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# THE PLACE AND ROLE OF THE INTERNATIONAL CRIMINAL JURISDICTIONS IN RELATION TO NATIONAL DOMESTIC COURTS WITH REGARD TO THE PRINCIPLES OF PRIMACY AND COMPLEMENTARITY

BY  
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## I. INTRODUCTION

The end of the Cold War 16 years ago marked a major shift in the development of international law. The need to address the ever-increasing culture of impunity and prevent future commission of atrocities made the international community to establish international criminal tribunals to try those responsible for the international crimes.<sup>2</sup> The establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 by the Security Council marked the beginning of the establishment of these tribunals.<sup>3</sup> The International Criminal Tribunal for Rwanda (ICTR) was established a year later to try those responsible for the genocide in Rwanda in 1994.<sup>4</sup> However, the mandate of these tribunals was confined to the crimes that took place in the former Yugoslavia and Rwanda; they lacked the capacity to deal with other emerging cases of impunity elsewhere. This called for the establishment of a permanent international criminal court. This was ultimately achieved in 1998 when the Statute of the Permanent International Criminal Court (ICC) was finally adopted.<sup>5</sup> Besides these international tribunals, other 'hybrid' tribunals have been created to deal with specific country conflicts. The most prominent in this category is the Special Court for Sierra Leone (SCSL), which was established in 2002.<sup>6</sup> In all these cases, however, the notion of jurisdiction has been a central

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<sup>2</sup> A Cassese International Law (2005) 459.

<sup>3</sup> Security Council Resolution 808/93 UN Doc S/Res/808/1993.

<sup>4</sup> Security Council Resolution 955/94 UN Doc S/Res/955/1157/1994.

<sup>5</sup> Adopted in Rome on 17 July 1998 and entered into force on 1 July 2002.

<sup>6</sup> The SCSL was established on 16 January 2002 by an agreement between the UN Secretary General and the Government of Sierra Leone.

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issue.<sup>1</sup> This is due to the need to reconcile the jurisdiction of international tribunals with that of domestic courts in situations where both are competent to try the same case. Historically, states had the sole authority to repress the commission of international crimes, but the creation of the international tribunals particularly the ICTY/R with primacy clauses in their concurrent jurisdictions changed the role of national courts in the area of international law. It also brought controversies since states felt that their sovereignty was being eroded.<sup>2</sup> This led to the consideration of complementary jurisdiction when the ICC was established as an alternative to primacy jurisdiction. With this introduction, this paper will attempt to discuss the role and place of international criminal jurisdictions in relation to domestic courts especially with regard to the principles of primacy and complementarity.

## II. THE PRINCIPLE OF PRIMACY UNDER INTERNATIONAL LAW

This is a form of concurrent jurisdiction where the international tribunals are given preference over national criminal courts. This means that at any stage of the proceedings, the tribunal may formally request the national courts to defer to the competence of the international tribunal where the case is one that falls within the jurisdiction of the tribunal. This extra-ordinary jurisdictional priority is justified by the compelling international humanitarian interests especially due to the nature of the crimes in context, effects of the crimes and the need to restore and maintain peace in post conflict societies.<sup>3</sup> This is so especially in post conflict societies where the national legal system has been severely affected and lacks the capacity to carry out prosecution properly or fairly without revenge.<sup>4</sup>

The jurisdiction of the ad-hoc tribunals of the ICTY, ICTR and SCSL are based on concurrent jurisdiction with a primacy clause over national courts.<sup>5</sup>

1 O Solera 'Complementarity jurisdiction and international criminal justice' IRRIC March 2002 Vol 84 145

2 Solera (n 6 above) 146.

3 See M El Zeidy 'The principle of complementarity: a new machinery to implement international law' Michigan International Law Journal (2002) 875.

4 E.g. the national judiciary had collapsed after the conflicts in Rwanda and Sierra Leone. In the former Yugoslavia, there existed deep animosity between various ethnic and religious groups and this made it difficult for national courts to carry out prosecution or fair trials.

5 Arts 9 ICTY, 8 ICTR & 8 SCSL.



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The Rules of Procedure and Evidence of these tribunals also reinforce their primacy.<sup>1</sup> The tribunals can assert their primacy in three circumstances: when the act being investigated or which is the subject of the proceedings in a domestic sphere is characterised as ordinary crimes; when there is lack of impartiality or independence, or the investigations or proceedings are designed to shield suspects from international criminal responsibility, or the case is not diligently prosecuted; and where what is in issue is closely related to or involves significant factual or legal questions which may have implications for investigations or prosecutions before the tribunals.

