



# DEVELOPING LOCAL CAPACITY FOR WAR CRIMES TRIALS: INSIGHTS FROM BIH, SIERRA LEONE, AND COLOMBIA

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## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing, policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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## EXECUTIVE SUMMARY

This report examines the impact that international and internationalized tribunals have had on the capacity of local legal systems to handle international crimes cases effectively. It does so by focusing on three concrete jurisdictions (Bosnia and Herzegovina, Sierra Leone and Colombia), and a myriad of different types of international and internationalized tribunals. On the basis of a number of interviews, it assesses different initiatives developed mainly in the context the completion strategies of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), the policy of “positive complementarity” of the International Criminal Court (ICC), and the experience in the Court of BiH and compares them with the situation in other jurisdictions.

This report seeks to identify the main weaknesses and needs that legal systems generally face in post-conflict situations and which may hinder their ability to conduct war crimes trials effectively. Chief among them are lack of adequate legislation, weak or non-existing infrastructure, appropriate technical and legal knowledge to conduct complex investigations for international crimes, virtually no witness protection and support mechanisms, and last, but not least, lack of sufficient political will to investigate past crimes. It recognizes, however, that different situations present very specific challenges and that any response aimed at addressing them needs to take into consideration the specificities of the legal system in point.

This report critically examines the main direct means of developing local capacity, namely, trainings and “study visits”. It argues, first, that there are still significant deficits in terms of long-term planning, coherence and coordination of activities. This is in part, due to inadequate or complete lack of needs assessments, insufficient local ownership over the process, or at least contribution by the relevant local stakeholders, and an extended neglect of the importance of self-education. The result of all this is that when pursued in isolation of more ‘institutionalized’ means of capacity development, these mechanisms have been largely inefficient in terms of impact, and lack sustainability.

It also assesses “indirect” mechanisms to capacity development, namely, ‘on the job’ transfer of knowledge, the transfer of information and files to the local judiciary, and legislative or normative changes. Each of them presents many opportunities and several pitfalls. In terms of mentoring or informal transfer of knowledge, it is argued that impact

has been undermined by different elements, such as that most international tribunals have been reluctant to hire professionals from the relevant regions, or by the resistance shown by locals who refused to be “chaperoned” by internationals who not always had the necessary knowledge or motivation to perform in such demanding contexts. By contrast, transfer of information and files to the local legal systems proved of momentous significance. This was, in part, because of its general unavailability; but the main reason for it was the political momentum it created and the horizontal relationships that were developed as a result of such policies. In terms of legislative changes, this report argues that although certain normative changes may put jurisdictions in a better position vis-à-vis effectively processing war crimes cases, the costs often associated with this kind of “drastic” or “blueprint” amendment may well exceed the perceived benefits.

The final section of the report addresses the institutional or policy considerations that, it argues, largely account for the main impacts in developing local capacity. It identifies as key elements the institutional position of the international or internationalized tribunal, its jurisdictional relations with local courts, its applicable law, and its exit strategy. Each of these dimensions, it is argued, has played a significant role in explaining the level of impact that international and internationalized courts have had over their local counterparts. This section of the report also argues that any comprehensive analysis of the impact of international or internationalized tribunals in developing local capacities in the justice sector must also, perhaps essentially, take into consideration the existing incentives that shape both the relevant policies towards the domestic judiciaries, and those of domestic judiciaries towards them. That is, the issue is whether the international(ised) tribunal has itself any concrete interest in local authorities handling part of the case load, and whether the international community can provide the right kind of incentives for the local constituencies to take a real interest in handling a portion of these cases domestically. Under this framework, we have found that impact is generally driven by the way in which institutional relationships between the domestic and the international system are structured, namely, whether they are relationships of collaboration, competition, resentment, or mere indifference. Furthermore, we suggest that these incentives are to a significant extent shaped by the prevalent division of labour between the international and the domestic tribunals – their jurisdictional relationship.

All in all, this report advocates adopting a more institutional, long-term approach to capacity development in international criminal justice. It argues that there are significant

difficulties in coherence, coordination and sequencing of initiatives, and that efforts have been too focused on “training” individuals without looking enough at the context in which they function. It also argues that successful policies directed at enhancing the capacity of local legal systems are connected with there being the right kind of incentives for both local and international institutions developing collaborative or constructive relationships and achieving justice at the local level. This report, in sum, suggests the need to rethink some of the key conceptual and causal considerations in this area.

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# 1. INTRODUCTION

In post-conflict situations the domestic justice system is generally in a state of collapse. International penal interventions are envisaged as the way to assure individual accountability for international crimes. Since the experience of the *ad hoc* Tribunals, it has become increasingly clear that international or “internationalized” tribunals lack themselves the capacity to deal with the vast majority of alleged perpetrators of international crimes. If their impact is to be enhanced, it seems, they would need to rely on support by the national legal systems. Yet doubts often exist as to whether alleged perpetrators of international crimes would be prosecuted before domestic courts effectively, or as to whether they would receive a fair trial. The way out of this circle, it is now often suggested, is for the international community to rebuild, enhance or develop the capacity.

