Chapter 4 The International Criminal Court – Its relationship to domestic jurisdictions

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1. Introduction

Before I go into my own remarks, let me confess, that I am still under the impact of the inspiring presentation of Professor Cassese[1] – thank you Professor Cassese, mille grazie, thank you very much!

In these remarks, I will briefly recall some basic aspects of the relationship of the ICC with domestic jurisdictions.[2] I think that indeed here in The Hague, in the "legal capital of the world" I can be brief. After all, we are at the seat of the ICC, in the Grotius Centre for International Legal Studies – so here, with an audience like you, I can safely assume that there exists already much knowledge and expertise with regard to the ICC system.

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1 For an earlier interesting contribution of Prof. Cassese see A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4 *JICJ* 434.

2 For an overview of the basic features of the complementarity principle, see J.T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 667; see also H.-P. Kaul, 'Construction Site for More Justice: The International Criminal Court after Two Years', (2005) 99 *American Journal of International Law* 370, at 384; H.-P. Kaul, 'Preconditions to the Exercise of Jurisdiction', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 583, at 607–616; H.-P. Kaul & C. Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court, Principles and Compromises', (1999) 2 *Yearbook of International Humanitarian Law*, 143, at 153 et seq.; M. P. Scharf, 'The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position', (2001) 64 *Law & Contemporary Problems* 67, at 110.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 31-38.

But, on the basis of my own efforts[3] to promote the ICC since 2003, let me share with you an experience that I have made time and again:

The situation can be quite different when you travel to other countries which have not yet joined the ICC, be it in Santiago de Chile, in Damascus,[4] in Beijing,[5] in Manila, in the US in general[6] or in Hanoi[7] or Sana'a, as the case may be. Needless to say, the situation there, the perception of the ICC and of the Rome Statute in these countries and capitals may vary considerably. But when you talk with relevant interlocutors and policy-makers there it is my experience that you may quite often be confronted again with one or more of the following:

Five years after the establishment of the ICC there may still be a quite limited understanding of the relationship of the Court with domestic jurisdictions.

Five years after the establishment of the ICC you may discover quite often a continuing lack of understanding of the jurisdiction and admissibility regime and of the cooperation regime of the Court.

Related to this there may also be continuing fears, critical arguments or mistrust that the ICC will present a threat to the sovereignty[8] of States or to the independence of national courts.

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3 See generally Kaul, *supra* note 2, at 370 et seq.; H.-P. Kaul, 'Breakthrough in Rome – The Statute of the International Criminal Court', (1999) 59/60 Law and St., 114; H.-P. Kaul, 'Towards a Permanent Criminal Court: Some Observations of a Negotiator', (1997) 18 *Human Rights Law Journal* 169.

4 See the consolidated version of a presentation made during the symposium "The International Criminal Court and Enlarging the Scope of International Humanitarian Law" held in Damascus on 13/14 December 2003 by H.-P. Kaul, 'Substantive Criminal Law in The Rome Statute and its Implementation in National Legislation', in International Committee of the Red Cross (ed.), *The International Criminal Court and Enlarging the Scope of International Humanitarian Law* (2004), 277.

5 See the consolidated version of a paper and statements presented at the Symposium on Comparative Study of International Criminal Law and the Rome Statute held in Beijing from 15-17 October 2003 by H.-P. Kaul, 'Germany: Methods and Techniques Used to Deal with Constitutional, Sovereignty and Criminal Law Issues', in Roy S. Lee (ed.), *States Responses to Issues arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (2005), 65.

6 See the consolidated version of the presentation given at the Judgement at Nuremberg Conference, Washington University St Louis, 28 September 2006 by H.-P. Kaul, 'The International Criminal Court – Current Challenges and Perspectives', (2007) 6 Global Studies Law Review 575; H.P. Kaul, 'The International Criminal Court: Key Features and Current Challenges', in H.R. Reginbogin, C.J.M. Safferling (eds.), *The Nuremberg Trials – International Criminal Law Since 1945* (2006), 245; Kaul, *supra* note 2, at 380 et. seq.

7 See the consolidated version of the presentation given at the Science Workshop – Hanoi, 25/26 October 2006 by H.-P. Kaul, 'The International Criminal Court – Key Features and Current Challenges', in Nguyen Ba Dien, Nguyen Xuan Son, Dong Thi Kim Thoa (eds.), *International Criminal Court and Vietnam's Accession* (2007), 27.

