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The Overlapping Jurisdictions between the International Criminal Court and *ad hoc* International Tribunals

Replies and Comments

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Focus

Article 103 UN Charter

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Art. 53 Rome Statute

"1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(c) A prosecution is not in the interests of justice, [...]"

Currently, a variety of international bodies has jurisdiction over international crimes.

On the one hand there is the "family" of *ad hoc* tribunals with jurisdiction over specific conflicts, the jurisdiction *ratione temporis, loci* and *personae* is precisely defined in accordance with a sole internal or international armed conflict, during which international core crimes such as crimes against humanity, genocide and/or war crimes have been committed. Within this family of *ad hoc* institutions, there are tribunals established by United Nations Security Council resolutions such as the *International Criminal Tribunal for the former Yugoslavia* (ICTY) and the *International Criminal Tribunal for Rwanda* (ICTR) and hybrid courts (see Bofaxe 298E).

On the other hand, the International Criminal Court (ICC) is the first *permanent* international institution with jurisdiction over international crimes. Having in mind the identical jurisdiction *ratione materiae* over the aforementioned crimes under international law (Arts. 6 – 8 of the Rome Statute), the question arises whether these jurisdictions can overlap, and if so, how a possible conflict of concurrent jurisdictions between *ad hoc* tribunals and the ICC can be resolved.

Possible limitations of jurisdiction of the ICC can already be derived from its statute. Most importantly, the principle of complementarity (Art. 17 of the statute) establishes that a case is inadmissible, if proper legal proceedings are initiated on national level by the State which has jurisdiction. Secondly, Art. 11 (1) of the Rome Statute limits the temporal jurisdiction to crimes committed after the entry into force of the Statute (1 July 2002).

However, these limitations do not provide a solution to a possible conflict of jurisdiction with U.N.-based international *ad hoc* tribunals.

If, for example, one of the States, which emerged from the secession of the former Yugoslav Federation ratified the Rome Statute, were to accept the retroactive jurisdiction of the ICC from 1 July 2002 onwards, a possible conflict of jurisdiction could theoretically arise with the ICTY. Neither the Rome Statute nor the *Negotiated Relationship Agreement between the ICC and the U.N.* do explicitly provide for a provision that deals with this eventuality.

A solution might be found in the nature of the conflicting institutions. The mandate of the U.N. *ad hoc* tribunals such as the ICTY and the ICTR is based upon a Chapter VII Security Council resolution, which generates the duty of all member States of the U.N. to fulfil their obligations under the U.N. Charter by granting priority to these resolutions over obligations under any other international agreement (Art. 103 U.N. Charter). The Rome Statute is a multilateral international agreement. Hence, by virtue of article 103 U.N. Charter, the obligations this treaty entail would be subsidiary to those enshrined in the UN Charter. Although the ICC is a distinct legal entity from the States parties and as such not subject to article 103 UN Charter, it is likely that, at least due to the indirect pressure upon the ICC through the direct applicability of article 103 UN Charter on its States parties, the respective investigation would be transferred to the ICTY.

This solution would furthermore go in line with the idea of the ICC as an institution of "last resort" in order to prevent impunity for the worst crimes when other means of prosecution fail. Thus, as long as an institution more "tailor-made" for a crime or conflict in question - such as the ICTY in the given example - exercises jurisdiction over respective crimes, the ICC would abstain from investigating.

Further, the abstention or withdrawal from investigation could be formally executed by the decision of the Prosecutor not to investigate because of a lack of "interests of justice" in pursuance of article 53 (1) (c) of the Statute or to seize investigations in accordance with article 53 (2) (c) if the investigation had already been initiated. Indeed the concept of "interests of justice" does not exclude such an interpretation, although one must admit that the case of another international court exercising jurisdiction might not have been in the drafters' minds.

Responsibility

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