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POLICY BRIEF SERIES

Complementarity and the Challenges of Equality and Empowerment

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1. The Shrinking of a Beautiful World

The rise of international criminal justice since 1993 represents an historic achievement of the international community of States and civil society alike. The high quality justice administered by the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, the work of the hybrid-mechanisms in Sierra Leone and Cambodia, the war crimes efforts in Kosovo and East Timor, and the promise of the International Criminal Court (ICC) are significant features of international relations since 1993. These international(ized) criminal jurisdictions[1] have faced many challenges. Mistakes have been made, but none so serious as to defeat the credibility and idea of international criminal justice. No prosecutor, judge or registrar can individually take the credit for this success story. None of them should be awarded the Nobel Peace Prize granted in my city of Oslo on 10 December each year. All are but cobble stones on a bridge upheld by the pillars of common aspiration and public trust of citizens around the world. International criminal justice is ours. And it may become more so.

As many as 4,000 persons were recently working for international(ized) criminal jurisdictions, consuming more than USD 500 million per year. It has been one of the most expansive areas of international institution building and co-operation since the mid-1990s. Careers, homes and pensions have been made. Some have projected their persons widely through media interest in these justice institutions and their mandates. A few have even died on duty, starting with the late Professor Torkel Opsahl who passed away in his office in the Palais des Nations in Geneva while serving as Acting Chairman of the UNSC Commission of Experts for the Former Yugoslavia, the 1992-94 catalyst leading to the subsequent renaissance of international criminal justice.

With the exception of the ICC, all existing international(ized) criminal jurisdictions will complete their work and fade away within the next few years. The personnel will shrink from 4,000 to hopefully less than 1,000 persons, and the overall annual bill should contract to EUR 100 million or thereabouts. The era of international institution building for war crimes accountability is over; a new era of national capacity building has begun. We are moving from 'international criminal justice' to 'criminal justice for core international crimes'.

2. Jurisdictional Capacity After the Golden Age

Whereas the Yugoslavia Tribunal has issued 161 substantive indictments – based on an unprecedented thoroughness of analysis and investigation – the ICC can only prosecute a few cases in each situation or conflict that it is seized of. It does not have capacity to do more. This is a natural consequence of the Court's open-ended territorial jurisdiction and administrative-financial realities. Today's centrepiece of the world's emerging system of criminal justice for atrocities – that is, the combined jurisdictional capacity of international(ized) mechanisms – will shrink.

Some foreign States prosecute their citizens for core international crimes committed in international military operations, or refugees for crimes committed in conflict States. But the number of foreign States that have effective universal jurisdiction legislation, and the political will to use it, is neither high nor increasing fast. Some have adopted a national prosecutorial approach that is almost as meticulous and costly as international criminal justice has tended to be. Some officials take pride in how their national judgements are almost as long as

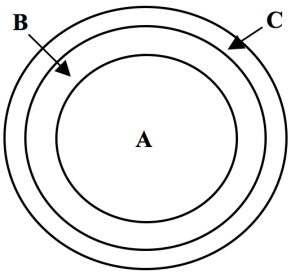
1 That is, both permanent and ad hoc international criminal jurisdictions and hybrid or domestic-international criminal jurisdictions, as opposed to regular national jurisdictions.

those of the *ad hoc* Tribunals. They see 'mini-ICTY justice' as an objective. For our purposes here, this tendency is worrying because it confirms the fear that these foreign criminal jurisdictions will not be able to prosecute many cases as international criminal justice shrinks.

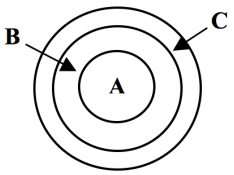
What about territorial States that are directly affected by the conflict and the crimes concerned? These States form the third – but perhaps the most important – tier in today's emerging system of criminal justice for atrocities. This is where the overwhelming majority of victims, perpetrators and evidence are located. This is where ordinary citizens have had their loved ones, their providers, homes and livelihood destroyed. But this is also where the State administration – including the criminal justice system – is likely to be most seriously affected. In materially less resourceful States, the conflict may have aggravated existing weaknesses in the justice sector.

