The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues

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SUMMARY

THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT – CERTAIN CONTESTED ISSUES

The subject of the present dissertation is the analysis of the territorial parameter of the jurisdiction of the International Criminal Court (hereinafter: the ICC) under article 12 ICC Statute. According to this provision, the Court shall have jurisdiction if "the conduct in question occurs" in the "territory of" a State Party to the Rome Statute. This topic is approached on the basis of the positivist tradition of public international law. The main research questions are formulated as follows:

a) How could jurisdictional questions concerning criminal activity, which cannot be isolated in a specific territory, be addressed by the Court?
b) How could the Court tackle jurisdictional questions under article 12(2)(a) when the crimes allegedly occur in occupied territories?

The methodology used is bibliographical research of the relevant literature and case-law on the topic and its analysis through deductive reasoning and legal analogy. The main perspective is that of public international law, as opposed to a criminal law, criminology or sociology.

Chapter 2 lays down certain important definitions of terms used in the present work, the basic distinctions of criminal jurisdiction on the basis of territory, (subjective territoriality, objective territoriality, ubiquity and the effects doctrine) and finally it establishes as the main framework of analysis Mann's doctrine of jurisdiction.

In Chapter 3, the *travaux preparatoires* of article 12 are analyzed, while Chapter 4 lays down the main instruments for the interpretation of this provision, with emphasis on the teleological interpretation for article 12(2)(a) and the argument that the principle of legality under article 22 ICC Statute (*nullum crimen nulla poena sine lege*) is not applicable for the interpretation of article 12(2)(a).

Chapter 5 of the present work begins the analysis of article 12 by attempting an interpretation of the terms 'conduct in question' in that provision. In the first part thereof, certain basic principles are provided. One of the basic tenets of this chapter – and indeed of the entire work – is that the question of interpretation of this provision is one that falls squarely within the Court's *compétence de la compétence* as an inherent power of the Court. Drawing from the theory of the law of international organizations, this implies by logical necessity that, since the power of the Court to decide on its own jurisdiction stems exclusively from its nature as a judicial institution, its application cannot be precluded or delimited by arguments rooted in the doctrine of delegation of authority. Accordingly, the position in this work is that arguments seeking to restict the scope of interpretation of article 12 claiming that, if a certain interpretation of territoriality is not applicable in the system of a State Party, then the Court does not have the authority to apply it, should be dismissed as this power exists independently of state consent. At the same time, however, this power is not without limits. It does not mean for example that the Court can interpret Article 12(2)(a) in such a way as to include for example universal jurisdiction, effectively amending the Statute. It does indicate however that the Court is entitled to a larger margin for interpretation than the one it currently employs – or is currently willing to acknowledge. It is therefore submitted that the Court may interpret this provision in accordance with permissible interpretations of territoriality under international law, even if such interpretation is not espoused by the courts of one or more States Parties.

Taking this as a starting point, the second part of Chapter 5 envisages two possible interpretations of the terms 'conduct in question' in article 12(2)(a); first, that conduct in question refers to criminal *conduct*, as opposed to criminal *consequences* or *circumstances*, along the lines suggested by Article 30 ICC Statute. This means that the Court would have territorial jurisdiction only if the Prosecutor proved that the criminal

conduct took place on State Party territory, as opposed to the territory of a State not Party. The second possible interpretation – which is favoured by the present author – is that 'conduct in question' means in fact 'crime in question'. From this perspective, the Court would have jurisdiction insofar as the criminal activity takes place in State Party territory in whole or in part – irrespective of the distinction between consequences and conduct. This position finds support not only in the early jurisprudence of the Court on the matter, but also in the writings of publicists and the drafting process of article 12(2)(a) ICC Statute. The next parts of this Chapter are dedicated to an analysis of the possibilities available under the Court insofar as the doctrine of objective territoriality and ubiquity are concerned, from the perspective of the Mann doctrine of jurisdiction ('doctrine of connecting links').

Chapter 6 addresses the question of whether the interpretation of Article 12(2)(a) could go so far as to include the effects doctrine of jurisdiction, mostly known from its application in antitrust/competition law. This Chapter seeks to explain that the effects doctrine has been applied in the past by national courts in their interpretation of territorial jurisdiction in criminal matters or quasi-criminal matters. The argument is addressed first on the policy level and secondly on the legal level. Insofar as the policy dimension of the issue is concerned, the present author takes the view that a comparison of the values involved tilts the scales in favour of the application of the effects doctrine by the International Criminal Court. Indeed, one fails to see why the International Criminal Court should not be entitled to extensively interpret its territorial jurisdiction in order to combat impunity for crimes such as genocide and war crimes, when national courts have consistently and increasingly done so, in order to protect the spending capacity of their consumers from anticompetitive practices. On the other hand, the legal argument seems to be more difficult to make. The classification of the 'effects' that would animate the Court's jurisdiction, the question of whether there is indeed a *lacuna* in article 12(2)(a) such that would justify the use of analogy in interpretation and the issues concerning state co-operation are some of the important matters highlighted and analysed. In closing this chapter, the author explains that, while at present this idea might constitute simply an effort at progressive development of the law, it is nonetheless an idea that merits further attention by the Court, in order to expand the territorial parameter of its reach in the future.

Chapter 7 addresses the territorial jurisdiction of the Court under article 12(2)(a) in situations of belligerent occupation. This Chapter does not deal with Palestine, as the investigation is on hold until it is ascertained whether Palestine qualifies as a 'state' for the purposes of the Rome Statute. Following a brief exposition of certain basic principles and rules of the law of occupation, this Chapter tackles three different scenarios; the occupation of State Party territory by another State Party (e.g. Ituri by Uganda), of State Party territory by a State not Party (e.g. Cyprus by Turkey), and State not Party territory by a State Party (e.g. Iraq by the United Kingdom). This chapter analyzes all three of these situations and concludes that, while the exercise of jurisdiction in the first two situations is largely uncontroversial, since occupation does not formally affect the sovereign right of jurisdiction of the occupied state, the third one is more difficult to apply. In this situation the author examines whether or not, and, if so, to what extent the International Criminal Court could use the interpretation of territorial jurisdiction on the basis of 'effective control', along the lines of the jurisprudence of the Human Rights Committee and the European Court of Human Rights. The author's opinion is that the differences in the wording, the context and the purposes of the instruments compared are such that do not allow much room for the application of the human rights interpretation of jurisdiction to article 12(2)(a) ICC Statute, although this possibility cannot be completely excluded due to the influnce of article 21(3) thereof.

The concluding chapter recapitulates the main findings of the present research and highlights that, while under international law the Court has many options available to it for the interpretation of the territorial parameter of its jurisdiction, its jurisprudence so far has not dealt with any of these issues. The hope is expressed that, should the need arise in the future, the Court will assume a teleological approach to the interpretation of Article 12(2)(a) more conducive to the goals it purports to achieve.