Recurring Themes/thémes récurrents

Conspicuous Absence of Jurisdictional Overreach

JUSTICE LOUISE ARBOUR[1] AND MORTEN BERGSMO[2]

The Statute of the International Criminal Court has come under attack by some Government representatives since its adoption in Rome on 17 July 1998. It has been suggested that the Statute invades national sovereignty through jurisdictional overreach. It is claimed that the Statute recognizes the doctrine of universal jurisdiction and that this is not generally acceptable to States. Frequent use of the term "automatic jurisdiction" by some of those who articulate these views has generated additional confusion about the exact jurisdictional scope of the new Court. Some States have let it be known that they are not prepared to ratify the Statute and that they fear that their citizens may be prosecuted by the International Criminal Court (hereinafter referred to as the ICC) even if they remain non-States Party. It has been proposed that such prosecution could even harm international peace-keeping operations. Other States say the Security Council has too strong a role in the ICC. They argue that the powers of the Security Council to refer cases to the Court, to block its investigations, and to bind non-States Party by Chapter VII referrals to the ICC are in contravention of international law.

The statutory realities of the ICC provide for a significantly more limited jurisdiction than these fears suggest. It is difficult to see how *bona fide* interpretations of the Statute's jurisdictional regime can generate genuine concern that the ICC may infringe unduly on national sovereignty or that the Statute unreasonably vests the Security Council with powers which it does not already possess under the United Nations Charter. It might be useful to draw a parallel between the ICC and the *ad hoc* Tribunals for the former Yugoslavia and Rwanda. Contrary to the ICC, the Tribunals constitute international judicial intervention by the Security Council as enforcement measures under Chapter VII of the Charter independent of consent by territorial States. The valid exercise of the Tribunals' powers, including the power to require State compliance with its orders, does not depend on domestic constitutional or statutory provisions. Member-States of the United Nations have an international legal obligation to comply with Tribunal orders pursuant to Statute and Rules of Procedure and Evidence, whether or not they have adopted implementing legislation. The Tribunals have jurisdictional primacy *vis-à-vis* national criminal justice systems. Despite such regimes of extraordinary jurisdictional efficacy, territorial States have been able to impede ICTY investigations and prosecutions simply by cynically disregarding their obligations under international law.

Complementarity Threshold

The jurisdictional basis of the ICC is of an entirely different nature. The jurisdictional primacy of the *ad hoc* Tribunals has been reversed: the ICC may only supplement national criminal justice systems when there is inadequate domestic will or ability to investigate

---

1. Chief Prosecutor, International Criminal Tribunal for the Former Yugoslavia (hereinafter referred to as ICTY) and International Criminal Tribunal for Rwanda.

2. Legal Adviser, Office of the Prosecutor, ICTY. The views expressed in this note are those of the authors and do not necessarily reflect the views of the United Nations.

and prosecute. This amounts to the ICC having to show deference to State-initiated investigations. Apart from instances of Security Council referral of situations to the ICC, in cases of a referral 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 must ask the Court for permission to proceed. The Court, in turn, 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" (see Article 17).

This question of deference 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 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 in essence consider whether the domestic prosecution has been undertaken for the purpose of shielding the accused from criminal responsibility. In other words, the Prosecutor must prove a devious intent on the part of a State, contrary to its apparent actions. The Court will have to consider whether there has been undue delay in the State initiated prosecution, indicative of a lack of a genuine intention to proceed, or whether the domestic case is conducted independently and impartially, consistent with the expressed intention to bring the person to justice. In other words, is the State acting in good faith? 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, as we have seen, have primacy over domestic courts and which 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. This must be taken into consideration when the ICC Rules of Procedure and Evidence are drafted by the Preparatory Commission[3]. 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

3. The Commission is mandated to draft such Rules pursuant to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, F, 5, UN document, A/CONF.183/C.1/L.76/Add.14, 16 July 1998.

class action or a constitutional case involving systemic issues, than resembling a criminal case of any normal description.