8 See R. Wedgwood, 'The Constitution and the ICC', in S. B. Sewall, C. Kaysen (eds.), *The United States and the International Criminal Court* (2000), 119; M. Morris, 'Comple-

Furthermore, it seems quite realistic to assume that there continue to be forces in this world with an interest to keep these questionable perceptions, these fears and criticisms of the ICC alive.

So the question arises: what needs to be done in such a situation? How can we secure more knowledge about the ICC system and a better understanding of the ICC especially in those countries which might join the Court as States parties?

Many answers are possible to this question. From my personal point of view there is very little choice other than to be patient, to explain time and again in particular the following points – and while most of these points will be familiar to you, hopefully the specific arguments and language I am using continually for this topic will be of some interest to you:

2. Jurisdiction and admissibility

The jurisdiction and admissibility regime of the ICC[9] has according to the Statute only a limited reach. The Court's jurisdiction is not universal. It is clearly limited to the most well-recognized bases of jurisdiction. The Court has jurisdiction over:

– Nationals of States Parties; or
– Offences committed on the territory of a State Party.

In addition, the Security Council can refer situations to the ICC, irrespective of the nationality of the accused or the location of the crime – and the first precedent for this is as you know Security Council Resolution 1593 on Sudan/Darfur.[10] The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.

The ICC is a Court of last resort. This is known as the principle of complementarity.[11] This principle, as provided for in particular in Article 17, is the decisive basis for the entire ICC system. It is also the key principle to determine the relationship of the ICC to national jurisdictions. As you know, this principle means: In normal circumstances, States will investigate or prosecute offences. The Court can only act where States are unwilling or unable genuinely to investigate or prosecute offences. The primary responsibility to investigate and prosecute crimes remains with the States.

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mentarity and Conflict: States, Victims, and the ICC', in S. B. Sewall, C. Kaysen (eds.), *The United States and the International Criminal Court* (2000), 195.

9 See Kaul, *supra* note 2, at 607 et. seq.; Kaul & Kress, *supra* note 2, at 152 et seq.; Scharf, *supra* note 2, at 110.

10 A. Zimmermann, 'Two steps forward, one step backwards? Security Council Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court', in P.-M. Dupuy et al (eds.), *Völkerrecht als Wertordnung – Common Values in International Law, Festschrift für/Essays in Honour of Christian Tomuschat* (2006), 681.

11 M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck Yearbook of United Nations Law* 591.

Furthermore, cases will only be admissible if they are of sufficient gravity to justify the Court's involvement.

The Rome Statute thus recognizes the primacy of national prosecutions.[12] It thus reaffirms State sovereignty and especially the sovereign and primary right of States to exercise criminal jurisdiction.

To explain this system in even more concrete and maybe more simple terms: the ICC is not a supranational court which can impose its decisions on member states. It also cannot function as an appeals court against the decision of national courts. Moreover, the ICC has no ability to demand that cases concerning genocide, crimes against humanity or war crimes, which are investigated or prosecuted by national courts, be transferred to the Court. In more technical language, the ICC thus has no parallel jurisdiction, it is not on the same level as national courts – in contrast for example to the ICTY, which has parallel jurisdiction and which therefore could request Germany to surrender Mr. Tadić to the ICTY.[13] One might say that the ICC is "subordinated" to national courts, subsidiary to the jurisdiction exercised by national courts. Whenever possible and appropriate, this must be clearly recalled and explained again to all concerned.

3. Cooperation

A further field of a crucial relationship between the Court and domestic jurisdictions is international cooperation[14] and judicial assistance pursuant to Part 9 of the Statute. When we assess the cooperation regime under the Rome Statute, we cannot fail to see that it is characterized by a decisive structural weakness: the Court does not have the competencies and means to enforce its own decisions.[15] Under the Statute, the ICC has no executive powers, no police force of its own or other executive units. It is totally dependent on full, effective, timely and predictable cooperation in particular from States Parties. This is true especially with regard to the decisive question of the

12 H.-P. Kaul, 'International Criminal Court', in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law* (forthcoming).

13 See Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Art. 8 of the Statute of the International Criminal Tribunal for Rwanda.

14 It should be noted that the following part of the contribution by the author dealing with international cooperation and judicial assistance could not be presented orally due to time constraints.

