

acting as judges in their own cause. This was not the only case where a judge stated that a statute giving a man power to be judge in his own cause would be void; in *Day v Savadge* (Hobart 85) Hobart CJ stated that such a statute 'made against natural equity ... is void in itself, for *jura naturae sunt immutabilia* and they are *leges legum*'.

It may be suggested that in *Bonham*, Coke was neither seeking to subject all statutes to a potentially expansive judicial review, nor was he simply looking towards judicial construction of statutes. Rather, he may have had in mind that there were constitutional boundaries which parliament could not cross. At one level, Coke appears a champion of parliamentary sovereignty, at one point calling it 'so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds' (4 *Institutes*, 32). Yet he did set bounds to what parliament could do. For instance, it was a maxim of the law of parliament that no parliament could bind its successor. Equally, 'No Act can bind the King from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*' (12 Co. Rep. 18). There were clear constitutional rules about the status of the king, and the status of parliament. Did this extend to the courts? Coke was clear that the courts did not derive

their authority from parliament: hence parliament could not impede them. By this view, the common law courts were not to be set above parliament to test and control its legislation, but they were to be protected from being undermined. We may wonder, if this is true, why Coke used the phrase 'common right and reason', and why Hobart referred to the law of nature, rather than articulating a constitutional view referring directly to the courts' customary autonomy. One answer to this may be that there were dangers in resting too much on the customary or chronological origins of the common law's authority. Not only was the history less than convincing, but even Coke proved inconsistent. Thus, where in the *Reports* he had sought to show that the common law courts existed before the time of Arthur, in the *Institutes* he said that they derived their authority from the king. If he sought to defend the position of the common lawyers, and their control of the law, Coke did not in the end want others to look too deeply at the original basis of its authority. 

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The International Criminal Court: complementarity with national criminal jurisdiction

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The 1998 Rome Statute established an International Criminal Court. Is its jurisdiction truly complementary to the national criminal jurisdictions?

In an historic event, on 17 July 1998, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy, the Statute Creating the International Criminal Court (the 'Rome Statute') was adopted by 120 nations and opened for signature.

While the US generally supports the creation of a permanent International Criminal Court (the 'ICC'), it opposes such a court as set forth in the 1998 Rome Statute, as it leaves open the potential for US military personnel and government officials to be prosecuted before the ICC for the unintended and accidental killing

of innocent civilians during a United Nations peacekeeping operation. Although the loss of innocent civilian life in such a situation would be highly regrettable, and perhaps even condemnable, the US maintains that the conduct would not rise to the level of a war crime or other offence within the jurisdiction of the proposed ICC. Thus, the ICC should not be permitted to exercise its jurisdiction.

The US' opposition to the Rome Statute could be construed as an objection to the exercise of the ICC's jurisdiction, which directly implicates the principle of complementarity. In short, the complementary regime established by the Statute does not adequately limit the ICC's ability to intervene with respect to matters properly within a state's jurisdiction. Stated another way, the ICC is not sufficiently deferential to national criminal jurisdictions.

A fundamental question facing the drafters of the Rome Statute was the role the institution would play with respect to national courts. Several state-delegates, while supporting the establishment of an ICC, were reluctant to create a court with primary or preemptory jurisdiction, requiring a state to defer or surrender jurisdiction to the ICC with respect to the commission of certain serious international crimes. In their view, such action would infringe on national sovereignty by limiting a state's ability to prosecute persons located in their territory suspected of committing international crimes.

PRIMARY JURISDICTION

Ultimately, the drafters of the Rome Statute decided that national courts should have 'primary' jurisdiction. Under the Rome Statute the proper role of the ICC is to complement national court jurisdictions and 'fill the gap' when States fail to comply with their obligations to prosecute perpetrators of serious international crimes.

At the same time, the Rome Statute recognises two exceptions to the rule of complementarity, authorising ICC prosecution despite pending or completed state proceedings. The ICC is not required to defer its jurisdiction if a state with jurisdiction is either 'unwilling' or 'unable' to undertake its obligations to prosecute serious international crimes within the jurisdiction of the ICC. More specifically, the complementary regime established by the Rome Statute authorises the ICC to intervene when the national criminal investigation or judicial proceedings are or were a sham aimed at shielding perpetrators from criminal responsibility, or when a state is unable to carry out its proceedings due to a 'total or substantial collapse of its national judicial system.'

With respect to a State's 'unwillingness' to prosecute, application of the principle of complementarity to State proceedings conducted in 'bad faith' presents the easy case. A more difficult question is to what extent the

principle of complementarity requires the ICC to defer to State judgments on questions of legal and factual sufficiency, resulting in a decision not to prosecute. For example, under the complementarity regime established by the Rome Statute, could the ICC properly exercise its jurisdiction over US nationals if, after conducting a full investigation of the situation, the US concluded that the alleged misconduct did not constitute an offence under the Rome Statute, and therefore decided not to prosecute the persons concerned? In such a case, could the ICC intervene in the matter anyway if it believed that the US misapplied the law? Furthermore, what if the ICC concluded that the law was grossly misapplied or interpreted in a manner inconsistent with the intent to bring the persons concerned to justice?

