International Criminal Courts and Tribunals, Complementarity and Jurisdiction

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A. Concept

1 In order for international criminal jurisdictions to achieve even their most basic objectives of prosecuting and adjudicating core international crimes effectively (→ *Crimes against Humanity*; → *Genocide*; → *War Crimes*), they must have jurisdiction over the appropriate situations (→ *Criminal Jurisdiction of States under International Law*; → *International Criminal Jurisdiction, Protective Principle*; → *Jurisdiction of States*). Two substantial challenges arise in this context. The first one is finding a balance between the principle of State → *sovereignty* and the need to punish serious crimes that are of concern to the → *international community* as a whole. The second challenge is to reinforce the obligation of all States to prosecute crimes for which universal jurisdiction exists, especially since it is practically impossible for an internationalized criminal jurisdiction to punish all perpetrators and because internationalized justice is often removed from the territorial State affected by the crimes in question.

2 There are various regimes of internationalized criminal jurisdictions in existence. Defining features of each regime are its relationship with domestic jurisdictions and the ways in which the internationalized jurisdiction in question can be activated or triggered.

B. Jurisdiction of the International Criminal Tribunals

1. International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda

3 The → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* and the → *International Criminal Tribunal for Rwanda (ICTR)*('Tribunals') have jurisdictional regimes characterized by primacy. Their statutes provide that the Tribunals and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international law. But in cases of conflict, such as where both a tribunal and a national court seek to exercise jurisdiction, the statutes give primacy to the Tribunals. Under their rules of procedure, the ICTY and ICTR have the legal discretion to order national courts to defer to them at any stage of the proceedings. A person who has been tried by a national court for the acts falling under the statute may be subsequently tried by the ICTY or ICTR if the act was characterized as an 'ordinary crime'; the proceedings were not impartial or independent; were designed to shield the accused; or the case was not diligently prosecuted.

4 The ad hoc tribunals are able to request national courts to defer to their jurisdiction because they were created by resolutions of the United Nations Security Council (→ *United Nations, Security Council*) ('Security Council').

Consequently, their jurisdiction is based on the Security Council enforcement measures rather than State → *consent* under a treaty. When the Security Council took the step to create the ICTY in 1993 by UNSC Resolution 808, there was uncertainty whether the → *United Nations Charter* Chapter VII ('Chapter VII') included the power to establish a court system. The Appeals Chamber of the ICTY concluded that Chapter VII included this power and there no longer appears to be a real question that the Security Council can establish ad hoc tribunals (*Prosecutor v Tadi? [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* ICTY 94-1 [2 October 1995]; → *Tadi? Case*).

2. Referral to National Courts

5 Despite the primacy of their jurisdiction, the ICTY and ICTR have been referring some cases to national courts. This is as a result of the so-called completion strategy for the Tribunals established by UNSC Resolution 1503. This strategy intends to ensure a phased and co-ordinated completion of the Tribunals' work by the end of 2010. According to the strategy, the Tribunals will concentrate on the prosecution of the most senior leaders while referring a number of cases involving intermediate and lower-rank accused to national courts in Bosnia and Herzegovina, Rwanda or other national jurisdictions (see also → *Gacaca Courts*). These referrals also aim to help strengthen the capacity of national courts to handle core international crime cases. However, the referral of cases to national courts raises concerns about compliance with international standards of fair trial as well as their ability to handle large case loads (→ *Fair Trial, Right to, International Protection*). This is an issue, for example, where the national jurisdiction has the ability to sentence the accused to death (→ *Death Penalty*).

6 The ICTY and ICTR are referring cases that have been investigated but did not result in the issuance of an indictment as well as cases that resulted in the issuance of indictments against named suspects.

C. Mixed Internationalized Criminal Jurisdictions

1. Sierra Leone

7 Instead of establishing an ad hoc tribunal to adjudicate the serious violations of international law committed in → *Sierra Leone*, the Security Council requested the Secretary-General of the → *United Nations (UN)* (→ *United Nations, Secretary General*) to negotiate an agreement with the Sierra Leone government to create an independent special court ('Special Court'; → *Mixed Criminal Tribunals [Sierra Leone, East Timor, Kosovo, Cambodia]*). The Statute of the Special Court for Sierra Leone ('Statute') was finalized in 2002, being annexed to the Agreement on the Establishment of a Special Court for Sierra Leone. The Special Court is a treaty-based *sui generis* court of mixed jurisdiction and composition. Unlike the ICTY and ICTR, it is not a subsidiary organ of the UN. The Special Court and the national courts have concurrent jurisdiction, and the Special Court has primacy. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence. A person who has been tried by a national court for the acts falling under the Statute may be subsequently tried by the Special Court if the act was characterized as an 'ordinary crime' or the proceedings were not impartial or independent, were designed to shield the accused, or the case was not diligently prosecuted.

