasbourg, 15 October 1975, European Treaty Series, no. 86; and Second Additional Protocol to the European Convention on Extradition, Strasbourg, 18 March 1978, European Treaty Series, no. 98.

[4] Recommendation no. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition (1980), reprinted in E. Müller-Rappard and M.C. Bassiouni, (eds.), European Inter-State Co-operation in Criminal Matters: The Council of Europe's Legal Instruments 277 (1993); and Recommendation No. R (80) 9 of the Committee of Ministers to Member States Concerning Extradition to States not Party to the European Convention on Human Rights, reprinted in *Id.* at 278.

[5] Strasbourg, 20 April 1959, European Treaty Series, no. 30.

[6] Strasbourg, 15 May 1972, European Treaty Series, no. 73.

R. Yepes-Enríquez and L. Tabassi. (eds.), Treaty Enforcement and International Cooperation in Criminal Matters
© 2002, OPCW, The Hague, and the authors

over which they have jurisdiction, in other States, and to relinquish a certain degree of their sovereign power to prosecute by transferring such proceedings to other States.

There are other instruments that also merit examination in this context. Notable among them are the European Convention on Information on Foreign Law,[7] the 1970 Convention on the International Validity of Criminal Judgements,[8] the 1987 European Union Convention on Double Jeopardy,[9] and the 1983 European Convention on the Transfer of Sentenced Persons.[10] These instruments have created in Europe a coherent network of treaty law providing a basis for well-functioning mutual legal assistance among their member States.

In addition to the numerous bilateral treaties between States, there are some examples of treaties with a wider, global base, such as the North Atlantic Treaty[11] and the Single Agreement regarding the Status of NATO Forces in the Partnership for Peace.[12] The Status of Forces agreement is a useful reference when searching for legal tools on how to deal with that type of cooperation. For a specific territory within Europe, the Schengen Agreement[13] regulates the cooperation of States not only on judicial or prosecutorial matters, but also on the level of police enforcement. The Agreement serves as an important model of how police cooperation functions in practice when police authorities are conducting investigations in the territory of another State. Finally, the Europol Convention[14] governs similar matters, while at the same time deals with immunities and other issues that may arise in State cooperation with supranational or supranational judicial bodies.

2.2 THE IMPACT OF COMMON LAW VS. CIVIL LAW SYSTEMS ON COOPERATION

In practice, from a defence lawyer's perspective, this whole network of conventions and treaties must be viewed in conjunction with the two legal systems in Europe under which the instruments are enforced: the common law, and the continental European civil law. The position of defence lawyers dealing with a request under one of the conventions is totally different in these systems. In the common law "adversarial system," the defendant is a party in the trial, and the system tasks the prosecution and defence with fact development while the judge functions principally as an arbiter of the law. The continental civil law tradition, however, utilises the "inquisitorial system": the judge governs the trial as both an arbiter dealing with the law and an investigator fully developing the *dossier* of facts. The role of the prosecution is also accordingly different. Trials in common law jurisdictions can be characterised as "horizontal," with the two parties equally addressing the cause, while in a civil law "top down trial" the prosecution is actually very close to the bench and the defendant becomes the subject of the trial rather than a participant in it.

[7] London, 7 June 1968, entered into force 17 December 1969; European Treaty Series, no. 62.
[8] The Hague, 28 May 1970, European Treaty Series, no. 70.
[9] Bulletin EU 5 (1987).
[10] Strasbourg, 21 March 1983, European Treaty Series, no. 112.
[11] Washington, D.C., 4 April 1949. Text available at http://www.nato.int
[12] Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, Brussels, 19 June 1995.
[13] Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Joint Ministerial Gazette 1986, p. 77ff.
[14] Brussels, 26 July 1995, [EU] official Journal C 316/1.

An examination of the mechanisms established in the mutual assistance conventions reveals that requests for State cooperation operate in a manner fitting a continental European civil law orientation. These conventions give very little room for effective defence lawyer participation, through either making or complying with requests, because the defence has such a marginal role in the top down system. This problem comes into even sharper focus when defence lawyers need State cooperation in proceedings before an international tribunal. The special issues arising in these cases are illustrated below.