15 For a discussion of the cooperation regime in the Rome Statute, see Kaul & Kress, *supra* note 2, at 143; P. Mochochoko, 'International Cooperation and Judicial Assistance', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute- Issues, Negotiation, Results* (1999), 305; M. Perry & J. McManus, 'The Cooperation of States with the International Criminal Court', (2002) 25 Fordham International Law Journal 767; B. Swart & G. Sluiter, 'The International Criminal Court and International Criminal Cooperation', in H. von Hebel et al. (eds.), *Reflections on the International Criminal Court* (1999), 91.

effective execution of arrest warrants and surrender of suspects to The Hague.[16] One may safely assume that this structural weakness was foreseen and planned by the founders of the ICC also in the field of criminal cooperation.

Against this background, Part 9 of the Statute on international cooperation and judicial assistance seeks to ensure the functioning of the Court through the following main elements:

– States Parties have a general obligation to cooperate fully with the Court with respect to its investigations and prosecutions (Article 86).
– States Parties shall ensure that procedures are available under national law for all forms of cooperation specified in Part 9 (Article 88).
– States Parties shall consult with the Court without delay in order to resolve any problems which may impede or prevent the execution of requests (Article 97).

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 supranational and inter-state model of cooperation.

This regime as laid down in Part 9 of the Statute must be seen as a reality and a fact of life which cannot be altered easily – and also not at the Review Conference in 2010. It therefore must be accepted by all concerned, namely by the Court itself and in particular by the Office of the Prosecutor, the States Parties, international organisations and NGOs. All these actors are called upon to breathe life into the cooperation system under the Statute and to exhaust its possibilities for effective, speedy, unreserved and sustained cooperation. This is in itself an ongoing task and challenge, with many related necessities. Amongst them, let me highlight in particular three fundamental necessities:

Firstly, the joint development of a new and innovative system of best practices of international criminal cooperation: direct, point to point, flexible, without unnecessary bureaucracy, with full use of modern information technology and a fast flow of information and supportive measures.

Second, the gradual build-up and increasing strengthening of a solid and reliable network of efficient international cooperation based on trust and confidence between the Court and State Parties.

Thirdly, practical solutions for the making of arrests and the surrender of suspects to the ICC.

Let us now have a brief look at the respective roles of the main actors involved and desirable forms of cooperation and division of labour among them.

The first responsibility to make the ICC system of cooperation work lies with the Court itself, in particular with the Office of the Prosecutor. The Prosecutor and his office as the driving force of the ICC bear a special responsibility both for effective

16 See B. Swart, 'Arrest and Surrender', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 1639.

investigations as effective cooperation.[17] In this respect, let me share with you a saying which I have picked up from the young people at our Court. They say – and you can hear this quite often – : "The Office of the Prosecutor is the engine, systematic efforts for effective investigations and equally effective cooperation are the fuel for the entire Court".

What does this mean in terms of concrete criminal cooperation? The Prosecutor has a key interest in effective criminal cooperation. Part 9 of the Statute provides the legal framework for such cooperation. The Prosecutor and his office are called upon to exhaust the potential of this legal framework for firstly, the sustained build-up of an appropriate organisational capacity for cooperation issues which is large enough, which is as efficacious as possible and second, the ongoing development of efficient working methods and best practices in particular with regard to cooperation. Ideally, the Office of the Prosecutor should act as the intellectual driving force, as the creative mastermind for systematic and efficient forms of cooperation on the basis of a well-developed concept with clear goals and priorities.

Especially in the field of cooperation, it is obvious that the Court and the Prosecutor cannot be successful without active and steadfast support from States Parties, both in word and in concrete deed. The hopes and expectations at the ICC are that States Parties will support it as responsible joint owners by engaging in unreserved and systematic cooperation in all practical fields. Whether they will do so remains, as it were, a question to end all questions.

Again, what does this mean in more concrete terms? Here is a short list of concrete areas of enhanced cooperation:

- If not done already States should enact implementing legislation pursuant to Article 88 of the Statute that is sufficiently precise to allow for direct cooperation, without the need for additional arrangements.
- States should support the Court's general or situational policies publicly and also in direct contacts with other States and civil societies.
- States should provide contextual and background information and advice on interlocutors and suspects, particularly through relevant specialised government departments and agencies.
- States should provide intelligence, satellite images, analytical support and communications – and here I would like to add an example: just imagine for a moment how it would help the Prosecutor if US satellite images taken over Darfur would be made available to him…!
- States should establish fast and reliable communication channels including national focal points to ensure immediate cooperation.

In general, if States Parties are genuinely interested in further progress and lasting success of "their Court", the logical course for them is to continuously search for ways and means of strengthening cooperation with the Court.

17 Article 42 (1), Part 5 on the Investigation and Prosecution and Part 9 on International Cooperation and Judicial Assistance of the Rome Statute.

