

Complementary jurisdiction and international criminal justice

by

OSCAR SOLERA

For the last ten years the notion of jurisdiction has been a central issue in many discussions on international humanitarian law. The reason is simple: in a world where the punishment of international crimes is essential to the maintenance of international peace and security, how do we reconcile international criminal jurisdictions with the jurisdiction of domestic courts in situations where both are competent to try the same case.

The question was not addressed in depth until the late 1980s. States previously applied general principles of criminal jurisdiction to determine which national court was competent to try an individual charged with acts amounting to internationally recognized crimes. In 1989, however, the creation of an international criminal court was proposed to the General Assembly of the United Nations by the delegation of Trinidad and Tobago, with the objective of combating what they considered to be one of the newly acknowledged international crimes: drug trafficking. The proposal, which was not new for the United Nations, echoed the earlier work of two special committees set up by the General Assembly to develop draft international criminal tribunal statutes in 1951 and 1953.

OSCAR SOLERA is a Ph.D candidate in International Law at the Graduate Institute of International Studies and Assistant at the Law Department of the University of Geneva. The author would like to thank Professor Georges Abi-Saab for his precious comments on the first draft of this article.

The International Law Commission (ILC) was charged by the General Assembly with the preparation of the new draft statute. Although the chances of success were not very high, a series of events between 1989 and 1992 cleared the way for the Commission's efforts: the creation by the Security Council of international criminal tribunals for the former Yugoslavia and Rwanda thus provided, for the first time since World War II, for the investigation and trial at the international level of individuals for violations of international humanitarian law.

In 1994 the ILC, in the course of its work on the Draft Code of Crimes Against Peace and Security of Mankind, presented the draft Statute of the International Criminal Court (ICC) to the General Assembly. The ILC's proposal was based on international precedents, such as the Nuremberg and Tokyo tribunals, the 1951 and 1953 draft statutes, the 1980 draft Statute for the Creation of an International Criminal Jurisdiction to enforce the Apartheid Convention, and the statutes for the Tribunals for Yugoslavia and Rwanda.

The draft ICC Statute was then analysed by an Ad Hoc Committee established by the General Assembly, in order to review the major substantive and administrative issues arising from the text. The work of the Committee, notwithstanding its failure to reach sufficient agreement to call a conference of plenipotentiaries, allowed States to grow used to the idea of creating an international criminal tribunal that would try individuals. As emerged in subsequent discussions, States were reluctant to accept the idea of having a completely independent international judicial body which could assess individual responsibility for international crimes. Many saw in this notion a potential loss of sovereignty.

The discussions and conclusions of the Ad Hoc Committee led to the establishment of a Preparatory Committee in 1996 to examine the ILC's draft Statute for the ICC, taking into account the different views, the remarks made by the Ad Hoc Committee and the written comments submitted by States and international organizations. To deal with the different issues, the Committee defined a list of subjects, including one designated as the

Complementarity and *Trigger Mechanism*. The idea was to discuss the proposed international court's relationship with domestic systems.

On submitting its final report in 1998, the Committee proposed a new version of the draft Statute that was then discussed at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The issue of complementarity was again included in the discussion, but was not taken up by any specific working group in its agenda and was thus left to the Committee of the Whole. The concept was finally accepted as proposed by the Preparatory Committee and explicitly incorporated in the Preamble and in Articles 1, 17, 18 and 19 of the Statute, although it is clear that it permeates the whole structure and functioning of the Court.

Complementary jurisdiction: domestic vs. international criminal jurisdictions?

To solve the problem of linkage between domestic and international jurisdiction the Security Council, in creating the International Criminal Tribunal for the former Yugoslavia (ICTY) and its counterpart for Rwanda, decided to vest both tribunals with what was called concurrent jurisdiction,¹ coupled with a "primacy clause".

The experience of the two ad hoc international tribunals led to further developments of the notion of jurisdiction. The primacy given to these tribunals gave rise to much controversy, since States felt that their sovereignty was being eroded. A new type of relationship was required in order to preserve State sovereignty without detriment to the goal of reducing impunity. It was therefore considered that the international court, instead of having primacy over domestic courts, should be complementary to such courts and intervene only when national criminal jurisdiction was not available or unable to perform its tasks.

¹ It should be considered that the concept of concurrent jurisdiction has been applied to inter-State relations for quite a few years.

For further developments, see Ian Brownlie, *Principles of Public International Law*, 4th edition, Clarendon Press, 1995, p. 317 ff.

Complementary jurisdiction dictates that the ICC would be competent to investigate and try a case, unless there is a State that claims jurisdiction. States continue to play the central role. But if they fail or find it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done. In particular, it is designed to operate in cases where there is no prospect of international criminals being duly tried in domestic courts. Emphasis is placed on the Court being a body which will complement existing domestic jurisdictions and existing procedures for international judicial cooperation in criminal matters, and which is not intended to exclude the existing jurisdiction of domestic courts or to affect the right of States to seek extradition.²

Proposed as an option by the ILC, the concept of complementary jurisdiction survived all stages of the negotiation process and was finally accepted and incorporated in the ICC Statute.