State Acceptance Traverse[4]

Even before the ICC were to consider whether a case is admissible under the complementarity standard, specific preconditions to the actual exercise of jurisdiction must be met. Article 12 of the Statute regulates the requirement of State acceptance of the Court's jurisdiction and the scope of the acceptance. The Article flows logically from the treaty approach which the States in the United Nations General Assembly chose as the preferred mode of establishment for the permanent Court. But it represents a jurisdictional hurdle which does not exist in the *ad hoc* Tribunals, where the Security Council's application of Chapter VII imposed the mandates on all Member States of the United Nations without any legal acceptance or consent requirement.

Article 12(1) of the ICC Statute provides that a State which becomes Party to the Statute "thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5", which in its subparagraph (1) simply lists the four categories of crimes within the Court's subject-matter jurisdiction. This principle has been referred to as "inherent" or "automatic" jurisdiction. It is questionable how accurate or helpful such terms are, especially in the early stages of the ratification process. Moreover, Article 120 states that no reservations may be made to the Statute. This bar adds strength to the main rule of no opt-out from the Court's subject-matter jurisdiction. However, Article 124 contains a significant exception to that rule, for the war crimes provisions, which reads:

> Notwithstanding article 12 paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [on war crimes] when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 124 played a critical role in securing support for the final draft of the Statute[5] put forward by the Bureau of the Committee of the Whole of the Diplomatic Conference on its last day. The negotiations on a transitional opt-out regime were largely conducted outside the formal meetings of the Conference, involving in particular Governments with a record of active participation in international peace-keeping and -enforcement operations. Some delegations wanted the opt-out clause to be broadened so as to include crimes against humanity and cover a longer time period than seven years. Others were reassured by the introduction of a limited clause which they considered sufficient to accommodate concerns in their operative military establishments, where it is not normally expected that their forces will commit crimes against humanity, but possibly exceptional acts which may be investigated as war crimes. An additional protocol with a broader opt-out regime presented in informal discussions in Rome was at one stage described as a "substractional" protocol by a prominent European diplomat. That remark captured the position of the

---

4. This chapter draws on parts of chapter 2 of Morten Bergsmo: "The Jurisdictional Regime of the International Criminal Court" in *European Journal of Crime, Criminal Law and Criminal Justice* 4/98.

5. This is document A/CONF.183/C.1/L.76 with Add.1-14, 16 July 1998, often referred to as the "take-it-or-leave-it package" presented on the last day of the Conference.

overwhelming majority of negotiating States. In the end it proved significant that the European Union Member States managed to reach a consensus on what the limits of the scope of the opt-out regime should be.

Article 12(2) preconditions the exercise of the Court's jurisdiction on its acceptance by the territorial State or State of nationality. Either the State "on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft"[6] (the so-called territorial State) or the State "of which the person accused [sic] of the crime is a national"[7] must have become a Party to the Statute or accepted the Court's jurisdiction by a unilateral declaration in accordance with Article 12(3)[8]. This precondition does not apply if the Security Council has referred a situation to the Court pursuant to Chapter VII.

Article 12(2) was the subject of prolonged negotiations during the sessions of the Preparatory Committee and the Diplomatic Conference. Some States, led by Germany, argued that since States may exercise universal jurisdiction for the core crimes of genocide, crimes against humanity and war crimes, the ICC must also have jurisdiction with regard to these crimes independent of State acceptance of the Court's jurisdiction.[9] Other States rejected the doctrine of universality and insisted that it not be given any recognition by the Statute.

The compromise contained in the final proposal by the Bureau of 16 July 1998[10] had reduced the principle of universality and Korea's list[11] of four alternative States whose jurisdictional acceptance was required, to *two* alternative States: the territorial State or State of nationality. But even this significant tightening of the Statute's requirement was unfortunately insufficient to bring all States on board, albeit many States regretted the absence of the custodial State as the third alternative State. It is difficult to understand what the real concerns of the reluctant States were. In its statement of 9 July 1998, the United States delegation described its position:

> The fundamental question is this, will the Court be able to prosecute even the officials and personnel of a government without that government having joined the treaty or otherwise submitted to the jurisdiction of the Court? This is a form of extraterritorial jurisdiction which would be quite unorthodox in treaty practice – to apply a treaty regime to a country without its consent.[12]

---

6. Article 12(2)(a).

7. Article 12(2)(b).

8. States which make such declarations are obliged to co-operate with the Court without any delay or exception in accordance with Part 9 on State co-operation, see Article 12(3) i.f.

