

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON- PARTY STATES*

(Conference Remarks)

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The Rome Treaty for an International Criminal Court (ICC) provides for the establishment of an international court with jurisdiction over genocide, war crimes, and crimes against humanity. The Treaty provides that, in some circumstances, the ICC may exercise jurisdiction even over nationals of states that are not parties to the Treaty and have not otherwise consented to jurisdiction. Specifically, Article 12 provides that, in addition to jurisdiction based on Security Council action under Chapter VII of the United Nations Charter and jurisdiction based on consent by the defendant's state of nationality, the ICC will have jurisdiction to prosecute the nationals of any state when crimes within the Court's subject matter jurisdiction are committed on the territory of a state that is a party to the Treaty or that consents to ICC jurisdiction for that case. That territorial basis would empower the Court to exercise jurisdiction even in cases where the defendant's state of nationality is not a party to the Treaty and does not consent to the exercise of jurisdiction.

The United States has objected to the ICC Treaty on the ground that, by purporting to confer upon the Court jurisdiction over the nationals of non-consenting non-party states, the Treaty would bind non-parties in contravention of the law of treaties. This objection has given rise to a heated controversy. The question of ICC jurisdiction over non-party nationals poses a genuine dilemma. There are legitimate and very important concerns on each side of this matter.

Let me tell you what I think is at stake. On the one hand, there is the pressing need for justice in cases of genocide, war crimes, and crimes against humanity. That need is pressing, if for no other reason, because of the interest of victims in seeing justice done. There is also the important and related fact that the sense that justice has been served may help to break cycles of violence in societies in which revenge and retaliation may otherwise take the place of trial and punishment. Those reasons are enough to qualify the need for justice as a pressing need. Perhaps prosecutions also would deter future crimes of mass violence. That, we do not know. Either way, the need for justice is a

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compelling one, and the ICC may make some important contribution in that cause.

This brings us to the issue of the ICC's jurisdiction. The crimes of genocide, war crimes, and crimes against humanity are often committed with the collusion of governments. Those governments are unlikely to consent to ICC jurisdiction over their nationals for crimes that the government supported or condoned. The Rome Treaty responds to that serious problem by providing that, in some cases, the Court will have jurisdiction even without the consent of the defendant's state of nationality and even if that state is not a party to the Treaty. This sort of jurisdiction makes some sense. It makes sense to give the Court robust jurisdiction lest a rogue regime should be able to shield its nationals from justice. And, when viewed from this perspective, it is hard to see how any state could legitimately object. If the Court's subject matter jurisdiction is limited to established international crimes and the process of the Court is fair, then no state — party or non-party — should have legitimate objections to the Court's exercising jurisdiction over its nationals.

This reasoning might cause us to see ICC jurisdiction over non-party nationals as relatively unproblematic were it not for the fact that the ICC will inevitably hear two different types of cases. There will be cases involving strictly a determination of individual culpability, and cases that will focus on the lawfulness of the official acts of states. There will, in ICC cases, always be an individual defendant in the dock. But if the conduct forming the basis for the indictment was an official act taken pursuant to state policy and under state authority, then the case will, in effect, be an adjudication of the lawfulness of the state's acts and policies. In such cases, the state whose conduct is questioned might acknowledge the conduct and maintain that the conduct was lawful; or the state might deny that the alleged acts in fact occurred. In either event, the case will represent an adjudication of the lawfulness of a state's conduct and, in that sense, will constitute a legal dispute between states.

For individual culpability cases, the ICC will share much in common with other criminal courts. For official acts cases, the ICC will resemble much more an international court for interstate dispute adjudication. For the former, robust jurisdiction is appropriate for the reasons I have touched on. For the latter, flexibility and consensuality of jurisdiction are important, as reflected in the jurisdictional regimes of other international courts that adjudicate interstate disputes, such as the ICJ, the Law of the Sea Tribunal, and the WTO dispute settlement system. The ICC, thus, requires a jurisdictional structure that is both sufficiently aggressive to make the Court effective in the prosecution of criminals and also sufficiently consensual to make the Court a suitable institution for the adjudication of international disputes. It is this need for the ICC's jurisdictional structure to accommodate these two conflicting requirements that creates our dilemma.