3. State Cooperation with International or Supranational Judicial Bodies

3.1 THE GOAL OF A FAIR TRIAL

Problems arise for a defence lawyer when State cooperation is requested in proceedings before a supranational judicial body such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). While the Tribunals' Statutes and Rules formulate State cooperation along lines similar to those governing general inter-State cooperation in criminal matters, the law and procedures that govern the Tribunals are more common law orientated. This means the role of the defence lawyer in proceedings before the ICTY and ICTR is much more active, since he or she has to put the case before the judges. The defence lawyer is in almost the same position as the prosecution, and that is where the problems start.

The assumption in all trials, wherever – nationally, in a common law or civil law system, or in supranational judicial bodies like the ICTY or ICTR – they are conducted, is that the standard should be always the same. All trials should be fair trials. But that begs a question: "What do you mean by 'fair trial'?" In my perception, the fairness of the trial is measured in the context of the system in which it is being conducted. What would be considered "fair" in a common law jurisdiction could, and should, be different than in a civil law jurisdiction. For example, the rights of the defence in a common law jurisdiction cannot function as a directly translated basis for evaluating the "proper" rights of the defence in a civil law jurisdiction because the rationale for the two systems' proceedings are not comparable.

Setting aside the question of the exact meaning of "fairness," let's agree in principle that a trial should be fair. Fairness can then serve as a criterion for examining the tools given to the defence by a legal system. Can a defence lawyer, utilising these tools, guarantee a fair trial by doing his or her job properly? If one looks at the legal instruments governing the two ad hoc tribunals and the International Criminal Court (ICC), and observes that the trials are being conducted on a basis similar to common law system trials, one notes that the drafters failed to provide the defence with tools comparable to those provided to the prosecution.

3.2 THE INSTITUTIONAL WEAKNESS OF THE DEFENCE IN THE AD HOC TRIBUNALS AND ICC

Put simply, the system established in the ICC and the tribunals is one bench before which two parties present their case. To be able to meaningfully prepare a case in this common law-styled system, a defence lawyer must have adequate facilities to conduct an investigation, and adequate powers of investigation, including the power to compel the attendance of

witnesses and the seizure of evidence, and the ability to conduct on-site investigations. Such powers are clearly granted to the prosecution,[15] but as discussed below, defence access to these powers is at best unclear. The Tribunals seem to allocate investigatory power with civil law procedural assumptions in mind, but their actual procedures were adopted from a common law system. This disconnect, and the power disparity it generates is, in my view, where one of the greatest dangers to fairness in the international administration of justice lurks.

This lack of defence power is magnified by the tribunals' necessary reliance on the cooperation of States, and by the differences in assumptions that arise between civil and common law jurisdictions. The Tribunal does not have its own arms and legs to perform the work normally conducted at the national level by the common body of government departments and services. This is doubly true for civil law jurisdictions, where the court carries more of the investigatory burden. There is no support network to compensate for loopholes because the Tribunal does not function within a broader legal system. Without enforcement agents of its own, an international tribunal must also rely upon the cooperation of States to exercise its powers *vis-à-vis* individuals *in situ* through their intervention. In short, a tribunal is a supranational judicial body, but it exercises its powers solely through the States.

In an effort to compensate for this lack of powers, Article 29 of the ICTY Statute,[16] and Article 28 of the ICTR Statute,[17] both oblige States to cooperate with the Tribunal and comply forthwith with any request of the trial chamber. This should apply to both the prosecution and the defence – but does it? In the case of the ICTY, the Office of the Prosecutor (OTP) is an official organ of the Tribunal[18] and, as such, doubtlessly falls under the aegis of Article 29. Defence lawyers, however, are not Tribunal organs; they are individuals, working on behalf of a defendant, and they are not a part of the Tribunal as such. This raises the question of whether they fall under either Tribunal's compliance articles.

The power to request and, ultimately, order the cooperation of States is a kind of secondary jurisdiction over states, separate from the primary jurisdiction of the Tribunal. This system, in which individuals are requested and ordered in their official state capacities to cooperate with the tribunal, may cause problems. For example, the *Blaskic* case[19] raised the issue of whether an order of the Tribunal is binding only upon a State, as a literal reading of the language of Article 29 would suggest, or upon individual State authorities as well. In *Blaskic*, the Appeals Chamber of the ICTY held that the OTP could issue binding orders to States under Article 29, but it could not issue binding orders upon

[15] For a discussion of the prosecutorial possession of these powers in the ICTY and ICTR Statutes and Rules, see *supra* in this volume, R. Reid, Practical Aspects of Gathering Evidence in an International Environment.