This report examines this impact on the municipal legal systems by looking in-depth into three concrete jurisdictions (Bosnia and Herzegovina, Sierra Leone and Colombia), and a myriad of different types of international and internationalized tribunals. It examines both formal and informal ways of developing local capacity, namely, it assesses initiatives developed mainly in the context the completion strategies in both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), the policy of positive complementarity of the International Criminal Court (ICC), and the experience in the Court of BiH. It situates them in the broader narrative of international criminal justice by contrasting them with other available experiences, such as the International Criminal Tribunal for Rwanda (ICTR), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and so on. The main purpose is to assess the performance of international and internationalized tribunals and other participating agencies and institutions that aim at, or can potentially contribute to developing local capacity to conduct war crimes trials. Ultimately, the analysis provided has a forward-looking focus. Although it addresses existing or past processes, dynamics, and synergies, it provides a critical approach to the issue of capacity development in international criminal justice.

This report advocates three main claims. First, it argues that there are crucial difficulties in coherence, coordination and sequencing of capacity development initiatives, and that this is the result of structural and not merely contingent features of

the dynamics in this area. Against what some of the literature suggests, it claims that this is not a feature that can be changed by simply making different policy decisions. Secondly, it suggests that existing efforts have been too focused on individuals and their capacities without looking enough at the institutional and cultural context in which they are immersed. And finally, it submits that there are specific considerations of the institutional design of international and internationalized courts and the balance of incentives that largely account for the main successes and shortcomings in terms of their impact on municipal legal systems. Their geographical and institutional position vis-à-vis local authorities, the applicable laws before them, their exit strategy, institutional culture and key policy incentives have determined the extent of the impact they have had in terms of enhancing the capacity of local courts.

Before proceeding two caveats are in order. First, this report is based on a number of interviews conducted in BiH, The Hague, Freetown, Bogotá, Buenos Aires, and London between the end of 2008 and the end of 2010. Selection of interviewees was aimed at getting as balanced a picture as possible although, for confidentiality reasons, no statements are explicitly attributed to any them.<sup>1</sup> Second, both for practical and methodological reasons this report does not consider in detail other important elements that arguably contribute to the willingness (and hence, the capacity) of local authorities to conduct war crimes trials in post-conflict situations. The first of these issues is the existing general security situation. The importance of physical security for judges, prosecutors and, most sensitively perhaps, witnesses for effective war crimes prosecutions simply cannot be exaggerated.<sup>2</sup> Political considerations are also of the essence. There are, for instance, many allegations that BiH's commitment to the prosecution of war crimes was closely connected to its interest in entering the EU.<sup>3</sup> Similarly, it has also been argued that one of Colombia's main incentives to initiate the transitional justice framework of Justice and Peace was it being required by the main donors of the Plan Colombia.<sup>4</sup> In some cases, these two elements can work together.

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<sup>1</sup> For a list of interviewees see annex at the end of this report.

<sup>2</sup> In a hearing before the ICC in June 2009, eg, the DRC Justice Minister stressed that the central authorities in Kinshasa, which are geographically removed from the current hostilities, find it difficult to investigate crimes in the war-torn eastern parts of the country (ICC Transcript of 1 June 2009). The issue of physical security is also connected with general unavailability of witness protection in most of these countries.

<sup>3</sup> See Alejandro Chehtman, "Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'" *Journal of International Criminal Justice* (forthcoming, 2011), 5.

<sup>4</sup> Interview C-14. For a more detailed account, see A. Chehtman, "The Impact of the ICC on Colombia: Positive Complementarity on Trial" (DOMAC Report, forthcoming).

Hence, it has been suggested that no prosecutions of international crimes have taken place at the Goma Military Garrison Tribunal (the first instance military court of Goma) because military authorities are unwilling and possibly unable to apprehend the rebel leaders responsible for them.<sup>5</sup>

Accordingly, section 2 identifies some of the key weaknesses or needs of local legal systems to process this kind of case. Sections 3 and 4 examine direct and indirect means of capacity development, respectively. Section 5, by contrast, concentrates on what are arguably the key enabling and constraining factors that ultimately account for the extent of the impact of an international or internationalized tribunal on the capacity of the local legal system. Finally, section 6 concludes briefly.

## 2. COMMON WEAKNESSES, NEEDS OR DEFICITS OF LEGAL SYSTEMS TO CONDUCT EFFECTIVE TRIALS FOR INTERNATIONAL CRIMES IN POST-CONFLICT SITUATIONS

Post-conflict judicial systems usually face serious deficits or weaknesses to conduct investigations and trials for international crimes perpetrated on their territory or by their military or security forces.<sup>6</sup> These weaknesses are various and of different orders, ranging from lack of an independent judiciary to lack of political will to conduct effective prosecutions. Some of them have to do with insufficient training or knowledge of international criminal law, some with the existing infrastructure, and still some with the domestic legal framework in force.<sup>7</sup> This section highlights some of them while at the same time advocates for the need to tailor concrete efforts to specific situation-countries rather than assuming a common cluster of weaknesses that apply across the board.<sup>8</sup>

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<sup>5</sup> Sigall Horovitz, "DR Congo: Interaction between International and National Responses to the Mass Atrocities" (DOMAC/WP forthcoming), at <http://www.domac.is/reports/> (last accessed on 6 April 2011).

<sup>6</sup> Avocats Sans Frontières, 'Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo' (2009), 95, available at [http://www.asf.be/publications/ASF\\_CaseStudy\\_RomeStatute\\_Light\\_PagePerPage.pdf](http://www.asf.be/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf) (last accessed 20 June 2011).