The notion of complementary jurisdiction is quite new. It stems from the increasingly important relationship between States and international organizations, for the role played by international entities other than States has forged a new conception of the international system and of the distribution of rights, responsibilities and tasks. In domestic law, it is not easy to foresee how the notion of complementary jurisdiction will develop. Internal legal systems usually possess

² In furthering the definition of complementarity, the Ad Hoc Committee on the Establishment of an International Criminal Court felt obliged to clarify how this concept should be understood within national jurisdiction. Once a clear definition of the concept had been established, it could then move on to determine the relationship between the national and international jurisdictions, giving special consideration to the nature of exceptions to the exercise of national jurisdiction, to determining the authority competent to decide on those exceptions, and to the timing requirements. National jurisdiction was seen as “not limited to territorial jurisdiction but also [as including] the exercise of

jurisdiction by the States competent to exercise jurisdiction in accordance with established principles and arrangements: thus, with respect to the application of military justice, it was not so much the territorial State that was important, but the State whose military was involved. The status-of-forces agreements and extradition agreements also had to be taken into consideration in determining which State had a strong interest in the issue and should consequently exercise jurisdiction.” Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 50th session, Supplement No. 22 (A/50/22), para. 39.

hierarchical structures in which judicial bodies have a more or less clear sphere of action, and it is difficult to imagine a judicial body failing to perform its function and the case being resolved by a substitute jurisdiction. At the inter-State level, the predominant trend appears to favour concurrent rather than complementary jurisdiction.

Admittedly, as awareness of the gravity of certain forms of conduct grows not only in domestic fora but also within the international community, States have realized that in certain circumstances their national apparatus or internal legislation is insufficient to deal with crimes that undermine the most essential principles of humanity. In order to preserve the ideal of justice, but above all to avoid impunity, States have consequently come to accept the fact that their systems, being imperfect, are in need of new mechanisms to complement them. The idea of international jurisdiction is thus viewed as a way to reinforce efforts against impunity, always with preservation of the ideal of justice in mind.

The creation of the ICTY shows that some States were finally ready to accept an international judicial body mandated to intervene in criminal matters, more specifically in those which, because of their gravity, have an international impact. However, as will be seen below, the relationship with a permanent international criminal court was not perceived in the same manner. Many States argued that the primacy of the ad hoc tribunals was due to their special link with the Security Council. This was not the case for the projected ICC, since it would be created by treaty. The idea of complementary jurisdiction appeared to be a good compromise for States that feared a limitation of their sovereignty.

The ILC and the definition of the ICC's jurisdiction

The main problem: the threat to sovereignty

The Commission clearly recognized that any proposal for the creation of an international court had to take into consideration resistance by States. Two problems had to be avoided: (1) that the Court did not undermine the sovereignty of States; and (2) that the mechanism to be adopted did not threaten the efforts which were being made in national systems to enact adequate legislation for the

punishment of international crimes under universal jurisdiction.³ Indeed, these two problems were discussed by State delegations within the Preparatory Committee. For instance, when analysing the importance of the Court and its relationship with national tribunals, some delegations referred unequivocally for the first time to one of the Court's main objectives. It was said that even if national authorities had the primary responsibility with regard to the crimes listed in the Statute, an international court was necessary to avoid impunity, and that this was so, notwithstanding the awareness that the Court should intervene only in those cases where the solution would not be satisfactory at the domestic level.⁴ Such a statement is far from being banal. It accurately expresses the situation that States were about to face during the Conference of Plenipotentiaries: did they want to preserve sovereignty at any price, even at the risk of condoning impunity for serious crimes against human rights and humanitarian law?

It should be noted that the Commission itself was convinced of the need to create an international criminal tribunal. For instance, in its report it dealt with the objections of certain States to the Court's establishment. One of the claims made by States was that the current system of international proceedings based on the rule of universal jurisdiction had worked fairly well, and that establishment of the Court could consequently restrict and hinder the effective application of that rule. In its reply, the Commission drew attention to the burden that the system of universal jurisdiction imposed on States, adducing that in certain circumstances it may lead to impunity due to external or internal pressures (blackmail, terrorist attacks, etc.), thus risking that the outcome of the trial may not be equitable.⁵

The ILC's proposals

The Commission proposed three options to the General Assembly: (1) an international criminal court with exclusive jurisdiction, according to which individual States should refrain from

³ *Yearbook of the ILC, ibid.*, paras 118-119.

⁴ Report of the Preparatory Committee on the Establishment of an Internat-

ional Criminal Court, A/CONF.183/2/Add. 1, para. 157.

⁵ *Yearbook of the ILC, 1992*, Vol. II, part 1, para. 7.

exercising jurisdiction over crimes falling within the competence of the Court; (2) concurrent jurisdiction of the international criminal court and domestic courts; and (3) an international criminal court having only review competence that allowed it to examine decisions of domestic courts on international crimes.⁶

The Commission saw some disadvantages in the second alternative, considering it contrary to uniformity of application. It also viewed as problematic the potential situation in which one party wished to initiate an action before a domestic court and another party wanted it brought before the international court. However, Special Rapporteur Thiam — who had prepared an earlier draft statute for the international criminal court⁷ — and the Commission deemed the possibility of having concurrent jurisdiction to be satisfactory and a good compromise. In fact, without expressly referring to the concept of complementary jurisdiction, the Commission indicated that in those cases where both domestic and international jurisdiction concur, preference would be given to domestic courts and the international court would have jurisdiction only if the competent States decide not to investigate.⁸

This solution was not uncontroversial within the Commission, especially for those who saw it as a source of conflicts of jurisdiction that may lead to paralysis and injustice. Some members therefore supported the idea of the ICC having exclusive jurisdiction, which would eliminate possible conflicts of jurisdiction between it and domestic courts. In this context it is important to note that some members of the Commission emphasized that the principle of

⁶ *Yearbook of the ILC*, 1990, Vol. II, part 2, para. 130.

