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Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher, 2011), 572 pp. £13.75 ISBN 978-82-93081-55-5**David Cohen**

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The International Criminal Court (ICC) celebrates its 10th anniversary this year. A major debate since its creation has been how the Court should relate to national jurisdictions. The primary focus of this debate has been on the evolving and contested concept of complementarity and particularly on the idea of positive complementarity. The core idea here is that most national jurisdictions in countries where international crimes are likely to occur will require significant assistance to be able to effectively and credibly prosecute and adjudicate such cases. The question that, at present, remains an open one for complementarity is whether it will remain a convenient, if hollow, slogan, or whether it will provide a framework for the significant development of national capacities to try core international crimes.

On the one hand, it has been widely recognized that national jurisdictions will have to play an important role in prosecuting serious international crimes and that in typical post-conflict contexts in developing countries that they will lack the capacity to do so. On the other hand, as the discussions at the Kampala Assembly of State Parties revealed in 2010, there is little agreement on how this capacity gap may be filled and what role the ICC should play in doing so. Given that the ICC has taken the view that it is not in a position to provide direct assistance to national legal systems of the kind that would be required, other parties have stepped in to attempt to ensure that national jurisdictions are adequately equipped to deliver accountability. In the vacuum left by the ICC, international and regional organizations, civil society organizations, research institutions, academics and donors have become engaged in assisting national jurisdictions to develop the tools in order to conduct credible investigations and trials that meet basic international fair trial standards. The activities and aims of these various organizations and individuals are neither uniform, nor centrally coordinated. This raises a series of questions of considerable importance for the future success of the ICC. What should the roles and objectives of these various actors be? Do they operate in the interests of the development of robust judiciaries in poor and conflict torn countries, or in the interests of the ICC and their own organizations? Which approaches and methods are being used and which strategies will prove most effective? What is the relation of such targeted capacity building to general international development programmes that aim at increasing the overall capacity of national judiciaries? These are among the primary questions addressed by the authors of this anthology, entitled *Active Complementarity: Legal Information Transfer*.

As noted in the preface by Giovanni Sartor, while '[s]tates, non-governmental organizations and academia all have a role to play' in ensuring that national actors are able to effectively investigate and prosecute core international crimes, 'lasting results' need to be based on 'sustainable' and 'widely available' knowledge transfer and capacity

building. Specifically, efforts cannot be limited to 'the traditional secondment of experts from Western States to countries that are less resourceful'.¹ The authors of this anthology develop this argument in two ways. First, the chapters argue that there is a need to change mainstream ways of thinking about assistance based on an active complementarity framework which has as its objective the empowerment and equality advancement of national actors. Second, and flowing from this framework, there is a need to reconsider the standards and assistance measures typically employed by international organizations, civil society organizations and other actors within the international community. This anthology highlights some highly innovative technical resources, such as those that have been made available through the ICC Legal Tools Project. This project advances the objectives of active complementarity of empowerment and equality. This book assesses these resources in a straightforward and clear manner, making it accessible to those without any technical background. It is noteworthy that this is the first book in this field to critically evaluate the impact of these resources and the potential of the internet and information technology. This alone makes the volume an invaluable resource.

Despite the recognition noted above concerning the need to enhance national capabilities to prosecute core international crimes at the national level, Morten Bergsmo notes in his foreword that 'we have not yet seen many practical and innovative examples of effective capacity building'.² Indeed, there is a tendency for well meaning activists in this area to focus on advocacy or assessment. At the same time, approaches that only target specialized courts of limited duration have not, as the Special Court for Sierra Leone and the Special Panels for Serious Crimes indicate, proven their ability to significantly increase institutional capacity in national judicial institutions. As further observed by Bergsmo, however, it may be unreasonable to require national jurisdictions with limited resources and diverse priorities to adopt the lengthy and intricate procedures of internationalized criminal jurisdictions. Typical assistance measures employed, such as the occasional seminar, training session or expert secondment, do not provide national actors with long-term and cost-effective access to the knowledge and tools that they need to independently make and implement decisions.

