Method to the Madness? John Bolton and US Objections to ICC Jurisdiction

September 12, 2018

By Steven Kay And Joshua Kern

Opinio Juris

http://opiniojuris.org/2018/09/12/method-to-the-madness-john-bolton-and-us-objections-to-icc-jurisdiction/

On the eve of 9/11, John Bolton [affirmed](https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html) the Trump Administration’s intention to rely on the full force, and more, of the [American Servicemembers’ Protection Act 2002](https://legcounsel.house.gov/Comps/aspa02.pdf) to shield US and its allied nationals from ICC jurisdiction. Given the ferocity of his attack (and as foreshadowed in the discussion following Kevin’s contribution [here](http://opiniojuris.org/2018/09/10/john-bolton-unplugged-and-unhinged/)), the question of whether the ICC may exercise its jurisdiction over nationals of non-state parties absent a Security Council referral is pressing once again. [Dapo Akande](https://academic.oup.com/jicj/article-abstract/1/3/618/2188874)’s landmark analysis has, to date, broadly been considered dispositive. But perhaps the question is worth revisiting considering Mr Bolton’s remarks.

Jurisdiction over nationals of non-states parties absent a Security Council referral

In its [Request to investigate the Situation in Afghanistan](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF) (“Request”) the OTP drew heavily on Dapo Akande in stating in its clearest terms to date its reasons for finding that states parties are not prohibited from delegating their territorial jurisdiction by treaty. As a result, the OTP argues that the Court may exercise jurisdiction over nationals of non-states parties even in the absence of a Security Council referral.

In its Request, the OTP does not expressly distinguish between prescriptive, adjudicatory, and enforcement jurisdiction and asserts that:

*“the conclusion of an agreement pursuant to article 98 of the Statute between the Government of Afghanistan and a third State does not impact on the exercise of jurisdiction by the Court… Indeed, the very purpose of article 98 is to regulate how the Court’s exercise of jurisdiction should be enforced.”*

While this statement may be accurate with respect to exercise of the Court’s prescriptive jurisdiction, it fails to acknowledge that the exercise of enforcement jurisdiction must be *permitted* under customary international law too. This because, although international law poses no limits on a state’s jurisdiction to *prescribe* rules absent a prohibitive rule to the contrary, pursuant to [*Lotus*](http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf) states are precluded from exercising their *enforcement* jurisdiction in another state’s territory absent a permissive rule.

Delegation of prescriptive, adjudicatory and enforcement jurisdiction

The OTP appears to accept the predominant view that Article 12 of the Rome Statute contemplates that (absent a Security Council referral) the Court’s jurisdiction derives from the delegated consent of the territorial state or the state of nationality. It argues that state practice which permits “*the conferral or delegation of jurisdiction by a party to a treaty*” shows that this practice is not novel (Request, para 46). It is accepted that the Court does not exercise a universal jurisdiction.

Prescriptive jurisdiction refers to the jurisdiction to prescribe, whether by legislation, by executive act or order, by administrative rule or regulation, or by court determination. Enforcement jurisdiction refers to a state’s jurisdiction to enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.

The ICC’s enforcement jurisdiction is exercised through, for example, the issuance of arrest warrants to secure the attendance of suspects. ICC jurisdiction attaches to natural persons, but its enforcement jurisdiction is exercised by states and the Court together through the arrest and surrender process. The successful operation of the Court’s mandate is impossible if it is not permitted to exercise a lawful enforcement jurisdiction. Without an effective enforcement jurisdiction, no ICC arrest could be made or surrender process completed successfully, as states’ national courts would be constrained (as in *Pinochet*) by the illegality underpinning a suspect’s arrest.

Non-states parties and the customary international law of jurisdiction

As the White House recently emphasised, it is a basic principle of treaty law that a treaty cannot create obligations or rights for a third state without its consent.  In the absence of a Security Council referral, the Rome Statute’s obligations are only binding on states parties and those states which consent to jurisdiction through an Article 12(3) Declaration. Thus, in situations not referred to the Court by the Security Council, disputes arising from protests by non-states parties with respect to whether the court may exericise jurisdiction over their nationals are not resolved by treaty (as they would be, by reference to the UN Charter in the case of a Security Council referral, or by reference to the Rome Statute in the case of a state party), as there is none. Instead, the dispute is resolved under the customary international law of jurisdiction.

*The* *Lotus* and the distinction between prescriptive and enforcement jurisdiction

The starting point when considering whether territorial states may or may not delegate their prescriptive and enforcement jurisdiction by treaty to an international court over nationals of non-consenting states is of course [*The Lotus*](http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf). With respect to the exercise of prescriptive jurisdiction,*Lotus*stands for the principle that ‘*what is not prohibited is permitted*’ (a *prohibitive* rule). This rule does not apply to the extraterritorial exercise of enforcement jurisdiction as *Lotus*holds that states are precluded from enforcing their laws in another state’s territory absent a *permissive* rule to the contrary: pp.18-19*.* *Lotus*therefore distinguishes between prescriptive and enforcement jurisdiction. The effect is material.

Lawful exercise of enforcement jurisdiction requires a permissive rule

Customary international law must *permit* a state to delegate the exercise of its enforcement jurisdiction to an international court for that delegation to be lawful. If customary international law does not permit a state so to delegate, the issuance and circulation of an ICC arrest warrant would in such circumstances be the exercise of an exorbitant jurisdiction. This has relevance both before the Court and at the national level, as the exercise of an exorbitant jurisdiction might render national surrender proceedings unlawful or otherwise an abuse of process.

Why is a permissive rule desirable?