[16] The Statute of the International Tribunal, adopted 25 May 1993 by UN Security Council resolution S/RES/827 (1993), as amended by UN Security Council resolutions S/RES/1166 (1998), S/RES/1329 (2000) and S/RES/1411 (2002). Amended text available at http://www.un.org/icty.

[17] Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by UN Security Council resolution S/RES/955 (1994), as amended by UN Security Council resolutions S/RES/1165 (1998), S/RES/1166 (1998), S/RES/1329 (2000) and S/RES/1411 (2002). Amended text available at http://www.ictr.org.

[18] See Article 16 of the Statute of the International Tribunal, *supra* note 15.

[19] *The Prosecutor v. Tihomir Blaskic*, Judgement, Case no. IT-95-14 (3 March 2000). See paras. 42-43 for a summary of the questions in the case relevant to the discussion here.

individual State government officers because the customary norms of international law do not grant the Tribunal power over them, nor do any specific provisions of the ICTY Statute.[20] This lack of authority could be a real issue if, for example, a defence lawyer wanted to interview an official of a State on matters that are highly relevant for the defence of the case. The same difficulty is encountered if a defence attorney sought to interview military personnel, organs of a State, or the authorities of the State, and again, the ability of defence attorneys to compel this cooperation is unclear.

The term "States" presents further interpretive problems in this context. It includes all States that are members of the United Nations,[21] but does it also cover non-UN member States or non-State entities? For example, in the ICTY's early days it needed to investigate in Republika Srpska. But what was Republika Srpska – a puppet State, a rebel State, or even a State at all? It may have been a State under the Montevideo criteria,[22] but arguments can be made both ways. And if it was not a State, did Article 29 apply to it? The answer is unclear, and that problem may cripple investigations or prosecutions. It will also certainly cripple the defence, which has no standing whatsoever because it not an organ of the Tribunal.

The defence was not addressed by the Dayton Agreement, in which all parties, including States and other factual entities within the Bosnian Federation, acknowledged the rights of the Tribunal to do on-site investigations. The defence was not discussed in the other principle document of international cooperation in these issues: Chapter VII of the Charter of the United Nations. The ICTY Rules[23] also provide little additional assistance on this issue. ICTY Rule 58, which stipulates that the obligations created in Article 29 of the Statute shall prevail over any legal impediment to surrender or transfer of the accused or a witness of the Tribunal, failed to mention the defence. Rule 56 reminds States of their obligations to act promptly with all jurisdictions to ensure proper and effective execution in accordance with Article 29, but is mute about the defence. And the other Rules are silent about supremacy, save Rule 7*bis*, which only warns States that failures to comply with obligations under Article 29 of the Statute shall be reported to the Security Council. On the whole, then, the defence is left in a vacuum; defence attorneys know neither their standing nor the tools with which they are equipped.

Against this background, imagine you are a defence attorney in a proceeding before the ICTY. You want to interview someone who is in the military, or is a policeman, and the State is not willing to cooperate with you because they say, "Who are you? You are an individual, not an organ of the Tribunal. We are not talking to you; any of your requests are totally irrelevant to us." Can you report that response to a trial chamber? What will the trial chamber do – will they order the State to cooperate with the defence?

It may, but now imagine what happens if you are looking for witnesses in the middle of an ongoing conflict. You have to come back to The Hague, ask for a court order, wait for it, get it, and then go back with the court order. And who is going to comply with the court order? The State? What if the State is not a UN member State, but a puppet or a rebel State?

---

[20] See Judgement on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July, 1997, Case no. IT-95-14-AR 108bis, paras. 25-31, 38-56 (29 October 1997).

[21] *Id.*

[22] 1933 Montevideo Convention on Rights and Duties of States, 165 LNTS 19, entered into force 26 December 1934.

[23] ICTY doc. IT/32/REV.22, dated 13 December 2001, as amended on 23 April 2002. Text available at http://www.un.org/icty.