The ICTY exercised its primacy in *Tadic v Prosecutor*<sup>2</sup> when it requested Germany to defer the case to the ICTY. The ICTY stated that the principle is necessary as it enhances the role of the prosecutor and the Tribunal to determine whether to exercise discretion to be seized of a case. It also cited the gravity of the crimes and the need for justice as some reasons that made it necessary for international tribunals to be endowed with the primacy jurisdiction. It stated thus:

It would be a travesty of law and betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.... Indeed when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise human nature being what it is, there would be a perennial danger of international crimes being designed to shield the accused or cases being not diligently prosecuted.

Similarly, the ICTR exercised its primacy jurisdiction in *Prosecutor v Karamira*<sup>3</sup> when it requested Rwanda to defer the accused to the ICTR.

This right can be exercised at any stage of the proceedings including at the investigations stage. In Lasva River Valley Investigations, the ICTY prosecutor requested Bosnia to defer the investigations of the case to the

1 Rules 9 ICTY, 9 ICTR & 9 SCSL.

2 IT-94-1-T, 1995.

3 ICTY-98-44 2000.

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ICTY.<sup>1</sup> However, the nature and scope of the primacy may differ from one tribunal to the other. For example, both the ICTY/R have primacy over domestic courts of all states whereas the SCSL has primacy over the domestic courts of Sierra Leone only.<sup>2</sup>

The principle of primacy also obliges states to cooperate with the tribunals in the investigations and prosecutions and to comply without undue delay to its request for assistance or order.<sup>3</sup> The ICTY considered this matter in *Prosecutor v Blaskic*<sup>4</sup> where it stated that under the Statute of the Tribunal, a state that refuses to cooperate with it is in breach of its international legal obligation.

However, the exercise of this jurisdictional principle is not absolute. The concurrent jurisdiction contained in the tribunals' statutes means that national courts have jurisdiction to try crimes of international character unless the tribunals assert their primacy. Indeed, the Rules of Procedure and Evidence of these tribunals do not lay down absolute primacy, rather they provide for concurrent jurisdiction with national courts. The Secretary General following the passing of Resolution 808 of 1993 noted that the creation of the ICTY did not preclude national courts from exercising jurisdiction over war crimes suspects.<sup>5</sup> The national courts have carried out prosecutions concurrently with both the ICTY/R for the crimes that were committed in Rwanda and former Yugoslavia.<sup>6</sup>

The exercise of primacy jurisdiction has given rise to controversies. In particular, states have felt that their sovereignty is being eroded. This was evident in the ICTR case of *Prosecutor v Kanyabashi* where the ICTR stated that the Tribunal did not violate Rwanda's sovereignty by exercising its primacy jurisdiction.<sup>7</sup> The ICTY has also been faced with similar problems and states have been loath to cooperate with it. The primacy jurisdiction has affected the ability of the tribunals to achieve their mandates effectively.<sup>8</sup>

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1 W Home 'The real trial of the century' in Belinda Cooper (ed) *War crimes: the legacy of Nuremberg* (1999) 133.

2 Art 8(2) SCSL.

3 Art 29 ICTY 29 ICTR.

4 ICTY-95-14-T.

5 UN Secretary General's Report on Resolution 808/93, UN Doc S/25704/1993.

6 In Rwanda, the domestic and gacaca courts have carried out prosecutions; other states have also carried out prosecutions regarding war crimes committed in former Yugoslavia.

7 Case No ICTR-96-15-T, 1997.

8 Dinah Shelton (ed) *International crimes, Peace and human rights: the role of the International*



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### III. THE PRINCIPLE OF COMPLEMENTARITY JURISDICTION UNDER INTERNATIONAL LAW

The complementarity jurisdiction is based on the premise that the original responsibility of prosecuting individuals for violations of law rests with states even where the crimes are international in character.<sup>1</sup> The national courts are thus given primacy in the repression of international crimes and the international tribunal only intervenes where the national criminal jurisdiction is not available, unable or unwilling to perform its tasks.<sup>2</sup> The international tribunals complement the existing structures within the domestic courts in order to enhance international judicial cooperation in criminal matters and break the culture of impunity.

The justification for this jurisdiction is based on the need for international jurisdiction to reinforce efforts by states against impunity; that due to the incapacity of states to deal with certain crimes, the international mechanisms would be resorted to. In so doing, it avoids two problems that have arisen from primacy jurisdiction. First, the problem of undermining state sovereignty and secondly, threatening the capacity of states to adopt legislations and other mechanisms for the repression of international crimes at the domestic level.<sup>3</sup> It thus preserves state sovereignty without detriment to the goal of reducing impunity and ensures that states become more responsive to the responsibilities when massive violations of international law are committed, while at the same time maintaining the effectiveness of the tribunal.