2. East Timor

8 In response to the serious violations of → *human rights* in East Timor, the Security Council passed UNSC Resolution 1272 under Chapter VII establishing the United Nations Transitional Administration in East Timor ('UNTAET'). It was specifically empowered to administer the justice system. UNTAET courageously issued regulations providing that 'serious crimes' would be within the exclusive jurisdiction of two special panels of international and local judges sitting in the District Court of Dili. UNTAET also established the Serious Crimes Unit ('SCU') with the mandate to conduct investigations and prosecutions against those responsible for crimes against humanity and other serious crimes. The temporal mandate of the special panels and SCU ended in May 2005. Since then, jurisdiction for serious crimes has been transferred to the ordinary prosecution service and district court system. There were some international prosecutors and judges involved in the cases which continued before the ordinary judiciary.

3. Cambodia

9 The United Nations General Assembly (→ *United Nations, General Assembly*) and the Government of Cambodia signed an agreement (UNGA Res 57/228 B) in 2003 establishing Extraordinary Chambers as part of Cambodia's national court system—the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). The ECCC has a mixture of international and Cambodian staff and applies international as well as Cambodian law. The Chambers have limited but exclusive

jurisdiction over selected crimes under international and Cambodian law committed between 17 April 1975 and 6 January 1979 (→ *Cambodia Conflicts [Kampuchea]*). They can only try a person who was a senior leader of 'Democratic Kampuchea' or who was most responsible for the crimes in the statute.

D. Complementarity at the International Criminal Court

1. Background

10 The jurisdiction of the → *International Criminal Court (ICC)* is governed by the principle of complementarity. This means that, unlike the ICTY, ICTR and the mixed internationalised criminal jurisdictions discussed above, the ICC does not have primacy over national courts. Instead, States have the first responsibility and right to prosecute the most serious crimes of international concern. The ICC may only exercise jurisdiction where the national legal system 'is unwilling or unable genuinely to carry out the investigation or prosecution' (Art. 17 Rome Statute of the International Criminal Court ['ICC Statute']). The principle of complementarity is based on respect for the primary jurisdiction of States and on practical considerations of effectiveness since the ICC is a single institution with limited resources, removed from the territorial States affected by mass atrocity (→ *Gross and Systematic Human Rights Violations*).

11 The concept of complementary jurisdiction first arose in the legal context in the Treaty of Versailles (→ *Versailles Peace Treaty [1919]*), in which the Allies agreed to accept Germany's offer to try a select number of accused offenders before its *Reichsgericht* sitting in Leipzig. The → *preamble* of the ICC as an international institution that 'shall be complementary to national criminal jurisdictions ICC Statute and its Art. 1 refer to the ICC as an international institution that 'shall be complementary to national criminal jurisdictions'. The statute does not explicitly use the term 'complementarity', but this term was adopted informally by the negotiators of the ICC Statute—and then by scholars writing about the ICC in commentaries edited by Cassese and Triffterer—to refer to the entirety of norms governing the relationship between the ICC and national jurisdictions.

2. Complementarity in the International Criminal Court Statute: Art. 17

12 The substantive rules that constitute the principle of complementarity are contained in Art. 17 ICC Statute. This article addresses issues of admissibility, so the question of complementarity therefore pertains to the admissibility of a case rather than the jurisdiction of the ICC (→ *International Criminal Courts and Tribunals, Procedure*). Therefore, the principle of complementarity does not affect the existence of jurisdiction of the ICC as such, but regulates when this jurisdiction may be exercised by the ICC. The Rules of Procedure and Evidence recognize this distinction by providing that the ICC shall rule on any challenge to its jurisdiction first before dealing with matters of admissibility.