Who is going to comply with the order if it is an individual lawyer who hands it over? Again, you are not an organ of the Tribunal. You are, politically speaking, no one. You are just an ordinary defence lawyer, acting on behalf of a defendant without any standing.

The obligation to cooperate with the Tribunal is only indicated in paragraph 1 of Article 29 and is without any specification to the defence. If the defence is to have any formal investigatory tools at all, one must interpret "tribunal" in Article 29 broadly to include all the elements functioning within it. The Article would then be seen as imposing an obligation on States to cooperate with the defence as well, since the defence falls under the "Tribunal" and thus has standing to make proper requests under the ICTY statute. Formal case law is required, however, so this point can be made utterly clear to States.

State cooperation with the tribunal may also be subject to national privileges recognised by international law, and the lack of clear defence standing in the ICTY statute compounds the difficulties these privileges can create. For example, the national security privilege can be an impediment to the defence in the context of Rules 66(c) and 70(b). These Rules state that the OTP may have access to state confidential materials, but they include no obligation of disclosure to the defence. If a defence attorney wishes to inspect such materials, however, his or her lack of standing means they would probably have no access to those documents; after all, a defence attorney cannot walk into a government building and demand documents, or raid a building and seize them. The State can refuse and invoke its national security privilege.

This limitation may be less of a problem in civil law jurisdictions, for in those jurisdictions the defence can request the prosecution or the investigative magistrate to do the job for it. Similar options are notably lacking in common law systems, however, where defence attorneys have to deal with court orders, which then have to be enforced by states, which can then again invoke their recognised privileges. And there is a further problem. If access to confidential documents were granted under the ICTY Statute and Rules, I believe that a proper understanding of the Statutes and Rules would oblige the defence to disclose that information to the OTP. But as noted above, the OTP is under no parallel obligation to the defence.

3.3 THE CHALLENGES PRESENTED BY NATIONAL LAW

Another issue I want to briefly explore is the fact that interstate cooperation on criminal matters is always envisioned with sole regard to the prosecution, and the resulting insufficient rules place the defence in a very limited position. It is essential, however, that the cooperation of States is regulated with a view to the fulfilment of the duties of all the parties in a trial: the judges, the prosecutors, and the defence. The current limitations of Article 29 of the ICTY Statute pose many potential problems to defence attorneys, though I think it safe to conclude that the development of ICTY case law can remedy these problems and avoid preventing the defence from doing their job properly.

These legal problems can also be viewed from a different perspective. If States do seek to comply with the Tribunals, and with the defence, what then? Then attorneys enter into a second area of problems, partially addressed in Europe by the conventions and treaties I alluded to above. For even if the State is fully willing to cooperate with the defence, there might be obstacles in their own national law.

For a very simple example, I was once arguing a case before the ICTY and wanted to locate possible witnesses who were among the refugees then located in Germany. I addressed the German authorities, asking them whether they would be able to assist the defence in locating these possible witnesses, and their answer was essentially: "No. Who are you?" Now it was their first case before the ICTY, and maybe these were beginner's problems. But once they were able to understand and identify my status, their answer was, "well, there is no provision under German law, so why should we answer your request?" My solution in those days was very simple: I asked the prosecution to do it. They got the right answers, and they passed the answers to me.

My solution is not, however, the normal common law routine; it's more or less a civil law orientated solution, and while it worked, it cannot be relied upon. Applying the ICTY system in a common law State renders the defence totally dependent on the prosecution, because defence attorneys can only get certain types of information through the prosecution. This system doesn't work. If I want documents in France, for example, and I want to inspect them because I have reason to believe that they are relevant to the defence, I cannot go to a French court and ask for an injunction ordering the French State to produce these documents for defence inspection. The prosecution may do so, but French national law gives no standing to defence lawyers in these matters. One faces the same problems under the European Conventions and treaties dealing with mutual assistance in criminal matters, because they are based on the civil law inquisitorial system.