9. See A/AC.249/1998/DP.2, 23 March 1998. In this discussion paper submitted to the Preparatory Committee Germany stated: "Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every State can exercise its own national criminal jurisdiction, regardless of whether the custodial State, the territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice. ... [T]here is no reason why the ICC -- established on the basis of a Treaty concluded by the largest possible number of States -- should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes".

10. A/CONF.183/C.1/L.76/Add.2, op. cit., Article 12(2).

11. See A/CONF.183/C.1/L.6, 18 June 1998.

The fear expressed centres on the ability of the Court to target citizens of non-States Party. The degree of real exposure of nationals of non-States Party must be examined further. It is conceivable that war crimes committed by members of an international peace-keeping or -enforcement force could be so serious that it would be warranted for the ICC Prosecutor to become seized of the matter. If the territorial State is a Party to the Statute and the situation is not covered by the transitional opt-out clause in Article 124, the alleged offences committed by a member of an international force on that territory could be subject to the Court's jurisdiction even if his or her State of nationality is a non-State Party.

Furthermore, it is not inconceivable that the alleged perpetrator is taken into custody by the territorial State, although that may be very difficult in practice. Article 90(6) grants discretion to a territorial State which has received competing requests for surrender in such cases (from the Court and a non-State Party) regardless of whether the requested State is under an existing international obligation to extradite the suspected person to the requesting non-State Party. However, such international obligations may be based on status-of-forces agreements which customarily provide for exclusive criminal jurisdiction for the States sending troops to international peace-keeping operations.[13] Article 98(2) provides that the Court "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court" unless the State consents. Status-of-forces agreements have traditionally not been drafted with the existence of an international criminal jurisdiction in mind. It has already been suggested that such agreements would have to be reformulated in order to include surrenders to the ICC as well.[14]

Moreover, what may appear as statutory competence for a territorial State to go against the request of a non-State Party which has sent peace-keeping forces to its territory by transferring its suspected citizen to the ICC, can in reality be made a non-issue if the requesting non-State Party formally requests that the suspected person be transferred to its jurisdiction for domestic investigation and prosecution. If the non-State Party shows that it is able and willing to investigate the alleged perpetrator, the Court will have to rule the case inadmissible based on the principle of complementarity. Thus, it would seem that the complementary nature of the ICC effectively places beyond the reach of the Court all States (including non-States Party) which investigate and prosecute relevant offences diligently and in good faith. This makes it difficult to understand the real nature of the concern of those few States which objected to the compromise reached through Article 12(2) on the preconditions for the exercise of the Court's jurisdiction.

---

12. Quoted from the statement of the United States delegation on 9 July 1998 in the Committee of the Whole in connection with the deliberation on discussion paper A/CONF.183/C.1/L.53, 6 July 1998, put forward by the Bureau of the Committee of the Whole. The statement also suggested: "As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world and, if adopted in this Statute, would erode fundamental principles of treaty law that every government in this room supports".

13. See, for example, Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and Its Personnel, 21 and 23 November 1995, para. 7 (para. 8 provides for immunity from personal arrest or detention for NATO personnel as experts on mission); and United Nations Model status-of-forces agreement for peace-keeping operations, A/45/594, 9 October 1990, para. 47(b).

14. See Ruth Wedgwood: "Fiddling in Rome: America and the International Criminal Court" in *Foreign Affairs*, Vol. 77, No. 6, p. 22

Authority: the Obvious Elusive

States can paralyse the ICC not only by holding back acceptance of its jurisdiction and by pursuing domestic investigation and prosecution of the situation at hand, but also by not co-operating with the Court and its Prosecutor in the preparation of cases which fall within the Court's jurisdiction. The main principle of the Statute, as articulated in Article 99(1), is that the law of the requested State determines how requests for assistance from the Court will be executed. It is only if the execution will not contravene the law of the requested State that it can be done in the manner specified in the request, including "permitting persons specified in the request to be present at and assist in the execution process". In effect, the authorities of the requested State decide how the request for assistance is to be executed, not the ICC or its Prosecutor. Based on the experience of the two *ad hoc* Tribunals, merely allowing Tribunal investigators to be present at and assist in the execution process would fall far short of the requirements of effective international investigation and prosecution. How can cases be prepared effectively if the Prosecutor cannot control the gathering of evidence?