<sup>7</sup> See, eg, interviews B-12, B-16 and D-4.

<sup>8</sup> On this, see, eg, Cecile Aptel, "Domestic Justice Systems and the Impact of the Rome Statute: Discussion Paper", available at <http://www.internationalcriminaljustice.net/experience/papers/session7.pdf> (last accessed 16 June 2011).

Perhaps the most obvious deficit is the lack of appropriate legal norms applicable to mass atrocity cases, both as a matter of substantive and procedural law. In some situations, such as Rwanda or the DRC, this also includes inappropriate rules regarding available penalties, which go against basic human rights' standards.<sup>9</sup> Many countries lack substantive provisions for international offences, such as crimes against humanity, war crimes or genocide. Sierra Leone is one of them. Thus, irrespective of the existence of the Lomé Agreement amnesty, no trials for international crimes could be conducted before its local courts.<sup>10</sup> Moreover, often countries in post-conflict situations lack provisions which would guarantee fair trials to defendants. Several European courts, for instance, have refused to extradite defendants to Rwanda on the basis that Rwanda could not guarantee a fair trial to the defendant.<sup>11</sup> This is not always the case. Yet to ensure a minimum level of capacity to conduct trials for international crimes effectively certain amendments to local procedural rules need to be introduced. Namely, countries typically need legal provisions that would facilitate handling extremely complex cases, or allow for the use of evidence collected by foreign authorities, norms that guarantee effective witness protection or support, and so on.

Needs and deficits in terms of existing infrastructure of domestic judiciaries is also a sensitive point of focus. Conflicts often affect the local infrastructure in ways which are difficult to overcome. This includes not only destruction of facilities and court buildings, including adequate prison facilities, but also lack of appropriate vehicles, IT tools, and communication services. Particularly pressing deficits in this context include, inter alia, the technical knowledge and capacity to collect and process certain evidence, such as DNA samples, or using computers to process large amounts of documentary evidence.<sup>12</sup>

A further weakness often encountered in post-conflict societies is lack of both legal and technical knowledge to conduct investigations and trials for international crimes.<sup>13</sup> Of course, this is a matter of degree. Situations in countries with a sophisticated legal system and experienced and generally well-trained legal

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<sup>9</sup> Such as the death penalty or life imprisonment in solitary confinement.

<sup>10</sup> Interviews B-12, B-14, B-16, B-17, among others. On the relevance of implementation measures of the ICC Statute, see below.

<sup>11</sup> See *Brown (aka Vincent Bajinja) et al. v. Government of Rwanda et al.* [2009] EWHC 770 Admin, Judgment, 8 April 2009, and Decision by the Toulouse Court of Appeal dated 23 October 2008 (in *Bivugarabago*), among several others.

<sup>12</sup> Interviews B-11, B-14, B-15, and D-4 among others.

<sup>13</sup> *Avocats Sans Frontières*, for example, reports that few Congolese judges, prosecutors, inspectors and judicial policemen have the level of training required to handle atrocity related proceedings (see their 'Case Study', 94-5).

professionals and investigators differ from countries in which these capacities are overwhelmingly absent. Put more concretely, research suggests that there is hardly the same need to develop general legal skills in countries like Colombia, or Serbia, than there is in situations like East Timor, Kosovo, or Sierra Leone.<sup>14</sup> And yet, there is specific knowledge applicable to this type of case that is required both in quite sophisticated legal systems as well as in less developed ones. This has to do with concrete knowledge of the relevant rules of International Criminal Law and International Humanitarian Law, but also more practical areas essential for international crimes' trials including court management, case handling, and investigation of complex institutional structures and chains of events.

This deficit in expertise is often combined with the lack of real incentives for local officials to actually perform this type of investigation. Lack of political will from the government is often cited as the most usual one, and also perhaps the most determinant.<sup>15</sup> The political will of the Kirchner administration in Argentina has arguably been decisive in the current wave of criminal investigations for mass atrocities perpetrated during the 1970s. But relevant incentives also include other arrangements such as, for instance, the quota system introduced in Bosnia Herzegovina to assess the performance of prosecutors and judges at the entity courts, or the level of salaries in Sierra Leone.<sup>16</sup> In short, assessing performance of prosecutors or judges on the basis of the number of cases they process or paying extremely poor salaries to these public officials constitute powerful disincentives for them to take on board the investigation and trial of extremely complex, time-consuming, and sometimes even dangerous cases.

A connected factor in terms of explaining the lack of capacity of local legal systems to conduct trials for international crimes has to do with standard claims of lack of independence, and sometimes of bias and even corruption among local judiciaries.<sup>17</sup>

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<sup>14</sup> In several countries, like Rwanda or Sierra Leone, there are no law reports; in other countries such as Kosovo or East Timor there is almost an absolute lack of trained lawyers who can fill relevant positions in the judiciary, as prosecutors or as legal counsel. According to a recent report, for instance, the DRC has only 2,000 magistrates, which means that there is one magistrate for every 40,000 people. The "acceptable" average would be one magistrate for every 5,000 people. Available at <http://www.afriqueavenir.org/en/2010/04/20/drc-has-low-ratio-of-magistrates-to-the-population-says-justice-minister/> (last accessed on 20 June 2011).

<sup>15</sup> Interviews A-36, B-14, D-7, among many others.

