CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick

I. CONFLICTS OF CRIMINAL JURISDICTION

A. Introduction

The expansion of claims of extended territorial and extraterritorial criminal legislative jurisdiction and the increasing facility with which States are able to obtain custody over defendants by way of more effective extradition arrangements is leading to a new problem in transnational criminal law. The result of these developments is that more than one State may have legitimate jurisdiction to legislate for the same conduct and the courts of more than one State may be entitled to exercise judicial jurisdiction over those persons charged with crimes arising from that conduct. For prosecutors, the problem may present itself as one of prosecutorial efficiency—how may the case be proceeded with expeditiously, in particular, in which jurisdiction is a conviction most likely to be secured? Considerations such as the availability of witnesses or the admissibility of evidence may influence the prospects of conviction and prospective punishments may be a factor when deciding in which system prosecutors prefer the case to go ahead. Defendants have different perspectives. In many cases involving extradition to face a charge based on an exercise of extended jurisdiction, the defendant will be removed from the place where he lives and works to another State. There may be adverse consequences for him compared to facing a trial where he is usually located. Criminal proceedings abroad will be in an unfamiliar legal system; bail may be harder to obtain because of a perceived greater danger of flight; the impossibility to continue working during the period in which the trial is being prepared may impose financial hardship; defendants will be removed from their families and social networks for considerable periods. And, of course, the potential punishments may be much greater in the other jurisdiction. It is not surprising that some defendants will look for arguments which would pre-empt their removal, even if the conditions which would otherwise satisfy extradition arrangements are there. As was explained in a recent item in this section of the *Quarterly*,[1] in *Bermingham*,[2] the defendants, facing extradition from the UK to the

[1] C Warbrick, 'Recent Developments in UK Extradition Law' (2007) 56 ICLQ 199.
[2] *Bermingham (R on the application of) v Director of the Serious Fraud Office and the Home Secrerary* [2006] EWHC (Admin) 200.

[*ICLQ* vol 56, July 2007 pp 659–666] doi: 10.1093/iclq/lei187

US, argued that their cases were 'really' English and should be investigated and, if appropriate, prosecuted in the UK. The rejection of the arguments in *Bermingham* has been followed in *Norris*,[3] a similar case involving extradition from the UK to the US under the present ad hoc arrangements between the two States. In *Norris*, the arguments against extradition were put in more orthodox terms—no extradition crime, no double criminality—but the human rights arguments were based on claims that it was not right for the trial to take place in the US.[4] The language used in these cases is redolent of that of Francis Mann in his Hague Lectures on Jurisdiction. He wrote:

> Perhaps public international lawyers should now discard the question whether the nature of territorial jurisdiction allows certain facts to be made subject to a State's legislation. Rather they should ask whether the legally relevant facts are such that they 'belong' to this or that jurisdiction.[5]

The method recommended is that of private international law. It is not a recommendation which so far has commended itself to governments or national courts. However, if it were a practicable route, problems of competing judicial jurisdiction would drop away because only the courts of the State to which facts 'belonged' would have authority in international law to hear the case.

The *Bermingham* case aroused great controversy in Parliament and in the press. In the course of the proceedings, a Minister told the House of Lords that the Attorney-General was conducting discussions with his counterpart, Alberto Gonzales, and American prosecutors about how to handle future cases which involved the possibility of proceedings in both jurisdictions.[6] The 'Guidance' which resulted from those discussions has now been published, along with a second document detailing how cases will be treated in practice in the UK.[7] The Guidance takes care of prosecutorial concerns but shows little regard for the interests of defendants. If the Guidance works by making the process of extradition even smoother, then one can see that there will be further instances like *Bermingham* and *Norris* in which defendants will seek relief against removal by arguing that any crimes which might have been committed should properly be proceeded with here.

B. The Guidance

The Document is entitled, 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States'.[8] 'Concurrent Jurisdiction' arises where a case has the *potential* to be prosecuted in both the UK and the US. The object of the Guidance is twofold: to provide timely contacts to enable

[3] *Norris v Government of the United States* [2007] EWHC (Admin) 71.

[4] ibid paras 155–80.

[5] FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964-I) RC 1, in *Studies in International Law* (OUP, Oxford, 1973) 35.

[6] *Hansard* HC vol 450, c 1393 (24 Oct 2006) (Ms Ryan); *Hansard* HL vol 686, c 285–7 (1 Nov 2006) (Baroness Scotland). The Guidance was 'shared' with the Foreign and Commonwealth Office and the Home Office, and city law firms were consulted, letter from Attorney-General's office, Mar 2007.