⁷ In this first draft statute, the Special Rapporteur proposes the following text: “1. The Court shall try individuals accused of the crimes defined (...) in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction. 2. Conferment of jurisdiction (...) shall be required only if such States also have jurisdiction, under their domestic legis-

lation, over such individuals.” The Comments to these proposals state that: “(...) Here again, the Special Rapporteur has thus taken account of the comments of the members of the Commission who expressed concern that the criminal jurisdiction of States should be respected.” *Yearbook of the ILC*, 1991, Vol. II, part 1, paras 38-41.

⁸ *Yearbook of the ILC*, 1991, Vol. II, part 2, para. 114.

sovereignty was no longer considered to be an absolute principle as in classic international law.⁹

The Commission — following a proposal made by the Special Rapporteur — also proposed a fusion of options (1) and (2), according to the types of crimes to be investigated: for certain crimes the Court would have exclusive jurisdiction and for others concurrent jurisdiction.¹⁰ The problem with this proposal was to compile the list of crimes which would fall under each type of jurisdiction and on which views differ sharply.¹¹

The third option — the Court having powers of judicial review — also had some supporters, who argued that this solution dealt with the uniformity problem raised by those in favour of exclusive jurisdiction. In their opinion this alternative “would also perform a preventive role in that it would be an incentive to national courts to be more careful and watchful in applying the norms of international law”,¹² and could be acceptable to States if similar systems in all existing complaints procedures in international human rights law were taken into account. However, it was finally ruled out as an unrealistic option.¹³

The ILC’s draft Statute: the starting point

In Resolution 47/33 of 25 November 1992 the General Assembly requested the ILC to undertake the elaboration of a draft Statute for the ICC as a permanent judicial body. The Working Group established within the Commission to that effect presented its first report in 1993.¹⁴ In this first formal draft the Working Group adopted the principle of complementary jurisdiction, with the particular proviso that the Court may not exercise its jurisdiction unless all States that may be competent give their consent. In its commentary to Article 24 of the draft, the Working Group indicated which

⁹ *Ibid.*, para. 115.

¹⁰ *Yearbook of the ILC*, 1991, Vol. II, part 1, para. 41.

¹¹ *Ibid.*, para. 42.

¹² *Yearbook of the ILC*, 1991, Vol. II, part 2, para. 116.

¹³ *Yearbook of the ILC*, 1992, Vol. II, part 2, para. 57.

¹⁴ *Yearbook of the ILC*, 1993, Vol. II, part 2, Annex.

concurring States will have to consent for the Court to establish jurisdiction: (a) any State having jurisdiction under the relevant treaty; (b) any State party to the Genocide Convention of 1948; (c) the State of which the person accused of the crime is a national (the national State); and (d) the State on the territory of which the conduct in question occurred (the territorial State).

The Working Group also proposed that the Court should have jurisdiction, this time exclusive jurisdiction, when the Security Council refers a case to it. In this situation no State may validly claim jurisdiction over the Court's own jurisdiction.

Jurisdiction as proposed by the Working Group aroused immediate reactions from the General Assembly's Sixth Committee and from States, which saw the provisions as creating a great deal of uncertainty. The Working Group consequently proceeded to re-examine the draft Statute, presenting a final version in 1994. This time the ILC stated that the Statute had been drafted bearing in mind "the fact that the court's system should be conceived as complementary to national systems which function on the basis of existing mechanisms for international cooperation and judicial assistance (...)".¹⁵ The Commission's intention was to let the Court intervene in cases where there is no prospect of a potential criminal being tried in national courts. Emphasis was therefore placed on the idea that the Court would act as a body complementing existing national jurisdictions and existing procedures for international judicial cooperation. Hence, it was not intended to exclude the existing jurisdiction of domestic courts, or to affect the right of any State to seek extradition.

On the basis of these considerations, the Commission proposed a group of articles to delimit and make possible the complementary character of the Court's jurisdiction. Draft Articles 20, 25, 27, 34 and 35, among others, accordingly established the basic requirements for the Court to exercise jurisdiction. In the view of the Commission, "it is thus by the combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled

¹⁵ *Yearbook of the ILC, 1994, Vol. II, part 2, para. 81.*

controls on the exercise of jurisdiction that the statute seeks to ensure, in the words of the preamble, that the court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective”.¹⁶

These last words of the Commission were to become the accepted definition for complementary jurisdiction. From then on, this concept was adopted by the Ad Hoc Committee and the Preparatory Committee, and undoubtedly permeated the Statute as approved at the Rome Conference.

The concept nonetheless did not escape criticism. On the contrary, as will be seen in the following sections, both the Ad Hoc Committee and the Preparatory Committee felt obliged to refine it, tacitly recognizing that any decision on the jurisdiction of the Court would determine its whole functioning.

Is complementary jurisdiction the best solution?

Despite the ILC’s success in putting together the draft Statute in a fairly short time, taking into consideration observations made — in writing and at the General Assembly’s Sixth Committee — by members of the Commission and States, it fell short of representing a widely supported agreement. There was still great concern about the implications of creating an international judicial body.

In view of these worries, and notwithstanding the Commission’s recommendation to “convene an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court”,¹⁷ the General Assembly created an Ad Hoc Committee to review the draft.