<sup>16</sup> Interviews A-25, B-9, B-12, B-15, and B-17. See also "Solving War Crime Cases in Bosnia and Herzegovina," 14-7.

<sup>17</sup> Interviews A-7, A-23, B-15, B-17, B-19, among others. See also ASD Report on DRC and UN Mission in BiH – Judicial System Assessment Programme, *Thematic Report IX- Political Influence: The independence of the Judiciary in Bosnia and Herzegovina* (November 2000), 4.

This can be partly explained in terms of the recent history of tensions and overwhelming conflict, but it also has components that have to do with the institutional culture, and the existing power relations in a specific country.<sup>18</sup> These are clearly among the most resilient deficits present in local legal systems that are allegedly willing to conduct genuine investigations and trials for international crimes.

A further sensitive area is the general unavailability, or at least unreliability, of witness support and protection mechanisms. This is an overriding concern in order to conduct effective investigations and prosecutions for international crimes.<sup>19</sup> Typically, countries coming out of military conflict or organized political violence tend to have severe difficulties in providing this kind support or protection for a number of reasons. Sometimes part of the problem is that, for this type of case, effective witness protection can only be carried out outside their territorial borders. Yet quite often these countries lack the necessary institutional framework, the relevant legal or procedural norms, the know-how, and the resources to conduct this type of task effectively.

The most important consideration to bear in mind, however, is that the level and type of needs that each different legal system faces in post-conflict situations varies to a significant degree. Conditions in places like East Timor or Kosovo, where they even lack trained lawyers are hardly comparable to situations in places like Serbia or Colombia, who have developed legal systems, with a sophisticated judiciary, and so on. Thus one of the critical aspects in effective capacity development is addressing the specifics of the situation at hand, and tailoring programmes to concrete needs. For this purpose it is essential to conduct needs assessments before programmes directed to develop local capacities are put in place. More precisely, it is crucial to get the balance right between accommodating inputs from local professionals as to what the perceived needs are, and insisting on basic conditions such as adequate procedural safeguards, establishment of adequate institutional incentives for local professionals (avoiding corruption and political influence), appropriate legal training, and adequate assistance and protection to victims and witnesses.

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<sup>18</sup> Chehtman, "Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases".

<sup>19</sup> See, eg, Paulina González Vega and Carla Ferstman, "Ending threats and reprisals against victims of torture and related international crimes: a call to action" (The Redress Trust, December 2009), available at <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf> (last accessed on 20 June 2011).

### 3. 'DIRECT' CAPACITY DEVELOPMENT INITIATIVES

Training or “transfer of knowledge” initiatives have generally been considered the main tool utilised in capacity development programmes for the justice sector.<sup>20</sup> It has, admittedly, been provided unevenly across jurisdictions in which some form of international or internationalized tribunal has been involved. The overriding consideration seems to be the likelihood or even the concrete need of domestic trials by the relevant actors in the international community. Hence, the number and significance of initiatives organized in Sierra Leone has been negligible compared with those organized in BiH, with Colombia, for instance, standing roughly between the two.<sup>21</sup> Interestingly, however, the overall analysis indicates that particularly in those jurisdictions in which significant trainings have been provided, such as BiH, these have generally been considered far from successful.<sup>22</sup> Accordingly, it is those jurisdictions where significant resources and efforts have been put in training programmes which best illustrate the main shortcomings in this area.

Training sessions have characteristically been organized and provided by a large number of organizations. In BiH, the most relevant ones have been the United Nations Development Programme (UNDP), the United Nations Interregional Crime and Justice Research Institute (UNICRI), the American Bar Association (ABA), the Organization for Security and Co-operation in Europe (OSCE), and the Council of Europe; but also the ICTY and the Court of BiH have been involved in the organization and provision of this kind of formalized transfer of knowledge. In Sierra Leone, trainings have been scant, though usually the SCSL was involved in the few sessions organized for local legal practitioners and officials. In Colombia, the main international actors in this area have been the International Center for Transitional Justice (ICTJ), the Deutsche Gesellschaft für Internationale Zusammenarbeit (GTZ), and USAID. Unlike the ICTY, the ICC has

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<sup>20</sup> See, eg, Kevin Heller, “Completion Strategies” (paper available at <http://www.ipp.ghum.kuleuven.be/publications/heller.pdf>, last accessed 20 June 2011), 37. I leave out contributions to physical infrastructure and other equipment for reasons of space.

<sup>21</sup> Interviews A-6, A-10, A-21, B-1, B-14, B-18, B-20, C-6 and C-8, among others.