It is nevertheless here, in territorial States, that we find the greatest potential to increase overall jurisdictional capacity for core international crimes even as we experience the contraction of international criminal justice. But do we believe that this is possible? Is it our view that territorial States like Bangladesh, the Democratic Republic of the Congo and Bosnia and Herzegovina should conduct war crimes trials in the same way as the *ad hoc* Tribunals? Or perhaps like Canada or Norway? Or are we prepared to respectfully discuss realistic notions of good enough or decent justice based on an open-minded and context-specific appreciation of the territorial State's national laws, institutions and human resources, the results of which may look distinctly different from the Rolls Royce justice we see in The Hague? Or are we saying that a country like Bangladesh is unable to conduct war crimes prosecutions until it gains the acceptance of the international war crimes industry? Is territorial State justice always to be deemed inadequate for this lobby until some English barristers, American prosecutors and Australian investigators are parachuted into these States to help or replace national actors? Could this lobby, in some situations, albeit inadvertently, end up defeating the domestic political will to prosecute in territorial States with less material resources and more complex challenges?

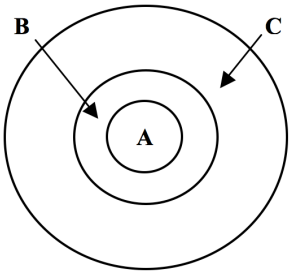
By the end of 2011, the world-wide distribution of capacity to prosecute core international crimes between international(ized) criminal jurisdictions (A), the criminal jurisdiction of foreign States (B), and that of territorial States (C) may be illustrated in the following manner (Figure 1):



With the closing down of international(ized) criminal jurisdictions, the overall jurisdictional capacity could shrink significantly (Figure 2):



A sustained, practical strengthening of the ability of criminal justice systems in territorial States could offset some of the anticipated reduction in overall jurisdictional capacity (Figure 3):



Only time will show how our global capacity to prosecute core international crimes evolves. We are facing a changing landscape. The international war crimes lobby has strong vested interests in the direction of this change. This is true for hundreds of international personnel (war crimes prosecutors, investigators, judges and administrators) who will have to change their jobs. In an ideal world, those recruited into international service will be among the best at the national level, well-qualified to return to their home jurisdictions to contribute to the strengthening of national capacity. Regrettably, this will not always be the case.

International NGOs that have been built on the accountability and transitional justice wave will also feel this impact, especially if they have engaged in advocacy or human rights work. It will not be easy to justify maintaining costly administrations in The Hague or New York when donors shift to prioritizing the fundamental resource challenges faced by criminal justice systems of materially poor territorial States. For older human rights organizations with smaller international justice programmes, it will be easier to adapt to this new reality. Thanks to leaders such as Richard Dicker and Christo-

pher K. Hall, Human Rights Watch and Amnesty International continue to be standard bearers in this field, a role which they could continue to play if they make the right strategic choices. But their long-standing human rights advocacy work makes them both unlikely national capacity builders. Indeed, it might well hinder their ability to engage with national criminal justice officials who are reluctant to openly discuss their capacity weaknesses and needs with them.

Some States have invested foreign policy capital in the international criminal justice regime. Although this has entailed more rhetorical and diplomatic cost than substantial material spending, we should not underestimate the investment made by some Governments. It remains to be seen how they will support the shift from international institution building to national capacity building. Those that have incorporated a strong rule of law component in their development aid policies should be able to continue making a significant contribution. But the devising and implementing of effective and sustainable strategies for the strengthening of national criminal justice may appeal less to many of the politicians and civil servants concerned. They may prefer to give grants to the usual suspects, even if the overhead invested in The Hague or New York is disproportionately high.

Then there are some individual diplomats whose involvement in the making of international criminal justice has boosted their careers, a few very significantly so. They have already capitalized on the Golden Age of international criminal justice. As the attention shifts away from the international institution building process, some will move on to other areas of service within their Governments. Those who remain involved in the field shoulder a particular responsibility in how they seek to influence the policies of States and donors, and how they conduct their relationship with special interest groups, at a time when the field experiences symptoms of saturation and national capacity building should be prioritized.

3. Building Capacity, Not Only Awareness

Just as the term 'impunity gap' was coined in the creative environment of the start-up team of the ICC in late 2002, so was the notion of 'positive complementarity' conceived in the Court's Office of the Prosecutor in 2003. It took seven years before the ICC Assembly of States Parties adopted a resolution on 'positive complementarity' during the first Review Conference on the ICC Statute in 2010.[2] The resolution signalled a paradigmatic shift, the significance and consequence of which is already evident. It has broadened civil society's interest in positive complementarity, particularly among the largest international NGOs. Donors, such as the European Union, have triggered some of this reorientation.