Let me focus for a moment on why compulsory jurisdiction to adjudicate interstate disputes in an international court may raise serious concerns for states. Particularly where an interstate dispute concerns an area of unsettled law, litigation may entail more risk than states can be expected to accept. If the subject matter is important and the law is unsettled, allowing a third party to, in effect, decide the binding law of the matter is a very perilous course of action. Relatedly, compulsory jurisdiction may be problematic insofar as compromise outcomes of various sorts may be desirable in interstate dispute type cases, but are unlikely to emerge from adjudicated rather than negotiated resolutions. It is also important to recognize here that the decisions of an international court will be more authoritative than would those of any individual state's courts. Thus, an international court would have the power to create law in a manner disproportionate to that of any state. This may be more law-making power than some states are comfortable granting to one international institution – especially in sensitive areas involving military activities and international security. Moreover, the law developed by an international court would not be susceptible to revision or reversal through any legislative process, as would be the case in municipal justice systems. States may have legitimate concerns about the compulsory jurisdiction of such a court. Finally, states would need to be more concerned about the political impact of adjudications before an international court than before an individual state's courts. An even-remotely successful international court will have significant prestige and authoritativeness. The political repercussions of such a court's determining that a state's acts or policies were unlawful would be very substantial indeed, and categorically different from the repercussions of the same verdict emerging from a national court. States may therefore be put to a choice, in some cases, of either revealing sensitive data as defense evidence or withholding that evidence and thereby risking severe political costs in case of a guilty verdict.

These are, in very abbreviated form, the legitimate and significant concerns that may give states pause in accepting ICC jurisdiction. This is not to say whether states ultimately should or should not accept ICC jurisdiction. Rather, the point is that the implications of jurisdiction exercised by an international court are very different from those of jurisdiction exercised by national courts. The two kinds of jurisdiction therefore raise very different concerns for states.

Now, you may say, "It is true that there are these political and policy considerations at stake for states, but those are not *legal* bars to jurisdiction." You may say, "The *lawfulness* of ICC jurisdiction over non-party nationals is unproblematic, and so states — whatever their policy concerns — are obliged to accept that jurisdiction." Here is where I believe that an error is made.

ICC jurisdiction over non-party nationals has been justified as a form of delegated jurisdiction. The theory is that states parties, in effect, delegate their

universal or territorial jurisdiction to the ICC. However, there are very significant differences in the consequences and implications of ICC jurisdiction as distinct from state jurisdiction, in the ways I have just described. For that reason, it should not be quickly presumed that the option of delegating a state's jurisdiction to an international court is necessarily part of the customary law of universal or territorial jurisdiction. Because different state interests are affected by state jurisdiction and international jurisdiction, consent to or acquiescence in state-exercised jurisdiction is not equivalent to consent to or acquiescence in jurisdiction exercised by an international court.

The international law of jurisdiction (universal, territorial, and so on) is customary law. It has developed through the consent, acquiescence, and practice of states. Its legitimacy rests precisely on the fact that, in the course of the law's development, states have accepted a particular jurisdictional principle *as law* and have acted accordingly.

Unsurprisingly, states decide whether to accept the development of particular principles or rules of law based on the implications of those rules for states' interests, however they define those interests. If the concept of the "incremental development of customary law" is to mean anything coherent, it *must* mean that a development can be considered incremental only if the development would not fundamentally change the impact of the law on states' interests. Customary law, if it is to maintain any claim to legitimacy, cannot proceed by ambush and surprise. We cannot say to states,

This "development" of customary law was unforeseeable and not part of what was anticipated as the law developed through state practice and *opinio juris*. In fact, this "development" has a significantly different impact on your interests than the rule that it developed *from*. But, nevertheless, you are now bound to accept this innovation because it has been deemed incremental.

That would not be legitimate, and it also would not work.

This is why I believe that the concerns that states may have with ICC jurisdiction are not "mere policy concerns" but are, in fact, of fundamental *legal* significance. It cannot be said that the option of delegating states' jurisdiction to an international court is already an established feature of the customary law of universal or territorial jurisdiction. And the fact that the impact of international jurisdiction on state interests is significantly different from the impact of state-exercised jurisdiction means that we cannot label the move to include delegability as an "incremental development."

There is no instance of prior state practice involving the delegation of states' jurisdiction to an international court without the consent of the defendant's state of nationality. The International Criminal Tribunals for the

former Yugoslavia and Rwanda base their jurisdiction on Security Council powers under Chapter VII. The Tokyo Tribunal after WWII based its jurisdiction on Japan's consent. And the Nuremberg Tribunal based its jurisdiction on the consent of the Allies, acting as the German sovereign. As the Nuremberg judgment stated:

[T]he making of the Charter [establishing the Nuremberg Tribunal] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.