Although the Committee did not reach sufficient consensus to call for an international conference after two years’ work, the discussions did enable States to analyse in greater detail the various aspects needing further consideration or deliberation. The Bureau of

¹⁶ *Yearbook of the ILC*, 1993, Vol. II, part 2, Annex, p. 37.

¹⁷ *Yearbook of the ILC*, 1994, Vol. II, part 2, para. 90.

the Committee proposed that the first issue that should be discussed was the concept of complementarity.¹⁸

In fact, the Ad Hoc Committee did make an in-depth analysis of the concept and implications of considering the Court as complementary to national tribunals. In its report to the General Assembly in 1995, the Committee tried to build the necessary theoretical framework within which complementarity should be understood. It is entirely conceivable that the intention was to provide States with sufficient elements to allow them to appreciate the advantages of such a system of jurisdiction.

Given that some agreement on formulating the terms of the ICC Statute had proved possible, and in view of “the educational value produced by the work of the Ad Hoc Committee”,¹⁹ the General Assembly decided to establish a Preparatory Committee to discuss the draft Statute prepared by the ILC and the comments made by States, paving the way for the International Conference of Plenipotentiaries.

Although there were doubts about the efficiency of the Committee in the first twelvemonth, especially its ability to agree on a text before the deadline set for it, it did manage to finish its work on time and its final report was duly presented in April 1998. It included the draft Statute for the ICC, the draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC, the draft Rules of Procedure for the conference, and the draft organization of work of the conference.

Despite the multiple obstacles faced by the Committee during its first year of work, it did, however, extensively analyse the issue of complementarity and its consequences for the Statute in terms of content and procedure.

¹⁸ Recommendations of the Bureau concerning the work of the Ad Hoc Committee during the period 14-25 August 1995, Informal Paper No. 5/Rev. 2.

¹⁹ Cherif Bassiouni, “Observations concerning the 1997-98 Preparatory Committee’s work”, in *Nouvelles Etudes Penales — The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, No. 13, *érès*, 1997, p. 9.

General considerations regarding the ICC's jurisdiction

The Ad Hoc Committee emphasized that the ILC and the Committee itself did not intend the proposed Court to replace domestic courts in criminal procedures. However, it recognized the fear of States that an abstract definition would lead to confusion and thus render the Court non-operational. It was consequently seen as desirable “to have a common understanding of the practical implications of the principle of complementarity for the operation of the international criminal court”.²⁰ According to a number of States, the concept should stress the presumption that national jurisdictions would have preference over the proposed court.²¹ Conversely, other States considered that the idea of concurrent jurisdiction should prevail, coupled with a primacy provision in favour of the international court.²²

It was also stressed that the ILC was not considering the creation of a hierarchy between the international court and domestic courts. Therefore, even if the international court were to determine that a domestic court's decision was ill-founded, this could not and should not be seen as the review power of a superior court. The underlying objective was to avoid a situation in which a criminal was shielded by a State in order to avoid his prosecution or a higher penalty. An additional situation in which it was thought that the international court would be entitled to intervene was if national

²⁰ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Official Records, 50th session, Supplement No. 22 (A/50/22), para. 30.

²¹ Delegations supporting this position argued that national systems have the following advantages:

“(a) all those involved would be working within the context of an established legal system, including existing bilateral and multilateral arrangements; (b) the applicable law would be more certain and more developed;

(c) the prosecution would be less complicated; (d) both prosecution and defence were likely to be less expensive; (e) evidence and witnesses would normally be more readily available; (f) language problems would be minimized; (g) local courts would apply established means for obtaining evidence and testimony, including application of rules relating to perjury; and (h) penalties would be clearly defined and readily enforceable. (...)”, *ibid.*, para. 31.

²² *Ibid.*, para. 32.

authorities failed, without justification, to take action in respect of a crime being committed.²³

One important consideration put forward is the need to safeguard the primacy of national jurisdictions while simultaneously ensuring that the international court's jurisdiction does not become merely residual. This consideration is very pertinent and should be seen as a call for caution: it is true that State sovereignty should be preserved, but what is the purpose of creating an international body with such limited scope of action that it would never get a chance to perform? Remember that, as mentioned above, the whole idea of establishing an international criminal court was based on an ideal of justice, on the conviction that when faced with heinous crimes that affect the international community, impunity was unacceptable. Now if all national systems were effective, efficient and just, as well as able to deal with such crimes, no international court would be necessary. However, some members of the international community nevertheless felt that that was not the case. So the warning is not superfluous. On the contrary, it is a reminder that at some point States deemed that there was a need to have such an international body, and that action taken must be consistent with that goal. The above consideration does not affect the fact that further clarification is required and that other related issues should be taken into account.²⁴

Exceptional character of the Court's jurisdiction

Both the Ad Hoc Committee and the Preparatory Committee reiterated that complementarity should be seen within the framework of the relationship between national jurisdiction and the jurisdiction of the international criminal court, and that the latter is to be considered as exceptional.²⁵ It was pointed out that, given the limited resources the proposed Court would have, it would be better to

²³ Report of the Ad Hoc Committee, *op. cit.* (note 2), para. 45.

²⁴ The Committee mentioned international judicial cooperation, surrender, extradition, detention, incarceration, recognition of decisions and applicable law.

²⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Supplement No. 22 (A/51/22), Vol. I, para. 154.

avoid bringing cases that could easily be dealt with by domestic courts. A better justification for this argument would be that in international law, the exercise of police power and penal law are deemed to remain within the competence of the State, and that the jurisdiction of the Court should therefore be considered as an exception to such State prerogative.²⁶ This idea was reinforced by the assessment of certain States that the establishment of the Court did not and should not diminish or serve as a substitute for the State's obligation to prosecute and punish those individuals suspected of having committed international crimes.²⁷ According to the said view, that remains an international obligation for all States, because those crimes affect the international community as a whole. But the foregoing assertion should not be understood as granting an absolute character to national jurisdiction, because this would lead to defining the jurisdiction of the Court in terms of what it could not do, instead of determining what it could do. It was therefore proposed that a specific article should be incorporated in the text of the draft.²⁸ The same proposal was made to the Ad Hoc Committee, but received insufficient support. The situation changed within the Preparatory Committee, where it was finally accepted.²⁹

According to the Preparatory Committee, the exceptions that would lead to intervention by the Court were to be deduced from the draft Preamble, which referred to cases where trial procedures in national criminal justice systems were not available or were ineffective.³⁰ States felt that the concepts of "available" and "ineffective" were unclear and thus might raise questions as to the standards for making such a determination. Reference was made in the Ad Hoc Committee to the ILC's intention when using these concepts, in the sense that the Commission "only expected the international criminal court to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts".³¹ This would

²⁶ *Ibid.*, para. 155.

²⁷ *Ibid.*, para. 156.

²⁸ *Ibid.*, para. 161.

²⁹ Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add. 1, p. 10.

³⁰ *Ibid.*, p. 9.

³¹ Report of the Ad Hoc Committee, *op. cit.* (note 2), para. 42.

preclude its intervention in the case of decisions made by domestic courts to acquit, to convict or not to prosecute, unless it is determined that they were not well founded.

Although it may seem a purely terminological matter, the notions of “unavailable” and “ineffective”, as referred to in the draft Statute, or “unwillingness” and “inability”, as provided for in Article 17.1(b) of the Rome Statute, may lead to ambiguity until the Court determines the standards to be applied. The provisions in Articles 17.2 and 17.3 of the Rome Statute are not very helpful in clarifying the above-mentioned terms. Instead, they add to the complexity of the problem by making reference to other subjective notions.³²

It was also considered that another exception to the exercise of national jurisdiction was the case of a State voluntarily waiving or relinquishing its jurisdiction in favour of the Court. Although this idea was contested by some States, which argued that it seemed inconsistent with the concept of complementarity, it appears to follow logically from that concept: the international court should intervene only in a situation of default by a competent national jurisdiction. Hence, if the competent State determines, for whatever reason, that it will not exercise its right of jurisdiction, it should be entitled to decline the exercise thereof and open the door to the ICC’s intervention in order to avoid impunity.

Finally, it was stated that these exceptions to national jurisdiction should be considered even before the ICC Prosecutor initiated an investigation, arguing that even the investigation might interfere with the exercise of national jurisdiction. At the same time, if a case was being investigated or was pending before a domestic court, the international court was expected to suspend its jurisdiction, although it could resume its investigation if the competent State desisted from

³² Paragraphs 2 and 3 of Article 17 refer to the criteria that the Court should apply in deciding the admissibility of a case. Reference is made to proceedings being taken “for the purpose of shielding” a person

from criminal responsibility, “unjustified delay” in the proceedings, or acting in a way which “is inconsistent with an intent to bring the person concerned to justice”.

its investigation, or if any of the exceptional circumstances mentioned above were established.³³

Who determines if the International Criminal Court has jurisdiction?

Once the possible situations in which the international court would be entitled to intervene had been determined, opposing views arose within the Ad Hoc Committee and the Preparatory Committee as to which body should decide whether the exceptional circumstances mentioned above were present. Some saw the approach adopted in the ICTY Statute as the rule to follow, considering that the said power needed to be vested in the Court itself. Reference was furthermore made to the provision in draft Article 24, which stated that the Court had to satisfy itself that it had jurisdiction. Since this is part of the powers of a judicial body, it is consequently up to the Court to determine whether it may commence an investigation or not. On the other hand, some delegations were against this proposal, considering that the precedent established by the ICTY was not representative of the current opinion of States, but that the Ad Hoc Tribunal was the product of very special circumstances. It was therefore proposed that standards be created which would apply to the diverse situations that may arise.

Three options were tabled to resolve these questions: (a) the Court would exercise its jurisdiction only with the consent of the States competent to investigate; (b) the Court would determine its own jurisdiction, according to a series of criteria expressly laid down in the Statute; and (c) the Court would be free to establish its own jurisdiction within flexible parameters.³⁴ Delegations saw the last two options as problematic because they did not require State consent for the opening of an investigation, a situation which they were not ready to accept. It was therefore considered necessary to study in depth the consequences of a refusal by a State of the Court's jurisdiction.³⁵

³³ Report of the Ad Hoc Committee, *op. cit.* (note 2), para. 51.

³⁴ Report of the Preparatory Committee, *op. cit.* (note 25), para. 162.

³⁵ *Ibid.*, para. 163.