As has often been recognized, but never implemented, there is the need for principles and a framework that allow for more systematic and sustainable assistance efforts by the international community. Such a framework would enable better coordination of efforts, provide direction to funders, and avoid the duplicative or competitive undertakings that too often characterize judicial capacity building projects by national development aid institutions. This anthology provides an important step in meeting this need by developing the concept of active complementarity. As Aleksandra Sidorenko describes in Chapter 5, an active complementarity framework may be based on ideas of empowerment and capacity building drawn from development studies. Over the years, the discipline of developmental studies has moved from implementing top down and goal based programmes to adopting an approach that aims to empower and that places individuals and peoples at its centre. Such an approach may find its basis in the text of the ICC Statute's jurisdictional scheme itself. Specifically, as highlighted by Sidorenko, the admissibility provision of Article 17 of the ICC Statute that refers to 'unable', highlights the need to engage in capacity building that will empower and enable national jurisdictions to take on the main burden of prosecuting core international crimes.

An important contribution of this anthology is its critical and comprehensive analysis of those tools that have delivered results and that comply with an empowerment and equality paradigm. An important technical platform described by various chapters in this anthology is the ICC Legal Tools Project. Through this platform, national actors obtain free, effective and equal access to thorough and updated legal sources on core international crimes. For example, the ICC's Legal Tools Database, which forms part of the ICC Legal Tools Project, provides revolutionary and all inclusive access to historical and contemporary legislation and jurisprudence related to the prosecution of core

international crimes. As described by Volker Nerlich in Chapter 6 and Franziska C. Eckelmans in Chapter 7, it has been developed with the needs of its users in mind. Another important collection made available through the ICC Legal Tools Project is the National Implementing Legislation Database. As Olympia Bekou in Chapter 8 makes clear, this tool allows national actors to independently access comparative national implementing legislation and prepare their own legislation in line with their own specific needs. It also serves as an invaluable comparative research resource. The scope and depth of these collections have established them as leaders in their respective areas, both online and off.

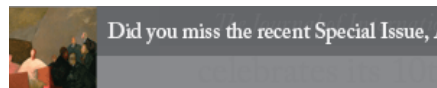
Apart from tools that provide access to legal information, this anthology's chapters also describe tools that facilitate the analytical process in investigations and prosecutions. For example, Ralph Hecksteden and Anne Hecksteden in Chapter 9 set out the Case Matrix application, which enables the correlation of the legal requirements of crimes and modes of liability with the evidence in a case. Its innovation led to the Case Matrix developers receiving the 2008 Dieter Meurer Prize for Legal Informatics. Core international crimes are by their nature highly complicated and fact intensive. Such analytical tools, provided free of charge, help national actors attain necessary standards of professionalism and results regardless of their geographical location and resource situation, while also allowing them the discretion to tailor usage to their circumstances. It should be noted that many of these tools have already been put to use by international and domestic actors, a fact that is highlighted in Bergsmo's and Bekou's Chapter 15 and Ilia Utmelidze in Chapter 17.

This anthology raises important questions regarding the role played by various actors within the international community in the area of core international crimes and showcases those technical tools available to national jurisdictions in an accessible manner. It will force some actors to confront uncomfortable questions because through adopting the active complementarity framework promoted by this anthology they will be required to substantially change how they deliver assistance to national jurisdictions. This is particularly the case for some major international development aid organizations whose multi-million dollar projects too often benefit the international consultants and advisors who implement them while leaving little measurable benefit relative to the investment. As the United Nations' recent evaluations of the failure of 10 years of capacity building in the tiny country of Timor Leste indicate, the challenges of judicial development require fresh approaches. While this may be uncomfortable, such critical reflection is necessary if the international community's accountability efforts are to proceed in an inclusive rather than alienating manner. This volume provides the best available starting point for such reflection.

Footnotes

[↵](#) 1 G. Sartor, 'Preface', in M. Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (Torkel Opsahl Academic EPublisher, 2011) iii, at iii-iv.

[↵](#) 2 M. Bergsmo, 'Foreword', in M. Bergsmo (ed.), *Active*



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