13 According to Art. 17 ICC Statute, the ICC shall determine that a case is inadmissible on the basis of four factors. The core of this 'admissibility test' is whether there is a national forum which has the willingness and ability to investigate and prosecute genuinely. The first two factors concern a situation where a State with jurisdiction—either a State Party or a non-State Party—is investigating or prosecuting the case at hand or has conducted an investigation and decided not to prosecute the person. In these circumstances, a case is only admissible if the State is shown to be 'unwilling or unable genuinely to carry out the investigation or prosecution' (Art. 17 ICC Statute).

14 Three alternative criteria for 'unwillingness' are provided in Art. 17. The ICC shall consider whether the national proceedings were for the purpose of shielding the person from criminal responsibility, there was an unjustified delay in the proceedings which was inconsistent with an intent to bring the person to justice, or the proceedings were not conducted independently or impartially and were not conducted in a manner consistent with bringing the person to justice.

15 For the determination of 'inability' in a particular case, the ICC shall consider whether 'due to the total or substantial collapse or unavailability 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 proceedings' (Art. 17(3)Art. 17 (3) ICC StatuteArt. 17 (3) ICC Statute). This could cover situations where there is a failed State (→ *Failing States*), a civil war (→ *Armed Conflict, Non-International*), or a natural disaster (see also → *State of Emergency*).

16 The third factor under Art. 17 concerns the situation where a person has already been tried for conduct which is the subject of the complaint and a trial by the ICC is not permitted under the principle of → *ne bis in idem*. The final factor is where the case is not of sufficient gravity to justify further action by the ICC. This relates to the ICC's objective of prosecuting the 'most serious crimes of concern to the international community as a whole' (Preamble ICC Statute).

3. Procedures under Complementarity

17 The procedural framework for complementarity allows States and the ICC to interact so that admissibility questions can be considered and resolved from a very early stage. The ICC is arbiter over the complementarity regime and may raise the issue *proprio motu*. As for the Office of the Prosecutor, complementarity is an issue that must be addressed from the start.

18 Where the Office of the Prosecutor wishes to initiate a *proprio motu* investigation, it is first obliged to consider whether the case would be admissible and to obtain authorization from a pre-trial chamber (→ *International Courts and Tribunals, Chambers*). This ensures that the prosecution is not starting an investigation where national authorities are already acting. Where there is a State referral of a situation, the Office of the Prosecutor has a duty to notify States which would normally exercise jurisdiction over the crimes concerned of the referral. Within one month of receipt of the notification, States may inform the ICC that they have investigated or are investigating the crime. Dialogue between the State and the Office of the Prosecutor is encouraged and the Office of the Prosecutor may request additional information. In order to proceed, the Office of the Prosecutor must be authorized by a pre-trial chamber. If the ICC's investigation is deferred, the Office of the Prosecutor can request periodic information on the status of the national proceedings. It has been argued that the complementarity regime does not apply to Security Council referrals, but the majority of scholars contend that it does and the Office of the Prosecutor has proceeded with its investigation in the situation concerning Darfur (→ *Sudan*) on this basis.

19 Challenges based on complementarity can be raised by the ICC, the Office of the Prosecutor, the accused, a State with jurisdiction, or a State from which acceptance of jurisdiction is required.

20 By September 2007, the principle of complementarity had been relevant in three situations that the Office of the Prosecutor has been investigating—Uganda, the Democratic Republic of the Congo ('DRC';→ *Congo, Democratic Republic of the*), and Darfur.

21 Uganda made the first referral of situation to the ICC in December 2003. In July 2004, the Office of the Prosecutor decided to open an investigation. The referral raised the question of whether a State with a judicial system that is both willing and able to conduct a prosecution can voluntarily relinquish jurisdiction in favour of the ICC. Uganda did not claim that there has been a total or substantial collapse of its justice system or that its justice system was unavailable. There is also no indication that Uganda was unwilling to investigate and prosecute in the sense that national proceedings were delayed or for the purposes of shielding the accused. The ICC Prosecutor has spoken of a 'positive' approach to complementarity whereby the ICC and the State agreed to a consensual division of labour, with the ICC prosecuting the leaders and the State prosecuting lower-ranking perpetrators. In May 2005, the Prosecutor filed an application for warrants of arrest for crimes against humanity and war crimes against five senior commanders of the Lord's Resistance Army, which were issued by the pre-trial chamber. No arrests had been made as of September 2007.

