9. The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions

HANS-PETER KAUL

I will concentrate my remarks on the compromise on jurisdiction as outlined earlier by Mauro Politi. Given this issue, some critical comments are unfortunately necessary with regard to the very restrictive approach of our American partners in Rome. But I speak on a firm factual basis as I can base myself on the authoritative report by Ambassador Scheffer in the January edition of the American Journal of International Law.[1]

At the outset, let me say that I speak as someone who continues to believe that the complementarity regime of the Statute is probably too strong and the jurisdictional regime is probably too weak. I will try to explain this view which is, of course, my personal one.

Relationship to National Jurisdiction[2]

As you are aware, the dominating principle is of course the principle of complementarity which establishes that the Court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction. *Sedes materiae* is Article 17 which establishes a reasonable balance between the ICC and national jurisdiction and national courts

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* Legal Service, Ministry of Foreign Affairs, Bonn.

[1] See David J. Scheffer, *The United States and the International Criminal Court*, in: AJIL, January 1999, Vol. 93, No. 1, pp. 12-22.

[2] The paragraph "Relationship to national jurisdiction" was contained in this statement but not read out because of time constraints.

which normally have priority. This principle of complementarity was later "strengthened" by Article 18 on preliminary rulings regarding admissibility, one of the so-called "safeguard provisions" which the American delegation forcefully pushed into the Statute. "Strengthened complementarity" sounds positive - in reality it means a considerable weakening of the Court. I invite all those who are not so familiar with the Statute to study Article 18 carefully and to understand all the procedural obstacles that a concerned State can establish by using this provision - especially if this State is not acting *bona fide*.

Jurisdictional Regime of the Statute

Maybe one can sum up the jurisdiction compromise[3] of the Rome Conference also like this: What it does is to provide for some kind of a Janus-headed double court with a double sword. But there are remarkable differences between the two faces of Janus.

One court is potentially very strong and universal and has a sharp jurisdictional sword with a long outreach.

The other court is quite weak and has only a jurisdictional sword, which is cumbersome and short.

Now, what is meant by this?

1. On one hand, you have Security Council-based, Security Council-triggered jurisdiction based on Article 13b of the Statute. Thus, the Statute contains the jurisdictional regime of a permanent ad-hoc tribunal which can be activated only by the Security Council, in particular by its permanent members. The only thing you need is a referral resolution by the Security Council under chapter VII of the Charter by which it refers a situation to the ICC. In such a case no further conditions apply, no further requirements are necessary. Moreover, this jurisdictional sword is so sharp and long that it does not matter whether the State concerned by the critical situation is a Party to the Statute or not.
2. On the other hand, you have the normal ICC jurisdiction - so to speak the one for the general membership of the Statute and of the United Nations. Here the activity of the Court can be activated or triggered either by a so-called State complaint or by the Prosecutor.

[3] For a report on the negotiations on jurisdiction before and during the Rome Conference see Hans-Peter Kaul: *Der Internationale Strafgerichtshof: Das Ringen um seine Zuständigkeit und Reichweite, in: Humanitäres Völkerrecht*, No. 3/1998, pp. 138-144. See also Hans-Peter Kaul, *Towards a Permanent International Criminal Court: Some Observations of a Negotiator*, in: Human Rights Law Journal (HRLJ) 18 (1997) p. 169 sequitur.

But the basic difference - which makes this jurisdictional sword so cumbersome and short is that you have the quite restrictive preconditions of Article 12[4] that either the State on the territory of which the crime was committed (territorial State) or the State of which the suspect is a national (nationality State) must be a Party to the Statute.

As many of you know, Germany had put forward a proposal[5] for a much more effective regime providing universal jurisdiction. I do not regret any more its non-acceptance because we had to recognize that this proposal enjoyed in Rome only the firm support by some 25 - 30 States.

But what I continue to deplore is the hard-to-explain disappearance or sudden death of the so-called South Korean proposal[6] replaced in the last two days by the current Article 12. The Korean proposal, which according to our notes was supported by roughly 80 percent of the States participating in Rome suggested that the Court could exercise jurisdiction if *any* of four possible States was a Party to the Statute (the territorial State, the State of nationality of the accused or of the victim or the custodial State). In particular the membership of the custodial State as a sufficient precondition for the exercise of jurisdiction would have made the general jurisdiction of the Court more effective. This is because in internal wars - the most common form of conflict today - the present compromise provision of Article 12 does not allow for any jurisdiction unless the State in question is a Party to the Statute. But if, in line with the Korean proposal the jurisdiction of the ICC could be established also by membership of the custodial State, this loophole would have been avoided. Such a provision would have meant that core crimes committed during a civil war could have been prosecuted, at least if suspects had been arrested in a State Party's territory. This way, territories of State Parties would have become a very dangerous place to be for perpetrators of such crimes. Now, how did this double compromise on jurisdiction come about in Rome?

Many explanations are possible. On my side, I will in all frankness mention two elements which were in my view decisive.

1. The very determined efforts of the American delegation to make the general jurisdiction, not Security Council-based-

[4] For a commentary see Sharon Williams, *Article 12 Preconditions to the exercise of jurisdiction*, in: Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article.*

[5] See UN Doc. A/AC 249/1998/DP 2. (The Jurisdiction of the International Criminal Court: An Informal Discussion Paper presented by Germany).

[6] UN Doc. A/CONF. 183/C. 1/L 6.

jurisdiction of the Court as weak as possible,[7] and to build in as many safeguards as possible against such a jurisdiction.

2. Ambassador Scheffer, in his interesting article in the American Journal has reported a second decisive factor: The fact that the P 5 in the critical final phase of the conference, at least for a decisive moment, closed ranks to put together a common, very restrictive proposal for the general jurisdiction of the Court.

This explains in my view to a large extent the disappearance of the Korean proposal, and explains also that the current jurisdictional regime as contained in Article 12 is relatively weak and is further weakened by the many other safeguard provisions that our American partners so successfully distributed practically all over the Statute.

A Last Remark

It is therefore an irony that the American delegation - in my view probably the most successful delegation in Rome - was not able to vote for the Statute. It is a further irony that some American representatives continue to oppose strongly the weak Article 12 provision.

In Rome a very high number of important concessions were made to the United States. Also we on the German side - a little bit against our convictions - accepted many American safeguard proposals - this just in order to accommodate the United States, our most important ally, and if possible, to get them on board.

Let me conclude with the hope that these facts are gradually better perceived, better understood and taken into account also by some in Washington.

I remain convinced: the International Criminal Court and its challenge to impunity will become reality.

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[7] The concrete expression of this American approach were US amendment proposals UN Doc. A/CONF. 183/C. 1 / L. 70 and UN Doc. A/CONF. 183/C. 1 / L 90 of 14 and 16 July 1997.