[7] The announcement that the guidance for handling cross-border cases between the UK and US had been agreed was made to the House of Lords by the Attorney-General on 25 Jan 2007. *Hansard* HL vol 688, c WS68 (25 Jan 2007) (Lord Goldsmith).

[8] Available at <http://www.attorneygeneral.gov.uk/sub_publications_foi.htm>. Published 25 Jan 2007.

prosecutors to agree on strategies for handling investigations and cases; and to avoid difficulties which might arise later in the process, whether in investigation or trial (para 1). Later, the Guidance says, 'the aim of . . . a co-operative approach is to agree on a co-ordinated strategy in relation to the particular case that respects the individual jurisdictions but recognises the benefits of co-operation . . .' (para 5).

There needs to be a degree of weight about the potential concurrent charges for the Guidance to come into play—only 'the most serious, sensitive or complex criminal cases' (para 5) will qualify. If this is so,

> in deciding whether contact should be made with the other country regarding such a case, the prosecutor should apply the following test: *does it appear that there is a real possibility that a prosecutor in the other country may have an interest in prosecuting the case?* Such a case would usually have significant links with the other country (para 2) (emphasis added).

The interesting question is whether or not the last sentence qualifies the words emphasized. The last sentence suggests that something more than mere competence needs to be involved: there should be something more than that the other State has exercised its legislative jurisdiction lawfully. For both States to have a sufficient link will not be unusual—transnational frauds with participants in each State; trafficking in illegal commodities from one State to the other; a common concern about terrorist-related activities. All other things being equal, either State would be entitled to start criminal proceedings. International law provides little by way to decide priorities of investigatory and judicial jurisdictions. This is reflected in the thrust of the Guidance, which remains ad hoc and case-specific, rather than setting out any principled standards. It says, 'Each case is unique and should be considered on its own facts and merits' (para 3).

The Guidance establishes a consultation procedure between prosecutors with a view to reaching agreement on the strategy for handling a particular case and of disposing of any issues which arise within it (paras 12–14). A central element is the sharing of information between prosecutors but, 'the information should not be disclosed to other countries without the permission of the originating State' (para 11). If agreement is not possible, the offices of the respective Attorneys-General[9] should 'take the lead' in resolving the issues that are outstanding (para 4). The aim of the consultation procedure is to enable prosecutors to decide, inter alia, where prosecutions may be most effectively pursued (para 14). However, the outcome of the process does not have any binding force. Each prosecutor has to decide in light of the consultations whether a case should go ahead in his jurisdiction, and whether that would be in accordance with the law and the public interest (para 14).

In the UK, the institutions involved are limited. The Attorney-General has superintendence over the Crown Prosecution Service, the Serious Fraud Office, the Revenue and Customs Prosecution Office and the Public Prosecution Service of Northern Ireland. The Lord Advocate is responsible for the prosecution service in Scotland. In the United States, the Attorney-General operates through Assistant Attorneys-General for the National Security and Criminal Divisions, the Federal Bureau of Investigation and '94 State Attorney-Generals' (para 15). The litigation which eventually reached the International Court of Justice in the *Avena*[10] case is evidence of the complicated task of making international understandings on criminal matters operate effectively in the US Federal system. Although the number of cases likely to be involved under the

[9] In cases arising in Scotland, the Lord Advocate will be responsible (para 15).
[10] *Avena and other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 128.

Guidance is small compared to those raising consular protection concerns like those in *Avena*, the implementation of the Guidance will require considerable effort on the part of the US Attorney-General, given that the bulk of criminal cases in the US are dealt with by state prosecutors and courts, though it might be that the shared interest of prosecutors in both States could encourage rather than handicap implementation.

The 'second document' referred to above is entitled, 'Attorney-General's Domestic Guidance for Handling Criminal Cases affecting both England, Wales or Northern Ireland and the United States of America'.[11] It provides: 'this Guidance does not seek to address or influence the manner in which independent prosecutors may exercise their discretion in an individual case' (para 2). The sensitivities of the Attorney-General's role in relation to operational aspects of the role of prosecutors have recently been matters of public discussion. The continuing saga of the investigation into the so-called 'cash for honours' cases[12] and the involvement of the Attorney-General and the Serious Fraud Office in decisions not to proceed against BAE on corruption charges[13] are indications of how he may be drawn into operational questions. This is recognized in the Guidance which states in the introduction that 'decisions on concurrent jurisdiction as between the UK and US are properly to be made out by prosecutors' (para 3).The Directors of the prosecuting authorities and the Attorney-General are given the opportunity to be consulted on jurisdictional questions before a prosecutor reaches his final decision (para 10). The involvement of the Attorney-General's office will always mean that he has the opportunity to make his views known on jurisdictional matters (para 16).