22 The DRC referred the situation to the ICC in April 2004 and the Office of the Prosecutor decided to open an investigation two months later. In terms of the overall situation, the criteria of Art. 17 (3) ICC Statute concerning the genuine inability of the State to carry out the investigation or prosecution appeared to be met. However, this assessment had to be adjusted with the arrest of Mr Thomas Lubanga Dyilo. Mr Lubanga had been arrested by Congolese authorities in February 2006 following the killing of nine UN peacekeepers in Ituri. He was transferred to the ICC in March 2006 pursuant to an arrest warrant for the war crimes of enlisting, conscripting and using children under the age of 15 to participate actively in hostilities (→ *Children and Armed Conflict*). In its decision on the warrant application, the ICC Pre-Trial Chamber stated that 'it is *a conditio sine qua non* for a case arising from an investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court' (*The Prosecutor v Thomas Lubanga Dyilo [Warrant of Arrest]* 10 February 2006 ICC-01/04-01/06 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf> [15 December 2007]). Since the conduct for which Mr Lubanga was being held in the DRC was different to the war crimes he was accused of by the ICC Office of the Prosecutor, his case was considered admissible.

23 In March 2005, the Security Council adopted UNSC Resolution 1593 referring the situation in Darfur, the Sudan, to the ICC. In March 2005, the Security Council adopted UNSC Resolution 1593 referring the situation in Darfur, the Sudan, to the ICC. In accordance with the ICC Statute, the Office of the Prosecutor conducted a preliminary examination of the situation. On this basis, the Prosecutor opened the investigation in June 2005. At the same time, Sudan established the Special Criminal Court for Events in Darfur. It has in place a judicial investigation committee and special prosecutions

commissions. In February 2007, the Prosecutor made an application to the pre-trial chamber to issue summonses to appear against two named individuals. The application did not allege that the Sudanese government was 'unable' to investigate or prosecute those individuals. Rather, the Prosecutor stated that the Sudanese authorities had not investigated or prosecuted the case which was the subject of the application. On this basis, the Prosecutor concluded that the case was admissible. As of September 2007, the two individuals had not appeared before the ICC.

4. Impact of the ICC on Universal Criminal Jurisdiction Exercised by States

24 The complementarity regime of the ICC is designed to encourage full and genuine domestic prosecutions of crimes. This would be a positive development as national courts are often best placed to deal with core international crimes. By acknowledging that the effective prosecution of core international crimes depends on action by national authorities, the principle of complementarity contained in the ICC Statute may act as a catalyst encouraging States to investigate and prosecute serious violations of human rights. This will contribute to the fundamental objectives of international criminal law, namely, the avoidance of impunity and the deterrence of future crimes.

E. Challenges

25 The establishment of the ICTY, ICTR and the mixed internationalized criminal jurisdictions, the exercise of universal jurisdiction by national courts, and the creation of a permanent International Criminal Court signal the emergence of a system of international criminal justice. There has been an evolution from ad hoc attempts to enforce international law in specific situations to a developing, interdependent system aiming to end impunity for serious violations of international criminal law around the world. The ICC forms only a small part of this system. There are temporal, substantive and resource limits on what it can do. The principle of complementarity gives the court a supplementary role, not a primary one, in investigating and prosecuting core international crimes.

26 The change from primary jurisdiction to complementary jurisdiction alters the balance between State sovereignty and international criminal justice. The ICC's principle of complementarity affirms the obligation of States to prosecute core international crimes. It implies that there will often be a division of labour between the ICC and national courts. The ICC will prosecute some of those who bear the greatest responsibility for crimes while the national authorities bring other perpetrators to justice. The national authorities may not always be in a position to do this. An 'impunity gap' will open up between the few cases which the ICC will be able to investigate and prosecute, and the numerous cases which the national authorities are unable to deal with. The involvement of the court will highlight this gap. This is likely to create challenges beyond expectation management.

27 But if the ICC prosecutes those most responsible, reinvigorated national authorities might then be able to deal with other cases. If not, the international community will have a continuing role in encouraging national and international efforts to ensure that perpetrators of serious core international crimes are brought to justice. It is clear that the principle of complementarity requires the ICC to be embedded in a broader system. Its jurisdictional regime needs the multiple engagement of States to be effective.

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