PRINCIPLE 20. JURISDICTION INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

William Schabas

A. Summary of findings

1. There is a presumption that national courts are primarily responsible for the prosecution of serious international crimes. International or internationalized criminal courts should step in only when the national institutions fail in this respect. In some cases, the international criminal courts have primacy while in others they may only exercise jurisdiction when the shortcomings of the national system have been established, an approach described as 'complementarity'. Formulation of the relationship suggests tension and conflict but in practice it is often marked by cooperation and even synergy, a feature insufficiently developed in the Updated Set of Principles. Obligations of cooperation are also fundamental because the international institutions cannot function if they are unable to obtain evidence and secure the custody of suspects. The obligations result from a tangled web of international treaties of general application, international human rights instruments, customary norms and detailed provisions of the statutes of the relevant international bodies.

B. Contextual and Historical Introduction

2. International and 'internationalized' criminal courts are a recent phenomenon by contrast with national courts that have existed since ancient times. Isolated examples of criminal trials with an international dimension have been found in medieval times but the real beginnings of international and internationalized courts in the sense we understand them today dates to little more than a century. From the early nineteenth century there are many examples of international arbitration tribunals with authority to rule on disputes between States. They are the forerunners

of the permanent institutions of the twentieth century, the Permanent Court of International Justice and the International Court of Justice (ICJ). The role of these bodies in addressing impunity should not be overlooked. In some cases they have managed to confront issues that have largely escaped national and international criminal courts. For example, in its famous advisory opinion on the Wall in the Occupied Palestinian Territory, the ICJ might be said to have acted in some sense like an international truth commission.

3. The international and internationalized criminal tribunals with jurisdiction over individuals for war crimes and other atrocities can be traced to efforts at the end of the First World War under the Treaties of Versailles and Sèvres although the institutions were never actually set up. After the Second World War, two international military tribunals, one located in Nuremberg and the other in Tokyo, held trials of major war criminals. A permanent international criminal court was contemplated in the 1948 Genocide Convention but its establishment was delayed for half a century. In the early 1990s, as international law focused greater attention on problems of impunity and accountability for serious violations of international humanitarian law and human rights, the United Nations Security Council set up international criminal tribunals with respect to the conflicts in the former Yugoslavia and Rwanda and, several years later, Sierra Leone. The United Nations also created judicial mechanisms as part of its larger administration of the territories of East Timor and Kosovo, and negotiated an agreement with Cambodia regarding 'extraordinary' chambers of its national courts in which foreign judges and prosecutors participated. Negotiation of the Rome Statute of the International Criminal Court (ICC) concluded in 1998. It entered into force in 2002 and the Court soon began its judicial activities.
4. The Set of Principles uses the terms 'international and internationalized criminal tribunals' but does not define them. Shortly before the Set of Principles was adopted, the Secretary-General issued his Report on The rule of law and transitional justice in conflict and post-conflict societies where reference is made to 'a wide range of special criminal tribunals' including 'ad hoc international criminal tribunals', 'mixed tribunals', and national courts where there is international

participation. Elsewhere in the same document he refers to 'international and hybrid criminal tribunals'. It is beyond the scope of this Commentary to parse all of the distinctions that arise from this terminology. There is no great difficulty with the concept of 'international criminal tribunals' because these must be set up by mechanisms of international law, namely treaties (the case of the ICC and the Special Court of Sierra Leone) and by decision of the United Nations Security Council (the case of the *ad hoc* tribunals for the former Yugoslavia and Rwanda). There is probably no entirely satisfactory formula for identifying 'internationalized criminal tribunals'. Diane Orentlicher described 'a new breed of court comprising both national and international elements, a trend exemplified by the establishment of the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Timor-Leste, and courts in Kosovo established under the authority of the United Nations Interim Administration Mission in Kosovo; and the likely establishment of other internationalized courts, including the Extraordinary Chambers in the Courts of Cambodia'.[1] Participation of foreign judges is probably too broad a criterion given that this is a rather common feature of many national jurisdictions, notably those of the Commonwealth. Nor is the fact that they exercise jurisdiction over serious international crimes because Principle 20 specifically deals with the obligation of national courts to exercise jurisdiction over such offences. Principle 20 juxtaposes national courts with international and internationalized courts, suggesting some sort of coexistence. But probably what was envisaged was the operation of international or internationalized criminal courts even in the total absence of national courts capable of exercising concurrent jurisdiction, as was the case in East Timor and Kosovo for some time.