In common law jurisdictions this is totally different. In the United States, for example, I have standing as a defence attorney working for the ICTY or ICTR to request an injunction in a US federal court. This difference underscores my central point. If a supranational institution is structured through a mixture of different legal systems, and its founders fail to thoroughly consider the implications of their theoretical and procedural differences (as arguably occurred in the ICTY, where the pre-trial proceedings are basically civil law in nature, while the trial is essentially a common law proceeding), the resulting institution faces many troubles because the melting pot merger of systems often leaves the defence in a procedural lurch. In order to properly argue the case of an accused person, defence counsel must be able conduct discovery in the areas containing the right information. The defence should, just like the prosecution, be able to locate, interview, bring forward, examine and challenge relevant witnesses. The same applies for documents and all other types of information.

4. Conclusion: Looking to the Future

I think my message is clear: the law needed to clearly meet the standards of a fair trial – one in which both parties are able to sufficiently present their case – is not present in current legal documents. This is an issue of international law, but it is also an issue of national law, because states comply with international obligations through domestic statutes. The practice of implementing these obligations in common law jurisdictions is totally different from the implementation in civil law jurisdictions, and legislators have overlooked the consequences of these differences on the powers and abilities of the defence.

I had hoped that, in drafting future legislation, the legislators would have seen this problem, but I participated in the drafting of the ICC Statute[24] and am sad to say that the same mistake has been made again. The drafters again forgot about the defence, the necessary wording is not in the documents, and the only immediately evident solution is to attribute powers to the ICC Registrar that may be mandated to the defence, thereby allowing the defence to act through the Registrar to meet its needs. There is, then, an important lesson to be learned from these experiences. When drafting treaties, protocols, conventions or statutes regarding state cooperation with international or supranational bodies, be they judicial bodies or not, the drafters must always remember that there are always at least two parties, and those parties should have, or at least be able to achieve, equal rights.

I believe that, under the European Conventions on assistance in criminal matters outlined above, the defence cannot always achieve what it ought to be able to achieve. But an important difference between this situation and a similar one under *supranational* law is that, under the latter, an attorney's greatest resource – the assistance of other attorneys – is replaced by a much less accessible and familiar institution: a state.

For example, in an interstate cooperation case between the Netherlands and France, I can ask a local French lawyer to deal with the issue on the basis of French law, and so long as he can act on behalf of an interested party he has standing to do so. In supranational institutions like the ICTY or ICTR, however, the addressee of my request is another State, and their compliance is complex because it often affects both their own nationals and people who are accidentally on their territory. The different and often novel law of supranational bodies further muddles the issue. In normal proceedings, when I retain my friend the French lawyer, he will be familiar with the mechanics of my request because he is familiar with international law on interstate cooperation. But were I to retain a lawyer in Banja Luka to address the local courts on an issue involving the ICTY, in the early days, and perhaps even today, he or she often had no clue what I was asking for. The remedy of retaining a national lawyer, then, functions within the European system of interstate cooperation, but does not yet do so on the supranational level.

As a final thought, one might wonder whether defence attorneys could just "play ball through the prosecution" and solve all these problems that way. Consider, however, the following example. You are a defence attorney looking for possible witnesses, but you're not sure whether you will call them once you have interviewed them because you don't know what they have to say. They may provide information that will be helpful to you, but they also might possess information that is not relevant to the case, or that is even incriminating to your client. If you have no access to *ex parte* proceedings, as is true in the tribunals, would you be willing to publicly inform the court, or worse yet the prosecution, whom you am looking for? Every time you did, you would be potentially directing the prosecutor to new witnesses who may support his or her case. As this example makes clear, defence attorneys cannot rely on prosecutorial help to conduct their investigations because reliance always runs the risk of doing more harm than good; this stifles thorough, risk-taking investigation. Defence attorneys must have access to independent investigatory tools

[24] 1998 Rome Statute of the International Criminal Court, entered into force 1 July 2002; UN doc. A/CONF.183/9*, as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999. Corrected text available at http://www.un.org/law/icc.

and, at a bare minimum, access to a private or *ex parte* procedure to help fill the gaps in the current Tribunal statutes.

I do not seek procedures for guaranteeing the ideal trial; there are no ideal trials, for either the prosecution or the defence. But I do seek laws establishing a procedural standard that adequately fulfils the demands of fair trial in tribunal proceedings. And after a survey of the ICTY, the ICTR, the European conventions and treaties, and the Statute of the ICC, I am not yet satisfied.