With regard to the third necessity for practical solutions for the decisive question, unresolved question of serving arrest warrants and surrendering suspect criminals to the ICC, the major responsibility belongs squarely to the States Parties.

It is obvious, that States Parties and all forces who support the Court cannot let down the Court in respect of arrest by adopting an attitude along the lines of "we have given you the money for the first budgets – now see for yourselves how you get the perpetrators before your Court…".

This will not work.

Let me recall that there are currently since 2005 four arrest warrants confirmed by Pre-Trial Chamber II with regard to suspects from Uganda[18]. Furthermore, there are since 2 May 2007 two arrest warrants concerning two high ranking Sudanese officials.[19]

As the Court does not have the authority to execute arrest warrants directly on the territory of states, arrests are primarily the responsibility of relevant territorial states. Securing arrests is a complex process that may require the commitment of significant police and military resources. Above all, it requires the necessary political will. While it is mainly for the territorial state to decide on arrest actions support by other or all States could involve:

Public and vocal support of the international community. Such support and pressure have been crucial to securing surrenders, both voluntary and coercive, to the ICTY, ICTR and the Special Court for Sierra Leone.

States should support territorial states, for example through sharing information on suspect tracking, through logistical support and specialised training for arrest operations.

States should investigate and eliminate networks of financial and logistical supply for perpetrators sought with arrest warrants.

States should create operational groups for coordinated military and diplomatic efforts to secure arrests.

The ultimate responsibility for the execution of arrest warrants on a national territory remains with the territorial state. But the territorial State has also the possibility to allow or to delegate arrest actions to third parties, such as eg. peacekeeping troops or police forces of other states. It is recognized under international law that arrest actions by such third parties are fully legitimate as long as they are consented by the territorial State. Many arrests of suspects prosecuted by the ICTY were made on the territory of Bosnia by peacekeeping troops, with the consent of Bosnia. Another example is the attack on a high-jacked Lufthansa airplane, liberation of its passengers

18 See Pre-Trial Chamber II, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, 27 September 2005; Warrant of arrest for Vincent Otti, ICC-02/04-01/05-54, 8 July 2005; Warrant of arrest for Okot Odhiambo, ICC-02/04-01/05-56, 8 July 2005; Warrant of arrest for Dominic Ongwen, ICC-02/04-01/05-57, 8 July 2005.

19 See Pre-Trial Chamber I, Warrant of arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr., 27 April 2007; Warrant of arrest for Ahmad Harun, ICC-02/05-01/07-2-Corr., 27 April 2007.

and arrests of German terrorists by German special police at the airport of Mogadishu in 1977, for which permission had been given by President Barre of Somalia.

4. Conclusion

In sum: both the jurisdiction and admissibility regime and the cooperation regime of the Rome Statute are of decisive importance for the relationship of domestic jurisdictions with the International Criminal Court. Emerging, hopefully constructive state practice by States Parties and equally responsible practice by the ICC with regard to the concrete interpretation and application of these two regimes will be crucial for the future of the Court. All concerned should also be fully aware that, as with the jurisdiction and admissibility regime of the Rome Statute, it was also with regard to the cooperation regime of the Court according to Part 9 of the Statute the wish of the Court's creators that States' sovereignty and the prerogatives of domestic jurisdictions remain prevailing. This explains the critical dependency of the Court on full, effective and reliable cooperation in particular from States Parties.

Against this background, a simple fact should also be borne in mind: already 108 States Parties – more to come! – have expressed their view through joining the Court that the Rome Statute does not violate their sovereignty, the independence of their courts or other important principles. In general, to join an international treaty or not is a sovereign right of a State, to become a State Party is a concrete exercise of this sovereignty.[20] When States join a multilateral treaty, they normally do it because they subscribe to the objectives and principles of this treaty. Thus, already 108 States from all regions of the world have joined the ICC because they share the wish to contribute to a better protection of human rights and to more international justice.

To come back to the topic of this panel session: more efforts, consistent efforts are necessary to ensure, on a worldwide level, a proper understanding of the relationship of the ICC with national jurisdictions.[21] We share the common goal to make the ICC universally understood and accepted. Let us continue to work together for this objective!

20 See the Preamble ("Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized") and Art. 6 ("Every State possesses capacity to conclude treaties.") of the Vienna Convention on the Law of Treaties of 23 May 1969.

21 See for example the campaigns of the Coalition for the International Criminal Court <www.iccnow.org> or the website of the ICC <www.icc-cpi.int>.