The dilemma is whether the ICC should be permitted to intervene only when the evidence demonstrates that the state proceedings were not conducted independently or impartially (sham proceedings intended to shield the perpetrator), or whether the ICC should exercise jurisdiction to correct a perceived miscarriage of justice, for whatever reason. Whether the ICC may properly exercise its jurisdiction turns on whether the ICC may substitute its judgment for that of state prosecutors on questions of legal and factual sufficiency or other matters involving the exercise of prosecutorial discretion. Stated another way, in the case of a good faith disagreement on questions of law or findings of fact, should a state's decision not to prosecute be afforded any deference by the ICC? If not, then the ICC's role with respect to national criminal jurisdictions would be more analogous to that of a 'super' international appeals court, vested with *de novo* review authority, rather than a court intended to complement states with primary jurisdiction. If this is in fact the case, perhaps the concerns voiced by the US are warranted. At the very least, the Rome Statute appears to have fallen short of realising the objective of establishing a complementary relationship between the ICC and State jurisdictions.

APPLICATION OF THE COMPLEMENTARITY PRINCIPLE TO A DECISION BY THE US NOT TO PROSECUTE THE PERSONS CONCERNED

Under the Rome Statute, a decision to investigate and prosecute US nationals for the inadvertent bombing and killing of innocent civilians during an international peacekeeping mission involves a four-step process:

- (1) a referral of the situation for investigation to the ICC Prosecutor ('the Prosecutor') either by a state party or the United Nations Security Council acting under Chapter VII of the United Nations Charter, or initiation of an investigation by the Prosecutor *proprio motu*;
- (2) acceptance of the ICC's jurisdiction by the state where the alleged criminal acts were committed (the

territorial state) or the state of nationality of the accused (the nationality state);

- (3) a judicial finding that the ICC has jurisdiction; and
- (4) a ruling that the case is admissible under art. 17. (See Rome Statute, arts. 12, 13, 14, 15, 17, 18, 19.)

The first three steps in the process do not pose serious obstacles to an ICC investigation and the filing of criminal charges against US nationals. First, while the US' status and influence as a permanent member of the UN Security Council would make it highly unlikely that the situation would be referred to the Prosecutor by the UN Security Council, any state party that believes that the facts constitute an offence within the ICC's jurisdiction could refer the situation to the Prosecutor for investigation.

Upon receipt of a state party referral, the Rome Statute affords the Prosecutor wide discretion to decide whether to proceed with a formal investigation. Pursuant to art. 18(1), the Prosecutor may commence an investigation if she has determined that a 'reasonable basis' exists to believe that a crime within the jurisdiction of the ICC has been or is being committed. Thus, a state party referral to the Prosecutor, followed by the Prosecutor's finding that a 'reasonable basis' exists to believe that US nationals have committed crimes within the ICC's jurisdiction, is sufficient to commence a formal investigation under the Rome Statute.

The Rome Statute also permits the initiation of a formal investigation against US nationals even in the absence of a referral by a state party or the UN Security Council. Pursuant to art. 15, if the Prosecutor concludes that there is a 'reasonable basis' to believe that a crime has been committed within the jurisdiction of the ICC, she shall request authority from the Pre-Trial Chamber to proceed with an investigation. Under art. 15(4), the standard applied by the Pre-Trial Chamber is whether a 'reasonable basis' exists to proceed with the investigation. In light of the relatively low threshold required for the court to authorise an investigation, an ICC investigation of US military personnel and government officials would be likely to be authorised by the court.

The next step in the process would be to determine whether either the state of nationality of the accused or the state where the conduct in question occurred has accepted the jurisdiction of the ICC. On this point, it should be emphasised that even if the US, the state of nationality of the alleged offenders, is not a party to the Rome Statute nor consents to the ICC's jurisdiction, the ICC may still exercise jurisdiction if the territorial state is a state party to the Statute (automatic jurisdiction) or consents to the ICC's jurisdiction with respect to the crimes in the question (acceptance of jurisdiction). Thus, in the UN peacekeeping scenario, if the territorial state demands that US officials and military commanders be prosecuted by the ICC, the requirement of acceptance of jurisdiction is satisfied.

Next, pursuant to art. 19, the ICC must have subject matter jurisdiction over the case. Assuming that the territorial state accepts the ICC's jurisdiction, and the investigation involves allegations that war crimes have been committed, an offence within art. 5, US military personnel who were sent abroad would be subject to the jurisdiction of the ICC.