Moreover, Article 99 is meant to apply also to territorial States directly affected by the conflict and the alleged atrocities, not only to States far removed from the scene of the situation under investigation. Needless to say, this is likely to create insurmountable difficulties for case preparation in cases where there has not been a change in regime after the alleged atrocities. Elements of the domestic police in the territorial State in question will often have been involved in the commission of war crimes, and will not be inclined towards investigating those same crimes effectively and independently.

More disturbing is the idea of relying on State co-operation after a failed claim of inadmissibility. By finding a situation admissible the ICC concludes that the national criminal justice system in question is unwilling or unable to genuinely investigate and prosecute. It would seem unduly optimistic for the Court to send requests for assistance to the very same national authorities which it has declared unwilling or unable to investigate.

There are two limited exceptions to the restrictive regime of Article 99(1). First, the Prosecutor may execute requests directly on the territory of the requested State when that can be done without any "compulsory measures". This 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(4)). This is reasonable and practical as regards voluntary interviews with potential witnesses, but does not meet 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 Pre-Trial Chamber has determined that a State Party is clearly unable to execute a request for co-operation due to the unavailability of any authority or any component of its judicial system competent to execute the request for co-operation, it can authorise the Prosecutor to take specific investigative steps within the territory of that State without having secured its co-operation (Article 57(3)(d)).

The Security Council as the Court's Partner

Despite these two exceptions, it must be expected that the Security Council will want to override some statutory limitations by conferring upon the Prosecutor and the Court powers to obtain both co-operation 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 situations referred to the Court by the Security Council could adequately 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, extending its jurisdictional reach to the whole world and strengthening its financial basis.

In conclusion, the proposition that the ICC Statute represents a jurisdictional overreach cannot be founded in the legal realities of the Statute. The principle of jurisdictional primacy which the *ad hoc* Tribunals are based on has been reversed in the ICC Statute. States which are prepared to conduct *bona fide* investigation and prosecution of their citizens for alleged war crimes of international concern need not fear ICC involvement in the same situation. Moreover, we fail to see objective merit in the concern expressed by some that international peace-keeping will be adversely affected by the theoretical possibility of ICC prosecution of peace-keepers who are citizens of non-States Party. The complementarity principle applies in such situations as well, effectively limiting the circumstances in which the ICC can become seized of a situation. Additionally, there are obvious practical and other barriers to apprehension of suspected peace-keepers by territorial States hosting such forces.

It may be a more accurate proposition that the restrictive jurisdictional regime of the ICC Statute will make effective investigation and prosecution by the Court very difficult as long as a situation has not been referred by the Security Council under Chapter VII of the United Nations Charter as envisaged by Article 13(b) of the Statute. Such Security Council referrals do away with the requirement of State acceptance of jurisdiction under Article 12(2). It must also be expected that the Council will give the Court jurisdictional primacy *vis-à-vis* the relevant national judicial systems when it makes a referral as an enforcement action under Chapter VII. The Security Council's power to conduct international judicial intervention derives from the Charter and is unaffected by the ICC Statute. Legally speaking the Council can establish further *ad hoc* Tribunals if it is of the view that the efficacy of its judicial intervention so requires. Security Council empowerment of the ICC through Chapter VII referrals should include a reinforcement of the State co-operation regime. The Charter itself, in particular Article 103, facilitates a constructive partnership between the Security Council and the ICC. The suggestion that the powers of the Security Council to refer cases to the ICC and to broaden the scope of its jurisdiction to include non-States Party undermine the law of treaties disregards Charter provisions, Security Council practice and the jurisprudence of the *ad hoc* Tribunals.