This is a 'prosecutors' deal'. Needless to say, in neither document is an obligation laid out to consult with defendants or reveal information to the defence. For the avoidance of any doubt, the Guidance says: 'This … does not create any rights on the part of a third party to object to or otherwise seek review of a decision by UK or US authorities regarding the investigation or prosecution of a case or issues related thereto' (para 13).[14] While the expectation is that the initiative to start the consultation process will be taken by individual prosecutors, the second document envisages a response when defence lawyers draw a case to the attention of the Attorney-General (para 8). Even if they do, there does not seem to be any obligation to involve them further in the process. There is not even a formal obligation to inform them that a consultation has started or has been completed.

C. The European Dimension

The details of the Guidance closely reflect the contents of the 2005 EC Commission's Green Paper 'On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings'.[15] The Green Paper is accompanied by a detailed 'Commission

[11] See Guidance (n 8).

[12] C Dyer et al, 'Blair's top lawyer to advise on cash for honours questions' *The Guardian* (4 Nov 2006).

[13] 'Saudi defence deal probe ditched' *BBC News 24* (15 Dec 2006). Available at <http://news.bbc.co.uk/1/hi/business/6180945.stm>.

[14] See (n 30).

[15] Green Paper, *On Conflicts of Jurisdiction and the Principle of* Ne Bis In Idem *in Criminal Proceedings* COM(2005) 696 final. Reference was made to the EC Green Paper and the Eurojust Guidelines, although little of the Guidelines was included in the Trilateral Guidance, letter (n 6).

Staff Working Document' on the matter.[16] It should be noted, that the Green Paper was directed to conflicts of jurisdiction between States of the EU, a rather special regime compared with the ordinary case in international law. Nonetheless, it is clear that the Green Paper does evince rather more concern for the position of defendants than does the Guidance.[17] The main objective of the Green Paper was to suggest possible approaches to the creation of a mechanism that could facilitate the choice of the most appropriate judicial jurisdiction.[18] Such a mechanism has become necessary given the increasing likelihood that two or more Member States could initiate parallel criminal proceedings.

The Attorneys-Generals' Guidance follows a three-step approach in 'determining issues arising in cases with concurrent jurisdiction' (para 4). As detailed above, the approach is based on the sharing of information, consultation between prosecutors and resolution by the Attorneys-Generals or Lord Advocate when prosecutors are unable to reach agreement (para 4). In a strikingly similar fashion, the Green Paper proposes a tripartite procedure for settling on the most appropriate jurisdiction amongst interested EU Member States where the potential for concurrent jurisdiction arises.[19] First, there would be a duty on the 'initiating' State to inform the competent authorities of the other Member State(s) when a prosecution has been, or will be, started. This requirement comes into play when it can be demonstrated that the case has '*significant links* to another Member State'.[20] Secondly, the relevant authorities of the Member States interested in conducting the prosecution would be required to enter into discussions. This ensures that the opinions of each interested State are considered. Thirdly, in instances where agreement cannot be reached through consultation, an EU-level body (such as *Eurojust*) could be called on to act as mediator. The aim here is to provide an objective consideration of the competing interests involved and advise accordingly. In an additional step, the Green Paper also proposes the possibility of establishing a final ('fourth') stage that would empower a designated EU body to issue a binding decision on the most appropriate jurisdiction when voluntary agreement cannot be reached through mediation.

Notwithstanding the basic similarities between the three stages in the Guidance and the proposal in the Green Paper, the latter document contributes to the matter of conflicts of criminal jurisdiction in two further important respects: by exploring the idea of priorities of investigatory and judicial jurisdictions and by considering the protection of the interests of defendants in the choice of jurisdiction.

Concentrating criminal proceedings in a *leading* Member State (emphasis in the original[21]) at a certain stage of the proceedings could have the advantage of circum-

[16] Commission staff Working Document, Annex to the Green Paper, *On Conflicts of Jurisdiction and the Principle of* Ne Bis In Idem *in Criminal Proceedings,* SEC (2005) 1767. The public consultation period closed on 31 Mar 2006. See <http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm>.

[17] Interestingly, the Attorney-General has requested clarification with regard to the Green Paper (n 15) over whether the implications for defendants of delays while conflicts of jurisdiction are considered have been fully appreciated. See House of Commons, Select Committee on European Scrutiny, 20th Report (2005–6) (13 Mar 2006). 14 HO (27178) *Green Paper on conflicts of jurisdiction and double jeopardy in criminal proceedings*, para 14.21.

[18] See Green Paper (n 15) 3.

