

Strengthening National Capacity to Prosecute Genocide, Crimes Against Humanity and War Crimes within the International Criminal Court System

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Abstract

The capacity of national justice sector institutions to prosecute the perpetrators of genocide, crimes against humanity and war crimes is one of the greatest challenges to national rule of law initiatives within the context of peace and security. Approximately 60% of States Parties of the International Criminal Court (ICC) are yet to adapt their national legal framework to the cooperation requirements, crimes and modes of liability defined by the ICC Statute. Positive Complementarity is the most important conceptual insight to address this. Emerging from the Office of the Prosecutor, positive complementarity is a broad stakeholder enterprise. The ICC Assembly of States has invited States, international organisations and NGOs to participate in a national capacity development framework. Practical and innovative efforts to address national capacity have directly tackled three of the most prohibitive aspects of core international crime adjudication: complexity, quantity and cost. Two such examples include the Legal Tools Database (LTD) the largest online library of documents relevant to the practice of international criminal law, and the Case Matrix Network (CMN), which provides users with technology aided services to assist in the investigation, prosecution and adjudication of core international crimes. The international community has contributed steadfastly to the development of positive complementarity and can continue to further its impact by mainstreaming accountability measures for core international crime into its legal technical assistance and capacity developing programmes, ensuring that activities are driven by thorough analysis of the need of national justice sectors and reflective of cost effective methods of delivery.

Keywords: domestic prosecution of core international crimes – positive complementarity – capacity development – efficiency – cost effective adjudication

Strengthening national capacity to prosecute genocide, crimes against humanity and war crimes

The capacity of national justice sector institutions to prosecute the perpetrators of genocide, crimes against humanity and war crimes has emerged as one of the greatest challenges to national rule of law initiatives within the context of peace and security.

On 1 July 2012, ten years after the International Criminal Court (ICC) became operational, Guatemala will become its 121st State Party. Despite the success in attracting members, substantial gaps remain in the formal legal frameworks of ICC States Parties: only 46 have incorporated the obligations to cooperate, while 49 members have incorporated the ICC crimes into domestic legislation, despite this not being a statutory requirement.¹ Whereas the limited incorporation of the obligation to cooperate slows down and limits the reach of the ICC to request evidence and the arrest and surrender of suspects from States, the absence of domestic legislation criminalising core international crime conduct and modes of liability, suggests that those States may not possess an adequate legal framework to prosecute perpetrators.²

This can also hinder the fair trial rights of the accused, and can cause delays in providing victims with meaningful access to justice. Even with this minimal legal framework in place, prosecutions are unlikely to fulfil broader international obligations without satisfactory protections that enable the independence and impartiality of national justice institutions and actors, guarantees fair trial standards, minimum international detention standards, provides adequate victim and witness protection, as well as mutual legal assistance agreements. The final precondition to legal capacity requires that investigators, prosecutors, defence counsel, judges and clerks be equipped with the skills, knowledge and resources that enable them to work according to the legal and institutional framework established therein.

It is perhaps no small surprise to note the small number of States pursuing prosecution at the national level. The UCDP/PRIO Armed Conflict Dataset reports 281 incidents of armed conflict in 38 countries between 2002 and 2010 and yet the ICC Legal Tools Database records only 10 States actively pursuing core international crime prosecution for acts conducted in the same period.³

This is important for two reasons: first, the unwillingness, inability or inaction of states to address conflict has been overwhelmingly linked to the onset of repeated episodes of violence, resulting in more deaths and victimisation, shifts in criminal activities, loss of stability and security and sharp reductions in economic growth.⁴ Second, national capacity to respond to core international crimes has an overwhelming bearing on the international community as a whole, in its efforts to respect sovereign equality while ensuring the shared goal of establishing conditions for the maintenance of justice.

Addressing the needs of national criminal justice bodies: Complexity, quantity and cost of core international crime prosecution

Positive Complementarity is perhaps the most important conceptual insight to address the needs of national criminal justice bodies in prosecuting core international crimes. First developed in the Office of the Prosecutor in 2003, to govern interaction with States that aimed to encourage national proceedings and support cooperation with ICC investigations, the adoption of a resolution by the Assembly of States Parties, at the first Review Conference in 2010, broadened its scope to that of a national capacity development framework, involving States, international organisations and NGOs, as well as the ICC.

Generic capacity development programmes, including thematic trainings, study visits and technical assistance continue to be organised, but the most practical and innovative efforts to address national capacity have done so by directly tackling three of the most prohibitive aspects of core international crime adjudication for less materially resourced States: complexity, quantity and cost.

The Legal Tools Database (LTD) is the largest online library of documents relevant to the practice of international criminal law. Designed by the Office of the Prosecutor between 2003 and 2005, the LTD contains over 57,000 documents, including national legislation, national cases of core international crimes, international cases and legislation, all preparatory works of the ICC, its Statute, rules, regulations, judgments, decisions and orders, and relevant international and regional human rights decisions. Documents can be accessed through a series of “folders” or through an efficient and easy to use search engine, and are provided free of charge to anyone with an Internet connection. In collating and verifying these materials, the LTD provides all national actors with the raw materials they need to inform themselves on core international crime adjudication, in a centralised, stable and trusted location.