Thus, the Nuremberg Tribunal relied on the right of the Allies to exercise sovereign prerogatives in Germany as the basis for its jurisdiction. There are excellent arguments for the view that the Nuremberg Tribunal should *not* have done so. But that is what it did. Its jurisdiction may have been flawed for that reason — but that would mean only that its jurisdiction was flawed, not that the jurisdiction rested on some basis other than the one stated by the court.

The net result is that none of the four modern international tribunals has exercised the delegated jurisdiction of states in the absence of consent by the defendant's state of nationality. Therefore, there appears to be no prior instance of state practice to support the ICC's exercise of universal or territorial jurisdiction delegated to it by states without the consent of the defendant's state of nationality.

Now, you may say, "You're quibbling. If each of the states parties to the ICC Treaty would have the right to prosecute these defendants, then surely those states can get together and prosecute them in an international court which they create." You may say, "Even if there are no prior instances of state practice of such delegated jurisdiction, the innovation is 'incremental' - states can prosecute in their national courts or in an international court — it's such a minor change."

But, here is precisely where we see that, from the point of view of states' interests, the implications of the innovation are very significant and not minor or incremental at all. States, for the reasons I have briefly elaborated, may be unwilling to have their interstate disputes adjudicated by an international court, even while those same states may accept universal and territorial jurisdiction and, thus, accept the prosecution of their nationals in the courts of other individual states.

Thus, when we speak of the delegation of states' jurisdiction to an international court, we are speaking *not* of an "incremental development" but of a substantial and significant legal change. Such substantial changes cannot and should not be accomplished through labeling them as minor or incremental

developments in customary international law. An attempt to characterize a major change as a minor change is bound to meet with resistance, just as we have seen in the ICC context.

Before closing, I would like briefly to address two different arguments, sometimes raised in this context, that I think we probably need not detain ourselves with. I will mention them here in passing, though I say much more about them in my paper.¹ The first of these arguments is that the Rome Treaty has itself created new customary law permitting jurisdiction over non-party nationals. That claim seems to me to be very premature, for reasons that I take to be self-evident. If I am wrong about that and there is disagreement on the point, I would be happy to discuss it.

The other argument sometimes made is that the terrorism treaties demonstrate that states can create otherwise non-existent jurisdiction in treaties and then apply that jurisdiction to non-parties. The terrorism treaties do, indeed, provide that states parties will have, in effect, universal jurisdiction over the crimes covered in the treaties. But, as I discuss at some length in the paper,² this does not indicate that states can create jurisdiction that they would not have individually by signing a treaty, and then impose that jurisdiction on non-parties. The better interpretation of the significance of the terrorism treaties is that those treaties, in effect, propose new customary law. Non-party states can respond to that proposal by acquiescing in or objecting to the jurisdiction. If they acquiesce, then the jurisdiction defined in the treaties will, in time, become customary law. If non-parties object, then the bid to create new custom will likely fail. So far, in the case of the terrorism treaties, we have seen acquiescence. That has not been true regarding the jurisdictional provisions of the ICC Treaty — and therein lies the relevant and crucial distinction. Once again, I would be happy to discuss the terrorism treaties further but, in truth, I think that they are off point.

What I think *is* really relevant here, in conclusion, is that there are meaningful concerns about the compulsory adjudication of interstate disputes that might cause a state to reject the jurisdictional regime of the Rome Treaty. These concerns cannot, I believe, be dismissed as being non-legal in character. Rather, the fact that the ramifications of international jurisdiction and state-exercised jurisdiction are very different is entirely relevant to and, indeed, calls sharply into question, the lawfulness of ICC jurisdiction over non-party nationals.

1. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, forthcoming 63 LAW & CONTEMP. PROBS _____ (2000).

2. See *id.*

For these reasons, I believe that, as I began by saying, what we have is a genuine dilemma — not excuses or pretexts, but legitimate concerns on each side. I feel deeply, as we all do, the need for enforcement of the body of law intended to reduce the human suffering caused by genocide, war crimes, and crimes against humanity. I want for us to make progress on the particular obstacle to an effective ICC that we are considering today. I believe that we stand a chance of doing so only if we see realistically the valid concerns on both sides of this issue and take those concerns seriously into account in examining whether there may be a workable resolution.