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Despite shortcomings, a court deserving support - International Criminal Court

by Louise Arbour, Morten Bergsmo

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Fifty years of collective efforts by the United Nations have finally led to the establishment of the foundation of what may become an effective and independent international criminal jurisdiction. For the jurisdiction to become a reality, 60 ratifications are required and an interim Preparatory Commission must successfully draft the detailed legal infrastructure of the International Criminal Court (ICC), as well as important texts such as the relationship agreement between the United Nations and the Court as an independent intergovernmental organization, and the financial regulations and rules of the Court. Once this is done, the international community will have at its disposal a permanent mechanism for the enforcement of individual criminal responsibility for serious violations of international humanitarian law committed on the territory of States party to the Statute or by their citizens.

One positive distinguishing feature of this mechanism is the provision for an ex officio power of the Prosecutor and Pre-Trial Chamber to initiate investigations based on information received from any source. This will facilitate an earlier response by the Prosecutor to allegations of war crimes of international concern than when situations are referred to the Court by the Security Council or by States party. Lives and evidence can be saved.

The subject-matter jurisdiction of the Court is limited to war crimes, crimes against humanity and genocide in a manner similar to the ad hoc Tribunals for the former Yugoslavia and for Rwanda, with the addition of the crime of aggression, the elements and jurisdictional attributes of which are to be determined later. Given the frequency of civil wars our times, it is distinctly positive that Article 8 of the Statute provides for the inclusion of prohibitions which apply also in conflicts not of an international character. This increases the relevancy of the Court to future armed conflicts.

We must also consider the many shortcomings of the Statute, a few of which are of such fundamental nature that they may erode the efficacy of the Court. For prosecutors, the weak State cooperation regime is an immediate source of concern. How can cases be prepared effectively if the Prosecutor of the ICC cannot control the process of the gathering of evidence? The main principle of the Statute is that the authorities of the requested State will execute requests for assistance from the Court and thus collect the evidence through its police and courts. This is also supposed to be the main rule when the requested State is a territorial State directly affected by the alleged atrocities. Needless to say, this could create insurmountable difficulties for the case preparation of the prosecution. There seems to be two limited exceptions to this restrictive regime. First, the Prosecutor may execute requests directly on the territory of the requested State when that can be done without any "compulsory measures is subject to consultations with the requested State when it is a territorial State, and otherwise to "any reasonable conditions or concerns raised by that State Party" (Article 99).

This is reasonable and practical as regards voluntary * interviews with potential witnesses, but falls far short of the requirements of effective international investigations of serious violations of international humanitarian law, particularly where there may be persons in authority with interests adverse to the prosecution.

Second, if the PreTrial Chamber has determined that a State party is dearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for co-operation, it can authorize the Prosecutor to take specific investigative steps within the territory of that State without having secured its cooperation (Article 57(3)(d)).

Despite these two exceptions, it must be expected that the Security Council will want to override these limitations by conferring upon the Prosecutor and the Court powers to obtain both cooperation and compliance when it refers situations under Chapter VII of the United Nations Charter to the Court, so that the powers of the Court would not be significantly weaker than those of the ad hoc Tribunals already established by the Council. Frankly, it is difficult to imagine how a situation referred to the Court by the Council could properly be investigated with the limited powers conferred upon the Prosecutor by the Statute. Referrals by the Security Council could become an important source of work for the ICC. Such referrals could also strengthen the financial basis of the Court and extend its jurisdictional reach to the whole world, including the territory and citizens of non-States party.

Another severe shortcoming of the Statute relates to the deference that the ICC must show to State-initiated investigations. Apart from instances of Security Council referral, in cases of a reference by a State party or ex officio-initiated investigations, the Prosecutor may be asked to desist in favour of a national jurisdiction which has seized itself of the matter. If the Prosecutor refuses, he or she may ask the Court for permission to proceed. The Court must decline jurisdiction unless the Prosecutor can show that the State which has seized itself of the matter is "unwilling or unable genuinely to carry out the investigation or prosecution".

This question of deferral to national jurisdiction, or "inadmissibility" as it is called in the Statute, as well as all questions of jurisdiction, may also be raised by the Court on its own initiative, by the accused whether arrested or not, and by any State with jurisdiction over the matter. These issues must be raised before trial, and both sides have a right of appeal to the Appeal chamber of the ICC.

What then is involved in the determination of admissibility? Essentially, it will involve a dispute between the Prosecutor and a State as to whether that State is genuinely ready, willing and able to undertake the prosecution of the matter in issue. Prior then Prior then to making much progress on the investigation, the Prosecutor may be embroiled - possibly for a long time - in a complex dispute with one or more States.

Unwillingness is defined in Article 17(2). The Court must consider whether the domestic prosecution has been undertaken for the purpose of shielding the accused from criminal responsibility. The Court will have to consider whether there has been undue delay in the State-initiated prosecution, indicative of a lack of an intention to proceed, or whether the domestic case is conducted independently and impartially, consistent with a genuine intention to bring the person to justice. This is not a standard issue in criminal cases. It is a highly complex and litigious jurisdictional matter that could nearly paralyse the Court, especially in its early years.

As for determining the inability of a State to prosecute, as opposed to its unwillingness, the Court is required to examine whether, despite the State's assertion that it can successfully manage the domestic prosecution, that State is unable to obtain the accused or the evidence, or otherwise to carry out the proceedings due to a total or partial collapse of its national judicial system. These types of issues have no precedent in the ad hoc Tribunals, which have primacy over domestic courts and may require these courts to desist in favour of the Tribunal's prosecution. Considering that the issue can be raised by the accused, and that the ICC will be required to desist in favour of any State which has jurisdiction under its national law and which has seized itself of the case, it is reasonable to expect that admissibility-based litigation will often occur in cases other than those referred to the Court by the Security Council. This will hardly be routine criminal litigation.

Three design of the Rules of Procedure and Evidence will quire the input of lawyers with a very sophisticated and broadly based experience involving work with systemic facts. Conceptually, and quite apart from its highly charged political dimension, this debate casting the Prosecutor against one or more States will look more, at least on a technical level, like a difficult product liability case, a complex class action or a constitutional case involving systemic issues, than resembling a criminal case of any description.

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