Working on the details: admissibility, *non bis in idem*, and judicial cooperation

• Admissibility

The ILC felt that in the draft Statute submitted by it the principle of complementarity was given operational expression in, *inter alia*, Article 35, which referred to admissibility. In this regard the Preparatory Committee thought that the range of situations in which the Court would have to declare a complaint inadmissible was greater than those considered by the ILC.³⁶ Only interested States³⁷ would be able to raise questions of inadmissibility which, according to the Committee, would have to be submitted before the trial starts or, at the latest, when it is opened by the Court.³⁸

• The principle of *non bis in idem*

The Preparatory Committee also considered the importance of the principle of *non bis in idem* in determining the notion of complementarity. The prohibition on trying a person for a crime for which he or she has already been tried by the same or another judicial body has major implications for the Court's jurisdiction, because it may impede an effective application of justice: a domestic court may wish to shield an accused person from a higher penalty by imposing a lower penalty, thus preventing the Court from taking any action. The Committee therefore determined that the principle of *non bis in idem* should not be interpreted in a manner that would allow criminals to escape from effective prosecution.³⁹ At the same time, it was considered that the Court should not have the power of judicial review of judgments passed by domestic courts. Hence it was decided by the Committee, and so drafted in its April 1998 proposal, that the principle of *non bis in idem* would not be applicable to the ICC when the proceedings held in the domestic court were for the purpose of shielding the accused from criminal responsibility or were not conducted

³⁶ *Ibid.*, para. 164.

³⁷ Interested State was defined as "the State of which the accused is a national, the State(s) of which the victim or victims are nationals, the State which has custody of the accused, the State on which the alleged crime

was committed (State of *locus delicti*) or any other State which could exercise jurisdiction in respect of the crime". *Ibid.*, para. 167.

³⁸ *Ibid.*, para. 168.

³⁹ *Ibid.*, para. 170.

independently or impartially, or took place in a manner inconsistent with the intent to bring the person to justice.⁴⁰

- Complementarity and judicial cooperation: which jurisdiction has priority?

Under draft Article 53 concerning surrender and extradition, a problem would arise in the event of competing requests by the ICC (surrender) and by a State (extradition). This prompted the Committee to present three options for Article 87, paragraph 6.⁴¹ A person may, for instance, be requested by a State for a common crime and by the ICC for an international crime. Which jurisdiction has priority? Should the requested State extradite to the requesting State, provided there is a treaty obligation to do so, or should it surrender the suspect to the ICC? Some States argued that to give priority to the ICC would be inconsistent with the principle of complementarity, because it would make international jurisdiction prevail over national jurisdiction. Two remarks are called for here: first of all, consideration should be given to the relative impact of crimes under domestic law and international crimes. International crimes are those crimes the gravity of which shocks the international community; they are considered as offences against humankind. It thus seems appropriate that priority be given to the trial of forms of conduct that offend humanity over forms of conduct which, however terrible, will hardly reach the level of gravity of an international crime. Secondly, any confusion when talking about competing requests in a complementary jurisdiction framework should be avoided. If a domestic court claims jurisdiction over a person to be charged with international crimes, the ICC's jurisdiction would have to yield precedence to that court.

The result of the 50-year saga: the ICC Statute

Without any doubt, the work of the Ad Hoc Committee was of fundamental importance for acceptance of the ICC. It allowed States to examine in greater detail an idea that was more than fifty years old. However, the events that were taking place during the

⁴⁰ Report of the Ad Hoc Committee, *op. cit.* (note 2), p. 45.

⁴¹ *Ibid.*, pp 135-136.

nineties led States, probably for the first time, to recognize the need to create an international criminal tribunal, opening the path for an international conference that took place three years later.

The efforts made by the Preparatory Committee did clear the way for the International Conference of Plenipotentiaries, held in Rome in June and July 1998. At the same time, the final product of the hard work accomplished by the three bodies concerned — the ILC, the Ad Hoc Committee and the Preparatory Committee — set the tone for the discussions held at the Conference. The fact that the complementarity issue was included in the agenda of the Committee of the Whole, instead of being assigned to a specific committee, may be interpreted as signaling sufficient agreement. The details of the application of complementarity were more controversial. But in the end, the notion was adequately integrated in various provisions in the Statute (though this does not mean that their interpretation will go smoothly), establishing a new precedent in the field of humanitarian law and international criminal tribunals.

Defining complementarity: the Preamble and Article 1

As remarked above, complementarity is to be found in many different forms throughout the Court's procedure, and even in the investigation phase to be carried out by the Prosecutor.

First of all, the introduction to the complementary character of the Court was spelled out and emphasized in the Preamble:⁴²

“(...) Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions (...)”

⁴² The Ad Hoc Committee put forward two options for regulating complementarity: the first held that a statement in the Preamble to the Statute was insufficient and that more precision was therefore required in a specific provision to that effect; this was seen as a way of indicating the importance attached to this principle. An alternative view stated that

the principle of complementarity could be elaborated in the Preamble; the rules of interpretation of the Vienna Convention on the Law of Treaties would be sufficient to determine the context in which the Statute as a whole was to be interpreted and applied. Report of the Ad Hoc Committee, *op. cit.* (note 2), paras 35-37.

This statement is supplemented by the preceding paragraphs, which establish the grounds for complementarity and the manner in which it should be understood: international crimes shock the conscience of humanity, threaten the peace, security and well-being of the world, and should not go unpunished; States have the main responsibility for taking the required measures to avoid impunity; and an international criminal court is needed, for the sake of present and future generations, to guard them against the most serious crimes of concern to the international community as a whole.

As already proposed in the draft prepared by the Preparatory Committee, the Statute contains in Article 1 the formula establishing the Court's jurisdiction:

“An international Court (...) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. (...)”