There are sound policy reasons why a permissive rule is desirable. An international court’s role is not simply to exercise the jurisdiction of the territorial state vicariously, or as its representative. ICC judges are acting not as government agents but as officers of an international organisation, i.e. the Court itself. It follows that the opprobrium, shame and, yes, legitimacy of a conviction for international crimes by an international court in The Hague is of a different nature to a conviction before a national court. This may partly explain the ferocity of Ambassador Bolton’s attack. It is reasonable to require a permissive rule to exist which allows delegating states to transform the nature of their criminal jurisdiction over international crimes absent the consent of the state of nationality, whose interests will foreseeably conflict with their own.

A permissive rule may also help safeguard protections against abuse of process which the Rome Statute framework lacks. Non-states parties have legitimate concerns that in situations of ongoing conflict and high political sensitivity, where the OTP’s investigations are reliant upon delegating states’ and NGO cooperation, that the process can become tainted by extraneous considerations. Protections from extraneous considerations are familiar in extradition law and are found in extradition conventions, MLA agreements, as well as in Article 3 of INTERPOL’s Constitution. By contrast at the ICC, the Appeals Chamber in *[Lubanga](https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF)* expressly disavowed an abuse of process jurisdiction, finding that the Rome Statute’s human rights protections are sufficient to protect due process. But would anyone argue in 2018 that the OTP is not – like INTERPOL – vulnerable to instrumentalisation and politically motivated abuse?  A rule requiring affected states’ consent to prosecute absent a Security Council referral may help cure problems caused by the absence of these protections.

State practice and *opinio juris*with respect to delegation of enforcement jurisdiction over international crimes

There is no prior instance of state practice where an international criminal court or tribunal has exercised its enforcement jurisdiction over a national of a non-consenting state when the Security Council has not performed a constitutive role in the establishment of that tribunal.  The OTP relies on the “Nuremberg Tribunal” (the IMT) as an example. However, the Allied states that established the IMT were exercising sovereign powers in Germany. The state of nationality gave consent when the sovereign rulers of Germany signed the London Charter, or when (as sovereign) the Control Council enacted Law No.10.

The ICTY and the ICTR were established as subsidiary organs of the Security Council exercising Chapter VII powers.  In the ICTR’s case, this was over and above the objection of the Government of Rwanda.  The SCSL and the STL are also creatures of the Security Council. (See, e.g., *Taylor*Jurisdiction [Decision](https://www.eccc.gov.kh/sites/default/files/Taylor.pdf), paras 36-39 (reaffirming importance of SC Res. 1315 (2000) in constituting the SCSL.) The legal framework through which jurisdiction is delegated to an international criminal tribunal by the UN Security Council is materially different from the Rome Statue mechanism where states consent to delegate territorial jurisdiction to the ICC through operation of Article 12.  Although both delegations are predicated on obligations which arise from multilateral treaties (the UN Charter and the Rome Statute respectively), the UN Charter’s status under customary international law (as reflected by its Article 103 as well as its universality) is distinguishable from the Rome Statute, which as a treaty is binding only as between its states parties and is not universal.

The OTP relies upon suppression conventions as precedent for the delegation of a state’s jurisdiction over non-state party nationals to an international court, but the Rome Statute and the suppression conventions have different natures. Aside from Article VI of the Genocide Convention and Article V of the Apartheid Convention, the suppression conventions operate *inter partes*and do not purport to permit states to delegate jurisdiction to an international criminal tribunal. They do not set a precedent whereby states are permitted to create (through the act of delegation) a jurisdiction (i.e. an international criminal jurisdiction) that they would not otherwise have individually, and then exercise that jurisdiction over nationals of non-consenting states.

Prior to the ICC, the establishment of the ICTY, ICTR, SCSL and STL represent state practice’s high watermark through which jurisdiction over international crimes was capable of being delegated to an international criminal tribunal.  In each case, the tribunal was constituted by a resolution of the Security Council.

As to *opinio juris*, at the Rome Conference, states – representing vast swathes of humanity – stated clear objections to the customary international law of international criminal jurisdiction being expanded in a way which could be construed as conferring universal jurisdiction on an international court established by treaty.  States further maintained that consent was a pre-requisite to the surrender of a national of a non-state party. If Article 12 of the Statute had been agreed consensually, it may follow that the article reflects customary international law.  However, the Conference *travaux* record that the jurisdictional provisions were among the most complex and most sensitive in the negotiation and for that reason remained subject to many options for as long as possible.

In Rome, the US expressed objection to ICC jurisdiction over nationals of states that are not parties to the Rome Statute absent a UN Security Council referral or the consent of that state. Its narrow position on consent was endorsed by several other states.  China objected to the purported conferral of jurisdiction over nationals of non-states parties absent a UN Security Council referral or the consent of that state (except in cases of genocide).

Conclusion

State practice and *opinio juris* reflect that the customary law of jurisdiction does *not* extend to *permit*the delegation of a state’s enforcement jurisdiction over international crimes committed by a foreign national to an international court absent Security Council involvement or the consent of the state of the accused’s nationality. Non-states parties’ jurisdictional objections to the ICC are of sufficient complexity to require determination by the Court’s Appeals Chamber as well as national jurisdictions’ most senior courts when considering whether to execute an arrest warrant issued by the Court.  This may be an outcome desired by some; a landmark national decision through which it is determined whether the surrender of nationals of non-states parties absent a Security Council referral would constitute an exorbitant exercise of the Court’s jurisdiction.  On the other hand, given that it cannot be presumed that states parties will cooperate with the Court in such cases, and non-states parties are under no obligation to do so, the road ahead cannot seem anything but fraught should the OTP proceed without full regard to the non-states parties’ legitimate jurisdictional objections.