[19] ibid 4–6. The Staff Working Paper details further the three stages (n 16) 20–5.

[20] See Green Paper (n 15) 4. See Guidance, para 2 above on 'significant links'. Once again, what constitutes a 'significant link' is not elaborated.

[21] See Working Paper (n 16) 31.

venting the current set-up of 'first come, first served'. Under this system, the first interested Member State to complete its investigation can initiate proceedings. The 'Working Paper' suggests that the most appropriate time to apply a rule of priority that would circumvent the first-past-the-investigatory-post system and thereafter concentrate proceedings in one Member State would be, 'the moment of the sending of an indictment or accusation before a court'.[22] Until that stage, parallel criminal proceedings would not seem to be contrary to the interests of justice. Leaving matters of priority open until the trial phase would (i) allow for as much information as possible to be collected before a decision is reached regarding the most appropriate jurisdiction, and (ii) avoid the situation where important new developments come to light at a late stage of the investigations, which could jeopardize a prior decision on the choice of jurisdiction. From the prosecutors' perspective, waiting until the indictment stage would allow prosecutors to be in possession of all the relevant information, enabling them to make an informed decision over the appropriate jurisdiction.[23] From the defendant's perspective, the burdens of a legal, financial and psychological nature normally become more acute after the indictment has been issued. Consequently, parallel preliminary proceedings should not significantly have an impact on the defendant's rights and interests.[24]

The Working Paper identifies the benefits of nominating a lead Member State, and raises several of the considerations that would need to be taken into account were any such rule of priority to come into effect (not least, whether the civil law concept of 'timely priority' is suited to the criminal law and the need to delay issuing indictments until the three-step procedure is complete[25]—when, for common law States, there might be serious problems about continuing to detain a person before he has been charged). However, the Working Paper provides no detail on how the lead State will be chosen, other then that 'the ultimate purpose of the [three-step] procedure/mechanism . . . should be to give priority to one Member State'.[26] In this way, the European approach to choice of jurisdiction seems redolent of the ad hoc, case-by-case determination foreseen under the Guidance (para 3).

Consideration of the defendant in the process of determining the most appropriate jurisdiction in the Green Paper[27] is twofold. More detail is provided in the Working Paper. First, the role the individual can reasonably play in the consultation proceedings and, subsequently, the possibility for a judicial review are taken into account;[28] secondly, the impact that the *circumstances of the defendant*[29] may have on the final choice of judicial jurisdiction are raised.

In contrast to the Guidance which is silent on the role of the defence and the interests of defendants at the consultation stage and also states that a third party has no right to object to, or seek review of, a decision regarding investigation or prosecution,[30] the possibility that they can contribute is considered in the Green Paper and the accompanying Working Paper.[31] Needless to say, the circumstances when a defendant and/or his or her lawyer can participate in the consultation between prosecuting authorities are limited. This stems from the legitimate concern that at this stage,

[22] ibid 32. [23] ibid. [24] ibid.
[25] ibid. [26] ibid 31.
[27] Section 2.3, *Role of individuals and judicial review*; section 2.5, *Relevant Criteria*.
[28] See Working Paper (n 16) 26–9. [29] ibid section 9.2, 37 et seq.
[30] See (n 14) discussing Guidelines (para 13).
[31] See Green Paper (n 15) 6–7. Discussing further the role of suspects/defendants and their defence team, see Working Paper (n 16) 26–29.

> . . . an intensive discussion of what is to be considered an appropriate jurisdiction with the suspected person or defendant and/or his lawyer is often not the most appropriate as it might often lead to the revelation of facts which could jeopardise the proceedings or the rights and freedoms of third parties.[32]

In contrast, when the likelihood of compromise is minimal, the Working Paper says the authorities are usually required by national law to provide access to the relevant files and grant the defence the right to be heard.[33] Here lies a rub that may be unavoidable in cases involving sensitive issues: the choice of jurisdiction may have to be determined without any input of the defence, even when such a decision could impact on the livelihood of the defendant. In these circumstances, the only possibility for legal review would have to wait until the trial stage, when hardships may have already been endured. The Working Paper recognizes the potential impact on 'concerned individuals', stating that 'determining jurisdiction . . . can have significant effects on the concerned individuals' rights and must, therefore, be subject to an effective remedy'.[34]

Determining the competence of the court is a normal stage in national criminal procedure. However, the Working Paper suggests further that 'a legal review on the additional question of which of the several competent Member States should be given preference in a certain case might not be foreseen in all legal systems'.[35] There is a very real possibility that, in cases of concurrent jurisdiction, the defence would request a review of the justification used for deciding to prosecute in a particular jurisdiction. How well equipped national courts are to deal with this matter remains to be seen. Application of general principles of procedural criminal law, specific rules or guidelines controlling the allocation of the leading jurisdiction ('priority'),[36] the right to a fair trial and due process and the right to have one's case heard by a competent court or tribunal established by law are suggested in the Working Paper as potential factors to be considered when dealing with such a challenge.[37]