<sup>22</sup> See, eg, OECD, “OECD DAC Handbook on Security System Reform: Supporting Security and Justice,” (2007), 18, and Suzannah Linton, “Putting Cambodia’s Extraordinary Chambers into Context”, *Singapore Year Book of International Law* 11 (2007), 205-7. Some institutions, whose training programmes are usually run by locals, seem to have had generally better results.

been largely inactive in this area.<sup>23</sup> In other jurisdictions, other national, regional, international and non-governmental bodies and many individual states have organized trainings, including *inter alia* the International Committee of the Red Cross (ICRC), the Programme for the Restoration of the Judicial System in Eastern Congo (REJUSCO), the UK Department for International Development (DFID), the International Bar Association, *Advocats sans Frontiers*, Women's Initiative for Gender justice, among many others. Some local institutions have also been involved in this issue in some jurisdictions. In BiH, the Court's Criminal Defence Section (OKO) has organized training sessions for defence attorneys while the recently created Judicial and Prosecutorial Training Centres (JPTCs) are in charge of devising continuing legal education programmes for judges and prosecutors.<sup>24</sup> In Colombia judges are generally trained in *Rodrigo Lara Bonilla Judicial School*, while prosecutors are trained by the National Prosecutor's Office.<sup>25</sup>

This general context provides for a variety of approaches and illustrates the popularity of training as a chosen path to developing local capacity. Yet it also creates difficulties in terms of coordination, coherence and sequencing. Furthermore, different governments and institutions often compete for power and influence in this area. It has been forcefully argued, for instance, that American and German institutions "have their own agendas and their own understanding of how the Colombian legal system should work, and they both struggle to get their way of doing things established. In fact, "their approach is often perceived as a form of legal imperialism".<sup>26</sup> A similar push obtained, albeit with a larger pool of actors, in BiH.<sup>27</sup>

A first important issue has to do with the content of seminars and other activities. Sessions have been overwhelmingly focussed on specific substantive, issues such as the elements of war crimes, genocide, and crimes against humanity while other more practical aspects of the job, such as case and evidence management, the formulation of

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<sup>23</sup> An ICC official suggested that the training seminars held by the ICC Registry have more of an outreach function, focusing on ICC norms and procedures rather than on issues relevant for national investigations. REJUSCO the main EU program in charge of 'rehabilitating the criminal and military justice systems in eastern DRC' have suggested that they have no connection with the ICC. See Horovitz, "DR Congo: Interaction between international and national responses to mass atrocities".

<sup>24</sup> Now there is even talk of creating a new Judicial Academy (interview A-16).

<sup>25</sup> Available at <http://www.ejrlb.net/index.php>.

<sup>26</sup> Anonymous interviewee. See also, Eric A. Witte, "Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya" (Open Society Foundation, 2011), 26 in reference to DRC.

<sup>27</sup> Interviews A-7, A-15, and A-25.

indictments for complex crimes, and so on, have been largely neglected.<sup>28</sup> A further common complaint among participants in these initiatives is that there has been too much overlap. Many actors have received similar training on the same issues by different organizations.<sup>29</sup> Together with the large number of trainings offered and the lack of a consistent long-term program, this has contributed in some jurisdictions such as BiH to creating some ‘training fatigue’ among receivers. Finally, participants complain that trainings often take no notice of the specificities of the local legal regime in place. “Lecturers are flown in [by different organizations,] they would give a training of how they do things ‘back home’, and they would fly out”.<sup>30</sup> There has often been no attempt to explain how the ideas being introduced could be applied in the local legal system.<sup>31</sup>

In terms of methodology, training sessions have often been planned as *ex cathedra* lectures. This creates little opportunity for real exchange between the participants. This mechanism has been heavily criticized by both participants and former lecturers.<sup>32</sup> Moreover, quite often activities were not sufficiently well pitched. Namely, there was no distinction between legal professionals with very different background and experience.<sup>33</sup> This is sometimes aggravated by the fact that often these initiatives do not pay enough attention to local culture or other institutional factors that may impinge on the effective transfer of knowledge. For instance, local judges in BiH were reluctant to accept training on legal or practical matters from a legal professional who was not herself a judge. And still, people in the international organizations involved in providing these trainings did not see the problem in sending mid-level officers to train judges or prosecutors with many years of experience.<sup>34</sup>

There have been, however, certain improvements in this respect. In BiH, for instance, trainings now involve many more hands-on activities and practical exercises.<sup>35</sup> They also provide participants with written materials of the issues discussed, and they

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<sup>28</sup> Interviews A-18, A-34, B-15, C-6, C-9 and C-11. See also, Witte, “Putting Complementarity into Practice”, 30 and 65.

<sup>29</sup> This problem is arguably connected to the lack of coherence and unification between training providers in the region.

<sup>30</sup> It was suggested, for example, that American lawyers who came to BiH to lecture on plea-bargaining automatically assumed that in BiH this also included charge bargaining (interview A-16).

<sup>31</sup> For instance, American trainers gave a full seminar including both plea and charge bargaining for BiH officials, without every considering that charge bargaining was not a possibility in the BiH legal system (interview A-15).

<sup>32</sup> Interview A-6.

<sup>33</sup> Interview A-18.

<sup>34</sup> Interviews A-32 and A-33.

<sup>35</sup> See, eg, OSCE, ICTY, and UNICRI, “Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer (Interim Report)” (Warsaw, The Hague, Torino: May 2009), 51-54.

standardly include conclusions on how to move forward, and sessions on lessons learned.<sup>36</sup> Academics have been often replaced, or at least complemented with practitioners, and some organizers also include facilitators with relevant training and experience in adult education at a high level. Numbers of participants in each specific event have also been lowered, to provide a better experience.<sup>37</sup> An interesting development in the context of technical assistance is the programme funded by the European Union that allowed two international experts with practical experience in mass atrocity cases to work on a permanent basis in Colombia.<sup>38</sup> This plan has implied the selection of two individuals with relevant training, language abilities, an understanding of the political and legal culture, and, perhaps most importantly, who remained attached to the programme for more than two years, allowing them to build relations of trust and respect with the local professionals.<sup>39</sup>

A significant part of the overall problems in this area stems from the fact that there are usually no needs assessments, updated information about what to prioritize, or about what actually works in different institutional or cultural contexts.<sup>40</sup> This is something on which training providers have arguably been working on, by slowly involving locals in the decision-making process of planning and organizing trainings.<sup>41</sup> Yet the level of information or, at least, the way in which this information was effectively utilized to plan future trainings has faced difficulties.<sup>42</sup> There are at least two problems that have been identified. First, often when local legal professionals are consulted they are unable, due to time constraints related to their own professional life, to contribute meaningfully by

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<sup>36</sup> Interviews A-10 and A-16.