The jurisdiction of the ICC is based on this principle.<sup>4</sup> Under the ICC regime, national courts enjoy priority in the exercise of jurisdiction over international crimes except under special circumstances when the ICC is entitled to take over and assert its jurisdiction. Under paragraph 10 of the preamble and articles 1 and 17(1) of the Statute of the ICC, the jurisdiction of the ICC is complementary to that of national criminal jurisdictions, with the ICC

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1 El Zeidy (n 8 above) 875.

2 Solera (n 6 above) 147.

3 Solera (n 6 above) 149.

4 Arts 1, 17, 18 & 19.

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prosecuting only those crimes referred to it by states<sup>1</sup> or Security Council<sup>2</sup> or those that individual countries cannot or will not prosecute themselves.<sup>3</sup> Article 17 of the Statute, requires the ICC to declare a case inadmissible where it is being investigated or prosecuted by a state that has jurisdiction over it or a case has been investigated by a state that has jurisdiction over it unless the state is unwilling or unable to genuinely carry out investigation or prosecution. The ICC can also assume jurisdiction where a state is inclined to conduct sham prosecutions to shield potential defendants from real prosecution or where the state actors seek to suppress, discredit or revenge upon political adversaries through prosecution or where the judicial system has collapsed.<sup>4</sup>

The procedural requirements of the Statute also reinforce the complementarity regime in that article 18 requires the prosecutor to notify all state parties as well as other states that would normally exercise jurisdiction over an offence in case he considers to bring a case. Should a state inform the ICC within one month of receiving the notice that it is pursuing investigations of its nationals or others within its jurisdiction regarding the case, the prosecutor is required to defer to that investigating until and unless the Pre-Trial Chamber of ICC determines that he should continue to investigate.

The ICC approach is a balance between competing interests of national sovereignty on one hand and international interest for administration of justice on the other hand. Thus states bear the primary responsibility of investigating and prosecuting the most serious crimes of international concern and the ICC will not interfere unless it determines that there are some reasons to doubt that the state's investigations, prosecution or decision not to prosecute was made in good faith.<sup>5</sup>

According to Philippe Sands,<sup>6</sup> the complementarity regime of the ICC Statute

1 E.g. the referrals of Uganda in December 2003 and Democratic Republic of Congo in March 2004. In both cases, the ICC prosecutor indicted the suspects after carrying out investigations.

2 A good example is the referral of the Sudan case to the ICC in 2005.

3 LC Demowski 'The international criminal court: complementary and its consequence' in Jane E Stromseth *Accountability for atrocities*, (2003) 135.

4 Dinah (n 21 above) 189.

5 These are crimes under article 5 of the statute i.e. genocide, crimes against humanity, war crimes and crimes of aggression.

6 P Sands 'After Pinochet: the role of national courts' in Philippe Sands (ed) *From Nuremberg to the*



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gives primacy to states for the following reasons. Firstly, it recognizes that national courts are often the best place to deal with international crimes, considering the availability of evidence, witnesses and costs. Secondly, the human and financial burden of exercising criminal justice have to be spread across, they cannot be centralized at the Hague, and thirdly, it creates an incentive for states to encourage them to develop and apply their national criminal justice systems as a way of avoiding the exercise of jurisdiction by ICC.

It has, however, been argued that the ICC complementarity jurisdiction is likely to be used by states to ensure that ICC does not successfully prosecute persons accused of international crimes.<sup>1</sup>

#### **IV. CONCLUSION**

The desirability of any kind of jurisdiction has to be based on its advantages and disadvantages depending on the circumstances of any given case. This would involve the balancing of the competing interests.<sup>2</sup> If national courts are bypassed or ignored then the international criminal justice system may come to a standstill since the national courts play an important role in addressing the culture of impunity. International tribunals can only deal with few cases and the national courts thus come in handy in the trial of the remaining suspects. The national system also needs the international system especially where circumstances prevailing in a country make it difficult to carry out prosecution and the need for certainty in the administration of international criminal justice.<sup>3</sup> The two systems are therefore interdependent and must exist together for accountability and the dispensation of justice in society especially in the modern world. Thus, the two systems of administration of international criminal justice have to operate side by side in a harmonious relationship.

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1 Dinah (n 21 above) 186.

2 El Zeidy (n 8 above) 877.

3 In international criminal justice system, the need for a uniform jurisprudence on criminal matters is important. The military tribunals established after World War II and the ICTY/R and the SCSL have espoused important jurisprudence on international criminal law and this has brought about the certainty and predictability of the law.

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