The Case Matrix Network (CMN) compliments the Legal Tools Database by providing services to assist in the investigation, prosecution and adjudication of core international crimes. The Case Matrix application breaks down the substantive elements of core international crimes, showing investigators, prosecutors, defence counsel or judges the means of proof that is required for each crime, its contextual elements and specific elements, as well as the modes of individual liability that must be assigned to every individual for every crime that they are charged with committing.

The Case Matrix consists of two analytical digests of the elements of crime and modes of liability required to successfully prosecute core international crime conduct, running to over 7,500 pages. If a prosecutor needs to know the means of proof required to successfully prosecute rape as a crime against humanity, or the recruitment of child soldiers as a war crime, they can, at the click of a button, view concise analysis of these requirements, as well as the exact paragraphs of previous international and national judgments. The Case Matrix application also enables different users to organise case files where the conduct may amount to core international crimes, testing where evidence is weak or insufficient, in a secure environment. It is designed to strengthen the ability of national actors to conduct investigations and trials for conduct that may fall under the ICC's jurisdiction by empowering the national professionals involved. The Case Matrix is provided free of charge, following the signature of a user undertaking and it does not require Internet access. It is currently used by 125 institutions, including judiciary, prosecution services, defence counsel, government ministries, NGO's, international and hybrid tribunals.

Core international crime cases consist of a complex web of evidence and materials that link incidents to suspects, victims and witnesses. The Case Matrix helps to organise that evidence and material. But criminal justice systems also face challenges due to the quantity of cases, and failure to comprehend the scale and nature of prosecutions across a country can lead to a number of rule of law issues. Without an overview of open case files, prosecutorial strategies including the prioritisation or selection of cases (according to criteria such as gravity, seriousness etc.) can unwittingly incur selective bias. Due to the expected quantity of open cases, prisons can become over-crowded, suspects can get "lost" in remand and delays can mount up without a clear overview of where the bottlenecks occur. Districts may prosecute particular crimes or ethnic groups disproportionately according to the known facts, requiring a laborious and time-consuming effort to gather statistics that could demonstrate this. The Database of Open Case Files designed by the Case Matrix Network addresses these challenges and has been used in Bosnia and Herzegovina and the Democratic Republic of Congo.

The use of technology-aided tools, as well as the information provided therein, can help overcome the complexity of core international crime cases by providing knowledge directly to national practitioners, within their work environment, on a permanent basis. While empowering and informing criminal justice actors sustainably, this can improve the quality and effectiveness of their work and reduce unnecessary repetitions and mistakes, thereby contributing to the reduction of costs associated with criminal justice based on international human rights standards.

Developing sustainable national expertise in core international crime adjudication: Contributions of the international policy community

The international community designed the ICC to have limited jurisdiction over States, and affirmed that effective prosecution must be ensured by domestic measures and enhanced by international cooperation. Where the ICC lacks capacity to investigate and prosecute more than 14 cases at any given time, the international community can fulfil its broader responsibilities by supporting national criminal justice efforts through methods that develop sustainable local expertise.

The international policy community has already made steadfast contributions, linking atrocity and accountability measures to economic recovery, development and rule of law (World Bank), shifting funding allocations in this direction (EU), and coordinating complementarity activities within the UN (UN Rule of Law Group).

To further the impact of positive complementarity, including technology-driven innovations, the international community, in particular the UN, can mainstream accountability measures for core international crimes into its technical assistance and capacity developing programmes in its subject matter areas including human rights, legislative reform, child soldiers, women and humanitarian issues. Coordination, cooperation and planning amongst agencies should be driven by thorough analysis of the need of national justice sectors and reflective of cost effective methods of delivery.

Websites

ICC Assembly of States Parties Focal Point on Complementarity, Ms. Gaile A. Ramoutar, may be contacted at: aspcomplementarity@icc-cpi.int.

Persons in New York wishing to make contact may do so via:
Mr. René Holbach, Assistant to the President, at: advisor4@nyc.llv.li.

Legal Tools Database: www.legal-tools.org

Case Matrix Network: www.casematrixnetwork.org

ICRC Customary International Humanitarian Law Database: www.icrc.org/customary-ihl/eng/docs/home

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Endnotes

¹ Taken from the National Implementation Legislation Database (NILD) of the ICC Legal Tools Database, last accessed 16 October 2011.

² The request of the ICTR Prosecutor to transfer Michael Bagaragaza to Norway was denied by the ICTR Transfer Panel on the grounds that the Norwegian Criminal Code did not prohibit genocide meaning that the accused would have to be prosecuted for the ordinary crime of murder. A second request for transfer to the Netherlands was also not possible as the Dutch Courts considered that it did not have jurisdiction over the acts committed. See Prosecutor v. Michel Bagaragaza, Case No. ICTR-2005-86-R11bis, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Rule 11 bis of the Rules of Procedure and Evidence, 19 May 2006 and LJN: BD6568, Hoge Raad, 08/00142.

³ See UPCD/PRIOD Conflict Database, dataset of 29 July 2011, http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/ and National Cases Involving Core International Crimes folder of the ICC Legal Tools Database, http://www.legal-tools.org/en/go-to-database/ltfolder/0_2373/#results, last accessed 16 October 2011.

⁴ World Bank, Conflict, Security and Development, World Development Report 2011.