Ultimately, the critical issue with respect to an ICC investigation and prosecution of US military and government personnel turns on issues of admissibility or complementarity.

ATTEMPTS TO HALT THE INVESTIGATION

After receipt of such notice, the US would have limited recourse to attempt to halt or even temporarily suspend the ICC investigation. First, pursuant to art. 16 an ICC investigation could be temporarily suspended if the UN Security Council, in a resolution adopted under Chapter VII of the United Nations Charter, requested the ICC to postpone the ICC investigation. Article 16 further provides that the investigation could be suspended for a period of twelve months, but the request could be renewed by the Security Council under the same conditions. However, there are several problems with using art. 16. First, the Security Council must act under Chapter VII of the United Nations Charter. Chapter VII only applies if the Security Council determines that there is 'a threat to the peace, breach of the peace or act of aggression.' Second, a Security Council resolution would require an affirmative vote of nine members, including the concurring votes of the permanent members. Thus, an attempt to suspend the ICC investigation could be vetoed by a negative vote of one of the permanent members or by the US' failure to garner an affirmative vote of nine members of the Security Council.

A second avenue of recourse afforded the US would be to initiate its own investigation of the conduct in question. After initiating an investigation, pursuant to art. 18(2), the US could file a motion with the Pre-Trial Chamber requesting that the Prosecutor defer to its jurisdiction. However, deferral is not mandated by the Statute. Instead, the Prosecutor is vested with wide discretion whether to grant the request for state deferral or petition the Pre-Trial Chamber to authorise the investigation.

The ultimate test of the principle of complementarity would arise if, after the US concluded its investigation, it decided not to file criminal charges against the persons concerned. The US' decision not to prosecute could be based on its reading of relevant legal authority, which it determined does not support prosecution of persons concerned for crimes within the ICC's jurisdiction. In other words, US Prosecutors might conclude that the conduct in question while perhaps negligent, preventable, and even a dereliction of duty by military commanders, does not satisfy the elements needed to prove a war crime

as defined by art. 8 of the Statute. In any event, the US' decision was based on an honest assessment of the relevant law, facts, and evidence, and not made for the purpose of shielding the accused from criminal responsibility.

Under the above-described scenario, the issue before the ICC would be whether the US' investigation and decision not to prosecute rendered the case inadmissible under art. 17. If so, the principle of complementarity would require the ICC to defer to the US' handling of the matter. If not, the ICC could exercise its jurisdiction over US military and government officials despite a completed investigation and decision by US not to prosecute.

Pursuant to art. 17(1), a case may be found inadmissible for four reasons:

- (1) the case is being investigated by a state with jurisdiction;
- (2) the state has investigated the case and concluded that there is no basis to prosecute;
- (3) the person has already been tried for the conduct at issue; or
- (4) the case is of insufficient gravity to proceed.

However, pursuant to art. 17(2), when a case has been investigated by a state that has jurisdiction over it and the state has decided not to prosecute the persons concerned, the ICC may find the case admissible if the investigation and decision resulted from the state's 'unwillingness or inability' 'genuinely' to prosecute.

Under art. 17(3), 'inability' means that due to a 'total or substantial collapse' of its national judicial system, 'the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.' This provision was intended to cover a situation, such as that in Rwanda, in which the state's national judicial system was unable to carry out its proceedings due to political turmoil, armed conflict, and the resultant damage and destruction to Rwanda's infrastructure and governmental institutions. Obviously, this provision is inapplicable in the present case.

With respect to whether the US' investigation and decision not to prosecute resulted from its 'unwillingness' to 'genuinely prosecute,' pursuant to art. 17(2), the Court could find the case *admissible* and not defer to the US' proceedings if either:

- (1) the State proceedings were undertaken or the national decision was made for the purpose of 'shielding' the persons concerned from prosecution before the ICC;
- (2) there had been an 'unjustified delay' in the proceedings which is inconsistent with an intent to bring the persons concerned to justice; or
- (3) the proceedings were not conducted 'independently or impartially,' and were conducted in a manner

inconsistent with an intent to bring the persons concerned to justice.

Assuming that the US' investigation was conducted expeditiously and the decision not to prosecute rendered in timely fashion, 'unjustified delay' could not serve as a legal basis to support a finding of 'unwillingness' to prosecute. Furthermore, under art. 17(2)(c), whether the US' decision not to prosecute was made for the purpose of 'shielding' the persons concerned would require proof that the investigation and proceedings were a sham and conducted in bad faith. Moreover, the ICC would have to find that US officials had the specific intent to shield the persons accused from criminal responsibility and thereby undermine the judicial process. In short, the ICC would have to conclude that US prosecutors were involved in obstruction of justice. Thus, art. 17(2)(2) imposes a heavy burden on the ICC, the Prosecutor and the territorial state to prove the case admissible on these grounds. It is highly unlikely that such a heavy burden could be sustained based on the reasons given by the US for its decision not to prosecute.

