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BOFAXE

The Overlapping Jurisdictions between the International Criminal Court and Hybrid International Tribunals

Replies and Comments

RRef Philipp Ambach
Ph.D. student at the Freie Universität Berlin

For comments
murisuhl@web.de

On the Web

http://www.ifhv.de

Focus

Art. 17 Rome Statute (excerpts)

"1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;[…]"

In the last Bofaxe, a possible conflict of jurisdiction between the International Criminal Court (ICC) and U.N.-established *ad hoc* tribunals such as the ICTY and ICTR was illustrated and an opportune solution was discussed. A second new brand of *ad hoc* tribunals, i.e. hybrid courts, may also be considered. These courts, which are composed of national as well as international judges and prosecutors and established with international participation, operate presently in Sierra Leone, Bosnia-Herzegovina and Kosovo. Hybrid courts are due to commence their work in Cambodia and in Lebanon within the coming months. Again the issue of the overlapping jurisdiction may arise.

The problem with hybrid tribunals is rooted in their mixed national-supranational nature while at the same time exercising jurisdiction over international crimes.

Hybrid tribunals cannot be regarded as international institutions, as long as they are implemented into the domestic judicial structure of the forum state, since they lack international legal personality (the only exception represents the *Special Court for Sierra Leone*, which operates *outside* the national juridical system). Neither can they be qualified as national courts, since apart from having a considerable amount of international personnel and exercising jurisdiction over international crimes, they are established through an international treaty with the U.N. (e.g. the hybrid tribunals in Sierra Leone, Cambodia and –currently under negotiation- the Lebanon) or as a measure of a U.N.-mandated international territorial administration such as Kosovo and East Timor (UNMIK and UNTAET).

Thus, the complementarity principle cannot be applied on hybrid courts *strictu sensu* since article 17 Rome Statute refers to the exercise of jurisdiction of "States", i. e. national courts. Nor can hybrid courts be regarded as institutions of purely international nature, which would arguably elevate hybrid courts into a horizontal relationship with the ICC.

To avoid possible conflicts of jurisdictions, various possible solutions are at hand:

Considering that hybrid courts in fact execute jurisdiction over crimes which otherwise would fall into the jurisdiction of the forum State, one could apply an extensive interpretation of the complementarity principle and thus consider some of these hybrid courts as *national* courts (Art. 17 Rome Statute) since they are integrated into the national court system and therefore do not possess an international legal personality.

An alternative mechanism could be to apply the criminal law principle of speciality (*lex specialis derogat legi generali*). Translated into the given context, the hybrid court would be the "special" institution, providing specific elements such as its direct attachment to a specific conflict, its geographical proximity to the crime scene, victims and witnesses as well as its additional expertise through the employment of national jurists with a more profound understanding of the conflict in question. The ICC, as the more "general" institution of international criminal law enforcement, would therefore not exercise its jurisdiction. The only remaining question would be whether a principle applicable to rules of substantive law can be transferred into the jurisdictional context. However, this solution does not contravene the wording of article 17 ICC Statute.

As already mentioned in Bofaxe 297, the possibility of the Prosecutor not to investigate because of a lack of "interests of justice" could be applied to the instant case.

The lack of universal ratification of the ICC Statute might become one of the main reasons to establish future hybrid courts. Although in these very cases a conflict of overlapping jurisdictions will not arise, the growing geographical range of the ICC's jurisdiction through the increasing number of ratifications of the Rome Statute on the one hand and the growing number of internationalised courts being established on the other hand makes a discussion of and solution to the problem regarding overlapping jurisdictions ever more necessary.

Responsibility

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