<sup>37</sup> Interview A-6.

<sup>38</sup> See "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdiction to deal with Rome Statute Crimes", RC/ST/CM/INF.2, 21-2. In Argentina, an international expert was hired to contribute to the work of one specific Prosecutor's unit to deal more effectively with mass criminality. Its greatest impact was arguably in enhancing case and evidence management techniques (interview D-2.).

<sup>39</sup> The German agency GTZ has created a program called ProFis to support the work of the Prosecutor's Office in Colombia (and also other offices in the judiciary) with the application of the JPL. On this programme see, <http://www.profis.com.co/modulos/contenido/default.asp?idmodulo=160> (last accessed April 28 2011). The US Department of Justice, on its part, has provided support in a "handful of cases against paramilitary actors, but the prosecutions have focused on individual crimes rather than systematic criminal activity". This is perceived as a major failure (see David Kaye, "Justice beyond The Hague", 13).

<sup>40</sup> Eloquently, wide-ranging, substantial needs assessments research projects were conducted in BiH only in 2006-2007 (see "Solving War Crime Cases in Bosnia and Herzegovina," (Sarajevo: UNDP, 2009); HJPC, "Position Paper on the Strategic War Crimes Cases Related Issues and on the Establishment of the Supreme Court of BiH," (Sarajevo: December 2007), among others.

<sup>41</sup> See, eg, OSCE, ICTY, and UNICRI, "Supporting the Transition Process," 41.

<sup>42</sup> International providers often neglect consulting the opinion of their national counterparts and national organizations are sometimes inactive in communicating existing needs.

providing detailed feedback to organizers. The issue, to put it shortly, is that they are usually “consulted” rather than actually involved in the decision-making process.<sup>43</sup> And secondly, even when they do provide relevant inputs, training providers are not always in a position to make room for their requests. Often the planning for that year has already been budgeted and approved, and the proposed session would have to take place the following year. By then it might simply be too late, and some other concerns and more pressing needs would have appeared.<sup>44</sup>

Furthermore, this area shows a persistent lack of coordination between different international organizations and a general neglect of local entities. In Colombia, for instance, despite the longstanding existence of official training centres for judges and prosecutors, international actors conduct their trainings on IHL or other relevant issues separately.<sup>45</sup> This lack of coordination is not merely a contingent factor. It is rather the product of certain bureaucratic elements such as funding flows and application deadlines, and of the vested interest of each agency in maintaining control over their own activities, securing funds to guarantee survival, and show “clear success stories to tout to their legislative constituencies”.<sup>46</sup> Hence, it cannot be altered simply by changing policy. Lord Ashdown summarized this well when suggesting that in his position as High Representative he “never managed to get the individual international community players, who were involved in penny-packet programmes aimed at tackling some elements of civil service reform, to combine together into a single nationwide programme.”<sup>47</sup>

A possible solution to this problem may be to rely more on a local institution to centralize and coordinate existing initiatives.<sup>48</sup> It is important to meaningfully enhance local ownership of the process as a whole. It has been suggested, however, that most of the alleged advantages would be usually offset by other elements. Namely, local institutions tend to resort to “old” approaches (*ex cathedra* lectures, etc), their mandate

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<sup>43</sup> See the language used by the ICTJ in its recent document “Making Complementarity Work: The Way Forward” (December 9, 2010), 4.

<sup>44</sup> Interviews A-18, D-1 and anonymous interviewee.

<sup>45</sup> Interview C-8.

<sup>46</sup> Interviews A-31, A-40 and D-1 and David Kaye, “Justice Beyond The Hague. Supporting the Prosecution of International Crimes in National Courts”, (Council on Foreign Relations Press, 2011), available at [http://www.cfr.org/international-criminal-courts-and-tribunals/justice-beyond-hague/p25119?cid=emc-\[beyond\\_the\\_hague\]-\[press\\_release\]-\[06\\_06\\_11](http://www.cfr.org/international-criminal-courts-and-tribunals/justice-beyond-hague/p25119?cid=emc-[beyond_the_hague]-[press_release]-[06_06_11) (last accessed on 20 June 2011), 20.

<sup>47</sup> Paddy Ashdown, *Swords and Ploughshares: Bringing Peace to the 21st Century* (London: Weidenfeld & Nicolson, 2007), 109.