Triggering the investigation

The preconditions for the exercise of its jurisdiction are spelled out in Article 12, under which the jurisdiction of the Court is automatically accepted by States that become party to the Statute. Hence, for the Court to exercise its jurisdiction, the following States must be parties to the Statute or must have accepted its jurisdiction in accordance with Article 12.3: (a) the territorial State (...); and (b) the national State.

Under Article 13, the procedure is triggered by three possible mechanisms: (a) referral by a State Party; (b) referral by the Security Council acting under Chapter VII of the Charter of United Nations, in which case the Court may initiate the investigation even if the national and territorial States have not accepted the Court's jurisdiction; and (c) by an investigation ordered by the Prosecutor on his or her own initiative.

Conditions for admissibility: when is a State unable or unwilling to prosecute?

- When can the ICC investigate?

The issue of admissibility arises at the point when the Court examines the suspect's judicial situation in terms of national jurisdiction: if the Court concludes that the matter has been submitted to a domestic court, it has to declare the case inadmissible.

It is interesting to see that the misgivings expressed by many delegations as to the Court's possible subjectivity when determining a State's unwillingness or inability to prosecute led to the definition of certain criteria which the Court must apply. Article 17 reflects the main elements of the relationship between the Court and domestic tribunals; it construes the jurisdiction of the Court in a negative manner — saying what it *cannot* do, instead of defining what it *can do*. Nevertheless, this article sets a pattern for the Court's intervention. For a case to be admissible, four conditions must be met, namely:

- that no competent State is investigating or prosecuting the person concerned for the same acts that constitute the international crime;
- that no competent State has decided not to prosecute;
- that the person concerned has not already been tried;
- that the case is of sufficient gravity to justify further action by the Court.

These conditions should be seen as cumulative, i.e. all must be met to allow the Court's intervention. The first requirement represents the situation in which the Court yields in favour of national jurisdictions. The second has elements of the first — primacy of domestic courts — and of the third, which relates to the principle of *non bis in idem*. The exception to which paragraph 17.1(c) refers is also covered by paragraph 17.2(a). The fourth requirement calls for a qualified intervention by the Court, in order to prevent it from being regarded as a substitute for domestic courts.

- A difficult decision: determining “inability” and “unwillingness”

More likely to be problematic are the exceptions to the aforesaid requirements. Certainly, affirming that a State is acting in bad faith or is unwilling or unable to prosecute is a serious accusation. If

the situation ever comes about in practice, it is sure to be a source of contention. The Statute foresees three types of State conduct that may lead the Court to rule that a State is unwilling to prosecute: (a) when the proceedings have been instituted to shield the person concerned; (b) when an unjustified delay is considered inconsistent with a genuine effort to bring a person to justice; and (c) when the competent domestic court is not independent or impartial. Regarding the inability to prosecute, the Statute refers to the lack of effective mechanisms at the national level to gather evidence and testimony or to arrest the accused.

The exceptions may consequently be classified as subjective and objective. The former are found in the first three situations, and the latter in the situations described in paragraph 17.3.

It is possible to interpret the first two elements of paragraph 17.2 as referring to the concept of bad faith. Thus shielding the accused or delaying indefinitely the proceedings may be ways of allowing the accused to go unpunished. The third situation may be due to external pressures, not only political but also, as mentioned by the ILC, threats by terrorist groups that may impede the proper course of the judicial proceedings.

As for the objective conditions, it is clear that a State without sufficient means to gather the necessary evidence or to arrest the accused may be deemed unable to carry out an adequate investigation. In such circumstances, the complementary jurisdiction of the ICC is required.

The question to be asked is whether all these conditions are consistent with the definition given for complementary jurisdiction. The answer seems to be in the affirmative, especially considering that Article 17 takes into account the various objectives set out in the Preamble, i.e. to avoid impunity, respect national jurisdictions and ensure that States adopt a responsible attitude towards grave violations lest they be divested, via exception, of primary jurisdiction over the case.

- Articles 18 and 19: procedural aspects of admissibility

Articles 18 and 19 complement the provisions laid down in Article 17. Article 18 establishes the procedure to be followed for

rulings on admissibility. It should be stressed that this article calls for close contact between the Prosecutor and the competent State regarding the progress of an investigation or a prosecution at the national level. This precaution is intended to avoid any unjustified delay in the proceedings.

On the other hand, Article 19 contains the rule — which many considered to be implicit in the judicial function — that the Court must establish that it has jurisdiction in any case brought before it. Its decision to admit a case may be challenged by the accused or by a State which has jurisdiction over the case, either because that State is already investigating the case or because its acceptance of the Court's jurisdiction was required under Article 12.

A synopsis of complementarity in the ICC Statute

Without entering into a procedural analysis, the following outline should clarify this first stage of the proceedings, in which the issue of complementarity plays a more visible role:

- Initiation of an investigation: the Prosecutor is in charge of this part of the proceedings and will take such action when a situation is referred to the Court by a State Party or by the Security Council, or on his or her own initiative. The first and latter instances require that the territorial State or the national State have accepted the Court's jurisdiction (Arts 9, 12, 13, 14 and 15).

- The Prosecutor will notify his intention to open an investigation to all States Parties and to those States which would normally exercise jurisdiction. Within one month, these States must inform the Court whether or not they are investigating or have investigated the acts that constitute the subject-matter of the Court's intervention. If this is so, the Prosecutor must defer to the State's investigation (Arts 15, 16 and 18).