Finally, the ICC could rule that the case is admissible if the proceedings were *not* conducted 'independently or impartially,' and were conducted in a manner inconsistent with the intent to bring the accused to justice. A finding of admissibility arguably could be based on these grounds.

THE LANGUAGE OF ART. 17(2)

The problem lies with language contained in art. 17(2). When determining whether a state is 'unwilling' to prosecute based on one or more of the grounds articulated in art. 17(2), the ICC is required to consider 'principles of due process recognised by international law.' However, the proper application of 'principles of due process recognised by international law' in determining whether a state is 'unwilling' genuinely to prosecute is unclear. More specifically, the use of the term 'due process' within the context of whether the state proceedings were conducted 'independently or impartially' is particularly perplexing.

Assuming that the drafters of the Rome Statute included this language as an objective way to measure whether the national proceedings were conducted fairly with respect to *all* parties concerned, several issues arise. For example, what do 'principles of due process recognised by international law' say about a Prosecutor's decision not to prosecute based on a finding of legal or factual insufficiency? On such issues, international due process principles are not instructive with respect to whether the national proceedings were conducted 'independently or impartially.'

Of course, the US' concern is that the ICC could find that the national proceedings were not conducted 'independently or impartially' because the US' interpretation of relevant legal authority was inconsistent with 'principles of due process recognised by international

law' (whatever that means). Thus, the ICC might conclude that the US' decision against prosecution resulted from its 'unwillingness' to genuinely prosecute the case. The case is therefore admissible and deference to the US' proceedings is not required under art. 17 and art. 19.

If the Rome Statute permits such a result, whether the ICC is truly complementary to national criminal jurisdictions must be seriously re-examined. If the ICC may substitute its judgment any time it disagrees with the outcome in the state proceedings, the role of the ICC is substantially more than merely to serve as a complementary court and 'fill the gap' when a State is either 'unwilling or unable' to prosecute perpetrators of serious international crimes. Despite declarations in the preamble and art. 1 of the Rome Statute that the ICC shall be a complementary court, it appears that articles 17–19 merely permit a state to prosecute persons who have allegedly committed crimes within the jurisdiction of the ICC. The ICC defers to state criminal jurisdictions in the first instance, but reserves the right and possesses the authority to intervene if it sees fit. Plainly speaking, if the ICC disagrees with the outcome in the state proceedings, it has the final say on the matter. Thus, in essence, the ICC functions as a 'super' or 'supreme' international appellate court, passing judgments on the decisions and proceedings of national judicial systems. In sum, the jurisdiction of the ICC is not truly complementary to national criminal jurisdictions, rather it is preemptory.

SOLVING THE PROBLEM

The problem, however, is not insurmountable. The principle of complementarity should draw a distinction between sham proceedings conducted for the purpose of protecting concerned persons from criminal responsibility, and those where the ICC merely disagrees with the outcome. If state officials who conducted the national criminal proceedings had the specific intent to obstruct justice, or the proceedings were unjustifiably delayed suggesting a lack of intent to bring the perpetrators to justice, the ICC should find the case admissible and exercise its jurisdiction. Simply stated, the ICC should not defer to sham state proceedings conducted in bad faith.

Thus, when a state conducts a criminal investigation and ultimately decides *not* to prosecute, the controlling factor should be whether the decision was for the purpose of shielding persons from criminal responsibility. However, in the absence of a finding that state officials had the specific intent to 'obstruct justice' by conducting a sham investigation or criminal prosecution, the principle of complementarity demands that the national proceedings should be granted 'substantial deference' by the ICC. With respect to disagreements on legal or factual sufficiency to prosecute, a truly complementary system requires that State judgments be afforded substantial

deference by the ICC. In other words, the Court should not intervene merely because it disagrees with the final outcome in the State proceedings.

At the same time the ICC should not defer when the state judgment on factual or legal sufficiency was clearly erroneous. However, the 'clearly erroneous' standard imposes a much higher standard than found in art. 17(2), which permits a finding of admissibility if the ICC determines that the national proceedings were not conducted 'independently or impartially' because they were inconsistent with 'principles of due process recognised by international law.' Under the proposed rule, a finding that the national proceedings were inconsistent with rules of international due process, by itself, would be insufficient to support a ruling of admissibility. The ICC could intervene only if the national judgment on findings of fact or questions of international law was 'clearly erroneous,' or the state proceedings were conducted for the purpose of shielding the perpetrator from criminal responsibility. In this respect, the 'clearly erroneous' standard affords state judgments reasonable deference, which is more consistent with the principle of complementarity than a procedural scheme that permits the ICC to conduct *de novo* review of state proceedings, and pre-empt state judgments whenever it sees fit. 