<sup>48</sup> In Sierra Leone, the most sustainable institution that would be able to provide this kind of training is allegedly the Institute for International Law. Interviews B-17 and B-20.

usually covers the entire spectrum of legal education which means that they lack specialization on war crimes cases, and they are generally understaffed and underfunded –that is, they lack the resources, the experience and know-how that some internationals could provide.<sup>49</sup> Also, the international community tends to be reluctant to support local institutions taking over this process. In BiH, for example, despite the creation of the JPTCs, most foreign actors were willing to conduct their own trainings. In DRC, attempts to institutionalize cooperation ended up, according to some, rendering the newly created body “a forum for discussion rather than true coordination”, with meetings being held at irregular time intervals.<sup>50</sup> This may have been partly driven by some measure of scepticism towards local institutions generally –internationals do not feel that things will get done, how they think they should get done, and when they think they should get done.<sup>51</sup> But there is also a measure of self-interest and strategic thinking involved in this approach towards them.

Training sessions have not been the only mechanism for the formal transfer of knowledge to local legal professionals. In this context we may also consider so-called “study visits”. Over the last few years there have been a significant number of visits from legal professionals from BiH to the ICTY, from Ugandan officials to the SCSL, the Court of BiH, and the ICC, and so on.<sup>52</sup> They normally include a small number of professionals that meet with their counterparts, attend trials, and have informal discussions. It is often argued that study visits can be useful in terms of making individuals aware of procedures or mechanisms that are in place in a more developed jurisdiction.<sup>53</sup> Yet, it would also be clear to them that due to the disparities in budget and material resources many of these elements might not be suitable for incorporation locally.<sup>54</sup> As suggested by the OSCE, although participants usually praise study visits as useful knowledge transfer tools, “when pressed, only a few interlocutors could articulate a practical application of the

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<sup>49</sup> Interview A-3, A-16, and OSCE et al, "Supporting the Transition Process," 23. The situation of OKO in BiH, is slightly different both in terms of its initial approach to capacity development and its current position. On this see Chehtman, "Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases".

<sup>50</sup> Witte, "Putting Complementarity into Practice", 46-47. The experience in Uganda, though, seems to have worked slightly better.

<sup>51</sup> Interview A-16.

<sup>52</sup> Interviews A-7, A-23, A-32, among others. See also ICC Review Conference, "Taking stock of the principle of complementarity: Bridging the impunity gap", RC/ST/CM/INF.2, 25.

<sup>53</sup> OSCE et al, "Supporting the Transition Process," 46.

<sup>54</sup> There is the further issue of how individuals are selected for this type of visit.

knowledge that they had gleaned during their visit.”<sup>55</sup> This puts into question their real potential as formal mechanisms for the transfer of knowledge.

But this need not always be the case. When local officials visited the ICTY in the context of a Rule 11*bis* case, or of a Category 2 case transferred to a local court, the situation was different. In such circumstances there would be concrete concerns to discuss and practical outcomes that were sought. Moreover, this type of visit created links between the relevant professionals both at the national and international level that improved collaboration in the future.<sup>56</sup> Thus, visits *can* contribute to capacity development but not so much in terms of transfer of knowledge to local professionals, as often implied. Rather, their more productive role has to do with bringing together local and international professionals and favour the creation of horizontal relationships between them, thereby allowing them to collaborate more effectively on concrete cases.

Let me conclude this section by flagging two prospective concerns. First, evidence shows that there are still significant deficits in terms of long-term planning, coherence and coordination of activities. This is in part, due to inadequate or complete lack of needs assessments, insufficient local ownership over the process (or at least contribution by the relevant local stakeholders), and an extended neglect of the importance of self-education. The result of all this is significant inefficiency in terms of impact, and lack of sustainability of promising initiatives. Admittedly, this does not depend exclusively on the quality of training initiatives. Rather, and as it will be argued below, it depends on the interconnection or “fit” between these initiatives and the existing legal culture and incentives to operationalize the acquired tools.

Secondly, formalized transfer of knowledge has been over-relied upon as a mechanism for developing local capacity. Trainings are often chosen as a mechanism for the transfer of knowledge mainly because of their tangibility or “visibility”. The relevant actors usually prefer providing a large number of training sessions, rather than fewer, better organized ones. The reason for this may well be connected with the capacity to raise funds; but it has to do, also, with specific activities being resorted to as a way to spend remnants of money before a given deadline.<sup>57</sup> Preparation time and sensible

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<sup>55</sup> OSCE, et al, "Supporting the Transition Process," 46.

<sup>56</sup> Interviews A-32 and A-18. The ICTY-OSCE-UNICRI Report highlights the impact of second and third visits to strengthen the personal relationships (OSCE et al, "Supporting the Transition Process," 47).

<sup>57</sup> Interviews A-32 and A-33.

means of assessment are not usually factored in.<sup>58</sup> This is another difficulty of this area being substantially donor driven.<sup>59</sup> This general context has often led to what has been termed a “tick in the box approach”. That is, a concern of the relevant organizations in “get[ting] their programme installed, their box checked, whether they produce any results or not; [a]nd the national side sometimes is very weak in telling strong international organizations [that they do not] need to be told about the elements of crimes against humanity over and over again.”<sup>60</sup> This kind of tick-in-the-box approach simply overrides the fact that effective transfer of knowledge “takes time and [that it should be] best viewed as a process rather than a ‘one-off’ event.”<sup>61</sup>

## 4. ‘INDIRECT’ CAPACITY DEVELOPMENT

Training initiatives have not been the only mechanism favoured by the international community to enhance domestic capacity to conduct war crimes trials. There are other types of initiatives that we may call, for lack of a better name, indirect means to enhance local capacity. Yet the fact that they are indirect should not be construed as meaning any less expected impact than ‘direct’ efforts. In fact, although these initiatives are generally not conceived strictly as ‘capacity-development’, their overall significance suggests the need to rethink the key conceptual and causal considerations in this area. We shall concentrate here on three specific types of initiatives, namely, ‘on the job’ transfer of knowledge, the transfer of files and information to the local legal system, and the development of legislation.