- If the Prosecutor finds that there is a reasonable basis to proceed with an investigation, he or she must submit to the Pre-Trial Chamber a request for its authorization. The Prosecutor may request this authorization even if the case is already being investigated by a State (Art. 15).

- The Pre-Trial Chamber may authorize the Prosecutor to proceed with the investigation. This decision will not prejudice the subsequent determination of the Court regarding the jurisdiction and admissibility of the case. The Pre-Trial Chamber may also refuse the Prosecutor's request, but that will not preclude a subsequent request based on new facts regarding the same situation. All these decisions are subject to appeal to the Appeals Chamber by the State concerned or by the Prosecutor (Arts 18, 19, 57 and 58).

- If there is sufficient evidence, the Prosecutor will request the Pre-Trial Chamber to issue a warrant of arrest or summons to appear. Upon the surrender of the person to the Court, the Pre-Trial Chamber must hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. Once the charges are confirmed, the Presidency must constitute the Trial Chamber which will be responsible for the trial (Arts 58 and 61).

- In order to proceed, the Court must satisfy itself that it has jurisdiction over the case, based on the criteria set forth in Article 17. Its decision may be challenged by the accused or by a State which has jurisdiction over the case. If the challenge is made before confirmation of the charges, it will be referred to the Pre-Trial Chamber. Otherwise, it will be referred to the Trial Chamber (Arts 17, 19 and 82).

This is the crucial moment when the Court will examine its relationship with national jurisdictions in order to determine its own jurisdiction, in other words, when complementarity comes to the fore.

Other issues closely related to complementarity which emerge later in the proceedings, such as judicial cooperation, extradition and surrender, and enforcement of sentences of imprisonment, are fields in which complementarity may also be discovered. Nevertheless, it is undoubtedly in the initial phase of the proceedings that complementarity plays its central role, because consideration of it then coincides with that moment, so feared and so awaited, when the Court will evaluate whether or not it may commence its investigation or trial. Time will tell whether practice confirms this view or not.

Concluding remarks

Explaining how delegations at the Rome conference arrived at the text which was finally approved is not an easy task. One can speculate and say that agreement before the conference was sufficient and that the negotiations went smoothly. It is evident, however, from the media coverage of the conference, and from the attitude of at least one powerful State towards the final Statute, that this was not the case.

A plausible answer is that States foresaw even before the Rome conference that complementarity was the only solution that could reconcile their interest in protecting national sovereignty with their altruistic concern about international crimes and impunity. At least one thing was sufficiently clear: a large majority of States wanted an *international* criminal court and supported the idea of its establishment. From the diverse proposals for the Court's jurisdiction they were able to see that complementary jurisdiction could be a good compromise.

What conclusions can be drawn from this process of almost ten years' duration?

- Humanitarian law has reached a stage where most States agree that it is in the interest of the entire international community to try individuals suspected of having committed grave violations of human rights and humanitarian law. It became clear, first during elaboration of the Draft Code of Crimes against Peace and Security of Mankind and then through the ILC's work on the establishment of the ICC, that in many cases States are unwilling or unable to prosecute at the national level. The only available solution was to vest an international body with the power to prosecute individuals.

- The second point is closely linked to the first. States recognized their concern about impunity, especially when dealing with international criminals. In view of the many problems that this type of trial posed for domestic courts, this new awareness of their obligations spoke in favour of an international forum which would represent the interests of the international community.

- The concept of sovereignty still has a great impact on international law and international relations; States are not yet ready to give up these privileges. Faced with the necessity of dealing with international crimes, States could therefore accept a permanent international court only if it acted on a limited basis, i.e. when the competent States agree that appropriate action cannot be taken at the national level. States are not willing to allow an international body to impinge on their sacrosanct judicial authority. The sole way to gain acceptance for such a body was to create a mechanism that would complement national jurisdictions, thus a complementary jurisdiction.

- The concept of complementary jurisdiction is not trouble-free; when, how, under what circumstances this mechanism will be triggered is still subject to further definition. Practice will certainly refine and adapt what as yet only exists in writing. But the general aspects of complementary jurisdiction have been clarified at each stage of the negotiations: the ILC, the Ad Hoc Committee and the Preparatory Committee devoted a considerable amount of time to working out a clear-cut concept. And without any doubt, the Court itself will contribute to further clarification of its jurisdiction.

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Résumé

Juridiction complémentaire et justice pénale internationale

par OSCAR SOLERA

Cet article analyse le développement de la notion de juridiction complémentaire proposée par la Commission de droit international et adoptée dans le Statut de la Cour pénale internationale compte tenu de la nécessité de renforcer le système de justice criminelle pour éviter l'impunité. L'étude porte sur les discussions de fond qui ont eu lieu au sein de la Commission de droit international, du Comité ad hoc établi par l'Assemblée générale pour réviser le projet proposé par la Commission, et du Comité préparatoire des Nations Unies pour la création d'une cour criminelle internationale. Le résultat obtenu à Rome est surtout le produit de l'accord des États sur le besoin de la

communauté internationale de disposer d'un organe juridictionnel international permanent chargé de statuer sur la responsabilité individuelle relative aux crimes de caractère international. Mais cet organe doit permettre à la juridiction pénale nationale compétente de s'exercer au préalable et n'interviendrait qu'en l'absence d'une telle juridiction ou dans l'incapacité de celle-ci d'éviter l'impunité.