Much post-Kampala activity has aimed at creating awareness of the new paradigm and the importance of national capacity building. Albeit cloaked in interesting policy terms, many of these activities may be compared to putting on ones shoes while still seated. The Kampala resolution and the signals sent by major donors call for an onward march, pursuant to a new direction. Various retreats and seminars may simply echo this call. In reality, the process of national capacity building will entail the tireless efforts of numerous international and national actors for many years to come. Some of this activity will be self-serving and not very effective. But gradually a broad range of competent, targeted activities should emerge and stand out. All such initiatives will require a systematic professionalism that adds value in a sustainable manner. The term 'active complementarity' may therefore capture the challenge before us more accurately than the more comfortable term 'positive complementarity'.

4. Equality and Empowerment

Are war crimes prosecutors working in Argentina, Bangladesh, Denmark and the Yugoslavia Tribunal equal? The negative answer to this unusual question turns our attention to the bread and butter of criminal lawyers around the world, namely, legal sources and information. If investigators, prosecutors, counsel, and judges do not have proper access to available legal sources and expert knowledge on international criminal law, they cannot write decent submissions and decisions. Without such access, even the most talented lawyers are unable to perform professionally. This – more so than the quality of offices, salaries and pension schemes – determines the quality of war crimes justice.

Democratization of access to legal information should therefore lie at the heart of capacity building and knowledge-transfer in the area of criminal justice for core international crimes. This calls for substantive equality to be made the centre of the positive complementarity discourse. Levelling the playing field for war crimes lawyers in all jurisdictions should top the priority list of positive complementarity proponents.

Most importantly, it entails a neutral form of knowledge-transfer that empowers domestic actors, rather than reshaping or replacing them. It does not require that, for example, Western experts teach or supervise professionals from materially less resourceful countries. We know from numerous attempts that didactic

2 See Resolution RC/Res. 1 Complementarity, adopted by consensus on 8 June 2010.

training and secondments can create unhealthy dependencies and sometimes disincentives. The moment the Western 'expert' is withdrawn, we see the ineffectiveness of any purported knowledge-transfer.

Legal empowerment should not be a term or approach reserved for the socio-economic development discourse. It should be a prioritized objective for those who seek to play a role in positive complementarity. It is more important to make legal professionals, who are in need of assistance, self-sufficient than to invest grants in the implementing of elaborate training programmes, the latter often on the terms of the external capacity builder. The idea of legal empowerment should guide and shape how positive complementarity is understood and how it is implemented.

5. One Neutral, Technical Platform

The Legal Tools Project of the ICC is a technical platform painstakingly developed since 2003 with the objective of enabling national criminal justice actors to obtain free, effective and equal access to all relevant legal sources on the international crimes. One of these tools, the Legal Tools Database,[3] has captured the online space for legal information on core international crimes – it is located in the public commons and has become a public good. One of its collections, the National Implementing Legislation Database, is used in the preparation of national implementing legislation and the import of core international crimes into national criminal law. It is also the leading tool for comparative research analysis on national legislation.

Another tool, the Case Matrix application – used by national criminal justice actors around the world – generates trust and openness among national actors, which are prerequisites for any respectful, constructive and needs-based dialogue on how to strengthen capacity at the national level. One of its key functions is the ability to correlate the legal requirements of crimes and modes of liability with the evidence in a case. It is this function on which the name of the Case Matrix application is based. And it is the innovative manner in which this function has been implemented that resulted in the Case Matrix developers being awarded the 2008 Dieter Meurer Prize for Legal Informatics. Furthermore, ICC Chambers have in several decisions implemented a key methodology of the Case Matrix by adopting so-called in-depth evidence analysis charts.

3 See http://www.legal-tools.org.

6. From Impairment to Empowerment

It is a matter of fact that foreign States, international organizations and international human rights NGOs enjoy limited trust *vis-à-vis* national criminal justice agencies working on war crimes cases. Due to sovereignty issues, fear of exposure and confidentiality concerns, national investigators, prosecutors and judges with an international crimes mandate are understandably reluctant to openly discuss their capacity weaknesses and needs with such foreign actors, however well-meaning the latter may be.

But this understandable reluctance should not hold qualified individuals back from contributing in a way that empowers domestic actors. Applying a legal empowerment paradigm to national capacity building should not foster the further growth of the international criminal justice lobby. The naked contrast between materially challenged national war crimes justice and generously funded international criminal justice actors is already too sharp. Resources must now be directed to where they are needed most and, more importantly, in a manner that empowers. Strong considerations of equality should make donors propel such a shift. The ICC Legal Tools Project is cited and described here as a successful example of a resource developed to empower domestic actors. It reflects and advances the Kampala Review Conference's progressive development of positive complementarity. It should inspire all positive complementarity actors to be innovative and to work hard in the development of new services to meet the needs of domestic actors.

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