The role the defence can play in the consultation procedure itself may well be limited. Fortunately, the Green Paper suggests that certain 'substantive criteria',[38] among them the circumstances of the defendant, should be considered during the consultation stage when the relevant authorities are determining the most appropriate jurisdiction. The Working Paper calls this aspect 'criteria related to the suspect or defendant'.[39] The requirement to consider the circumstances of the defendant could perhaps go some way to mitigating challenges by the defence over the choice of judicial jurisdiction at a later stage. Matters such as nationality, residence/location, place of arrest/detention, proceedings against the defendant in another Member State on other charges, and prospect of rehabilitation post-sentence should all be taken into account.[40] Specifically, the Working Paper seems to establish a presumption in favour of jurisdiction assigned on the basis of habitual residence of the defendant, all other factors being equal.[41] The Paper considers, 'the burdens and restrictions on a defen-

[32] ibid (Working Paper) 26.
[33] ibid 26.
[34] ibid.
[35] ibid 27.
[36] On this matter, see discussion above on a rule of priority.
[37] Working Paper (n 16) 27.
[38] These criteria draw on the 2003 Eurojust *Guidelines for Deciding which Jurisdiction should Prosecute*. Annex to the 2003 Annual Report. Available at <http://www.eurojust.europa.int/press_annual_report_2003.htm>
[39] Working Paper (n 16) 37.
[40] ibid.
[41] But cf *Launder v United Kingdom (Application No 27279/95)* (1997) 25 EHRR CD 67 on

dant's freedom which (on aspects related eg to family, job, language, finances, and property) go along with criminal proceedings can be limited if the proceedings take place in an area where he has his main residence. This is particularly true for the trial itself'.[42]

Prosecution in the 'home' jurisdiction when possible is endorsed by the European Criminal Bar Association. Commenting on the Green Paper, it submits,

> where the criminal conduct has occurred in more than one EU Member State and it is possible given this to prosecute a person in their home Member State, then it would seem disproportionate and unnecessary for them to be extradited to another EU Member State to be prosecuted for the same offence.[43]

Indeed, the European Criminal Bar Association made extensive suggestions about the substantive and procedural conditions which are necessary to protect defendants' interests in its response to the Green Paper, including the establishment of criteria to determine conflicts of jurisdiction and a procedure for a defendant to challenge decisions on jurisdiction.[44]

The interests of the defendant are only one factor that must be balanced against territoriality (ie place of commission), victim and/or State interest, along with efficiency and rapidity of proceedings.[45] Nonetheless, if such a presumption were to make it into the tabled Framework Decision,[46] combined with a rule of priority that reflects the same, this could significantly influence the decision on the choice of jurisdiction in cases like *Bermingham* and *Norris* that may unfold in a European context. It remains to be seen whether the European approach will, in the end, emulate the Attorneys-Generals' 'prosecutors' deal', or provide a more balanced consideration of the interests of defendants.

KATE BROOKSON-MORRIS*

II. ETHIOPIA'S MILITARY ACTION AGAINST THE UNION OF ISLAMIC COURTS AND OTHERS IN SOMALIA: SOME LEGAL IMPLICATIONS

Somalia has been without government since 1991. A transitional government was established in 2004 under the presidency of Abdullahi Yusuf, with the backing of the

Article 8 ECHR, the right to private and family life, where it was held that '… only in exceptional circumstances [will] the extradition of a person to face trial on charges of serious offences committed in the requesting State […] be held to be an unjustified or disproportionate interference with the right to respect for family life'.

[42] Working Paper (n 16) 38.

[43] Response by the ECBA to the Green Paper and Working Paper on Conflicts of Jurisdiction and the Principles of *Ne Bis In Idem* in Criminal Proceedings Presented by the European Commission, para 2.5. Available at <http://www.ecba.org/extdocserv/jurisdictionnebisinidemresponsefinal.PDF>

[44] ibid.

[45] Working Paper (n 16) 35–40; Also, eg *Ex p Postlethwaite* [1988] AC 97.

[46] The legislative proposal was tabled to be brought forward in the second half of 2006. At the time of writing, no movement on this matter has been observed.

* PhD Candidate, University of Birmingham.

[*ICLQ* vol 56, July 2007 pp 666–676] doi: 10.1093/iclq/lei188