C. Theoretical Framework

5. Principle 20 is one of three provisions of the guidelines in Part III, which is entitled 'The Right to Justice'. Within that Part there are two subheadings. Principle 20 falls under the second of them, entitled 'Distribution of jurisdiction between national,

[1] UN Doc. E/CN.4/2004/88, paras. 24, 39.

foreign, international and internationalised courts'. Principle 20 is concerned with 'international and internationalized courts'. It governs the relationship between such institutions and 'national courts'. The role of 'foreign' courts exercising universal jurisdiction appears to be reserved for Principle 21. 'Serious crimes under international law' are defined at the beginning of the Set of Principles.

6. The word 'impunity', defined at the beginning of the Updated Set of Principles, implies punishment or some similar sanction. It inexorably directs us towards judicial activity of criminal courts or the lack of it. It may therefore seem surprising that so little attention in the Updated Set of Principles is devoted to the work of courts and tribunals. Bringing perpetrators to account also involves 'civil, administrative or disciplinary proceedings' but references to persons being 'accused, arrested, tried and, if found guilty, sentenced to appropriate penalties' leaves little doubt that criminal justice is at the core of the issue of impunity.
7. The first sentence of Principle 20 is addressed to the national justice system. It affirms that it 'remains the rule' that States have primary responsibility in this regard. The language echoes recital 6 of the preamble of the Rome Statute, 'recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This duty stems from two sources. In various forms, treaties dealing with international crimes impose an obligation upon States parties to investigate and prosecute offences as well as to cooperate with other States that are prepared to exercise criminal jurisdiction. Examples include article 5 of the Genocide Convention and the grave breach provisions of the 1949 Geneva Conventions (Arts 49-50/50-51/129-130/1456-147) and Additional Protocol I (Arts 11 and 85). More recent treaties like the UN Torture Convention and the UN Convention on Enforced Disappearance also contain provisions to this effect. It can be argued that the obligation also exists under customary international law. Moreover, the requirement that States investigate and prosecute serious international crimes is a corollary of their duty to address all serious crimes against the person imposed by international human rights law, in particular as a consequence of the protection of the right to life and the prohibition of ill-treatment. This has been regularly confirmed in case law of the European Court of Human

Rights, the Inter-American Court of Human Rights and the United Nations Human Rights Committee.

8. The second sentence of Principle 20 is addressed to the international and internationalized criminal tribunals. It states that they may exercise 'concurrent jurisdiction' in two circumstances: when national courts cannot offer satisfactory guarantees of independence and impartiality or when they are materially unable or unwilling to conduct effective investigations or prosecutions. This phrase must be understood as being permissive rather than as an exhaustive enumeration of conditions under which international and internationalised courts may exercise concurrent jurisdiction.
9. Some international criminal tribunals operate on the basis of primacy, meaning that when they decide to proceed, the national court must defer to them. The *ad hoc* tribunals for the former Yugoslavia and Rwanda function on this basis. The rule of primacy is set out in their Statute which is an annex to a Security Council decision. Accordingly, the national court must decline jurisdiction where the international court opts to proceed. The other approach is designated 'complementarity'. Set out in detail in article 17 of the Rome Statute, it requires the ICC to declare a case inadmissible and defer it to the national jurisdiction unless the latter is unwilling or unable to investigate and prosecute the case. Amongst other criteria, article 17 says that unwillingness may be established if proceedings 'were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.
10. Whether primacy or complementarity is adopted, there must also be a rule to prevent a second prosecution for the same offence. Known as the *ne bis in idem* principle, it is set out in several human rights instruments including the International Covenant on Civil and Political Rights and Protocol No. 7 of the European Convention on Human Rights. Statutes of international criminal tribunals generally prevent the *bis* in both directions, blocking prosecution at the national level where the case has been finally judged by the international tribunals as well as preventing the international tribunal from proceeding if there is a final judgment

at the national level.

11. The final sentence of Principle 20 requires that States 'fully satisfy their legal obligations' with respect to international and internationalized criminal tribunals. This refers generally to cooperation in the investigation of alleged crimes, the apprehension of suspects and their transfer to the international jurisdiction. Very detailed rules in this area are set out in Part 9 of the Rome Statute. Problems may arise in this respect when a suspect may have a claim to immunity, a matter governed by special rules of international law. In 2002, the ICJ said that rules governing head of state immunity do not apply before 'certain international criminal tribunals', citing the ICC and the *ad hoc* tribunals for the former Yugoslavia and Rwanda as specific examples.

D. Practice

12. Failure of the national jurisdiction to observe the obligation to bring perpetrators to justice is at the root of international concerns with the problem of impunity. This has led to the establishment of international and internationalized courts. The legal obligation to prosecute is rarely debated before national courts. They are reluctant to intervene with the discretion of prosecutors. In many jurisdiction prosecution is conditional upon some sort of political approval or authorisation. Probably many cases that fulfil the terms of serious international crimes are in fact dealt with at the national level as ordinary crimes. There is barely a trace, in national jurisdiction, of the obligation set out in the treaties. For example, although the Geneva Conventions have been nearly universally ratified, there have been essentially no prosecutions at the national level for grave breaches.
13. Principle 20 has been violated in some cases by the United Nations Security Council itself. In a perverse application of article 16 of the Rome Statute, two resolutions of the Council blocked the ICC from exercising jurisdiction over nationals of non-party States. On the two occasions when the Council has referred situations to the Court, pursuant to article 13b of the Statute, it has carved out exceptions and required that certain suspects be brought to justice only before the

courts of their nationality. Such a requirement is incompatible with obligations under the relevant treaties, including the Geneva Conventions and the Genocide Convention.

14. Respect for the obligation to transfer suspects to the international institutions has generally depended upon political factors. In the former Yugoslavia, for example, there was considerable evidence to indicate that some States or elements within their government and military establishments were assisting persons in the evasion of justice. When suspects were brought to the ICTY in The Hague, there was obstruction in the production of relevant evidence. The fact that the Rwandan Tribunal focussed its prosecutions on members of the former regime meant that cooperation at the national level was generally more forthcoming.
15. Similar patterns present themselves in the work of the International Criminal Court. The Democratic Republic of the Congo willingly transferred suspects who led anti-government militias. In Kenya, on the other hand, where senior officials including the country's President were charged, the Prosecutor ultimately admitted defeat, contending that official connivance prevented the production of evidence and the protection of witnesses.
16. In contrast with the primacy of the ICTY and ICTR, the complementarity of the ICC has manifested itself in serious contestation at the international level. Where governments did not contest the matter, it was sometimes the accused who argued that the case should remain at the national level. But some shrewd accused persons seem to have calculated that they were better off in The Hague. The result in the case of Thomas Lubanga, for example, was that the admissibility of the case was essentially conceded by all concerned parties. In Libya, on the other hand, a Pre-Trial Chamber gave the national authorities the chance to deal with the prosecution of a former official.
17. Immunities have occasionally proven to be an obstacle although their importance may have been exaggerated. Only a handful of the many hundreds of suspects who have been charged at the international level had an arguable claim to immunity. The notion is offensive but in practice it has little impact on the operation of the international criminal courts.

E. Critical Assessment

18. During the late 1990s and the first decade of the new century, at any given time there were many trials underway at the international level. This has declined because of the closing of the *ad hoc* institutions for the former Yugoslavia, Rwanda and Sierra Leone and the poor level of productivity of the ICC. This does not necessarily signal a more acute problem of impunity, however. Recent years have also shown a heightened attention to national prosecutions including the establishment of more robust and focussed domestic institutions. In the States of the former Yugoslavia, as the work of the tribunal progressed, there were renewed initiatives at the national level, including the established of specialized tribunals with international involvement. The ICTY developed a practice of transferring less important cases to the national courts. There were somewhat similar developments in Rwanda. Before authorising transfer to the national courts, the ICTR insisted upon significant judicial reforms at the domestic level.
19. Principle 20 may suggest a relationship of tension and conflict between the national and the international criminal courts. But at the ICC, the adjective 'positive' was affixed to the term 'complementarity', denoting a more benign and constructive relationship between the two levels. To some extent, then, the national and the international are not rivals but rather partners in the campaign against impunity. This dimension is not sufficiently developed within the Updated Set of Principles.

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