### 4.1 ‘ON THE JOB’ TRANSFER OF KNOWLEDGE

A common approach to the transfer of knowledge to local legal professionals is by working side by side with experienced international colleagues. This conception, however, is overly optimistic. There are a number of difficulties that need to be carefully considered. They go from inadequate selection of international professionals and resistance of local colleagues, to a general lack of concern in developing processes and supporting institutional reform.

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<sup>58</sup> OSCE et al, "Supporting the Transition Process," 44. This is arguably because they must be appropriately budgeted.

<sup>59</sup> On a similar claim in Cambodia see Linton, "Putting Cambodia's Extraordinary Chambers into Context", 207.

<sup>60</sup> Interview A-18.

<sup>61</sup> OSCE et al, "Supporting the Transition Process," 41.

A prior consideration has to do with the fact that international tribunals, such as the ICTY, ICTR or the ICC have been generally reluctant to hire or involve local lawyers or investigators from the relevant national jurisdiction. This “detachment” was part of the institutional culture of the ICTY and the ICTR: “to be impartial it helped to be ignorant, to be remote, to be removed, not to have dialogue”.<sup>62</sup> Irrespective of its obvious practical advantages, it was felt as inappropriate to have people from the targeted countries, particularly in Chambers, as this would allegedly make it difficult to be sufficiently impartial.<sup>63</sup> There probably were good reasons for this, stemming mainly from the delicate sensitivities that persisted after or even still during the conflict.<sup>64</sup> There were also serious security concerns, which functioned as a powerful disincentive regarding the hiring of nationals of the region.<sup>65</sup> At the ICTR, for instance, defence teams picked their own investigators. But since they usually picked Hutus, and some of them may have been involved in the genocide, the ICTR had to institute a screening process, which included consultations with Rwandan authorities.<sup>66</sup> As a result of these considerations, no professionals from the region were employed at the ICTY or ICTR for the first part of their existence.<sup>67</sup>

This general policy was only revised as a result of the *ad hoc* Tribunals’ Completion Strategies. Yet, this revision was hardly connected with them becoming actively involved in developing local capacities. At the ICTY at least, the shift of view responded to the need to speed up the processes. People with knowledge of the conflict, the background, and the relevant languages were considered crucial by the new ICTY Prosecutor.<sup>68</sup> Further steps were taken later on “triggered by the idea that most of the work w[ould] have to be done by the region anyway.”<sup>69</sup> But what mainly explains these developments was that the people from the region who went to work at the ICTY proved

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<sup>62</sup> Interviews A-37, D-5, among others. See also Report on the Situation of Human Rights in Rwanda submitted by the Special Representative of the UN Commission on Human Rights (25 February 2000) UN Doc. E/CN.4/2000/41, available at: [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2000.41.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2000.41.En?Opendocument) (last accessed 20 June 2011), para. 16. For criticisms of this view, see del Ponte and Sudetic, *Madame Prosecutor*, 125.

<sup>63</sup> Interviews A-32 and A-33.

<sup>64</sup> It has been plausibly argued that in 1996-1997 it would have been impossible to let a Tutsi attorney cross examine a Hutu witness (or *vice versa*). Similar considerations were voiced in Sierra Leone and BiH, but they arguably apply in most circumstances.

<sup>65</sup> Interviews A-32, A-33, A-36, among others.

<sup>66</sup> Anonymous interviewee.

<sup>67</sup> The ICC has largely shared this general approach to the involvement of nationals of the relevant jurisdictions.

<sup>68</sup> del Ponte and Sudetic, *Madame Prosecutor*, 132.

<sup>69</sup> Interview A-32 and A-33.

to be good professionals. They proved capable of putting aside their personal feelings, and they had the language skills and the understanding of the conflict, the culture, etc. The success of the first few determined that it was acceptable and indeed useful to bring more. The ICTR also successfully adopted a policy of hiring Rwandans in the Registry, as members of defence teams, and at the OTP since 2003, but kept a stricter policy in chambers.<sup>70</sup> These positive experiences do not seem to have transpired in the ICC.

Hybrid or internationalized tribunals are, at least on paper, in a much better position than internationals in terms of their potential to contribute to developing local capacity through “mentoring”. Yet at the SCSL this “mixed” composition has been largely underused for most part of the Tribunal’s life. Sierra Leoneans were only involved on a widespread basis at lower level and court administration functions.<sup>71</sup> Quite eloquent is what happened at the Special Court with local interns. As no funding was provided for them, even those Sierra Leoneans who managed to get a position at the Court ended up usually not turning up to work because they had to keep their other jobs.<sup>72</sup>

At the level of decision makers, the government of Sierra Leone chose not to appoint Sierra Leoneans in several of the relevant positions it was entitled to fill. This was a way for the Government to keep a certain distance from the Court.<sup>73</sup> The first Deputy Prosecutor elected by the Sierra Leonean government was then a British lawyer, and several of the Sierra Leonean judges appointed by the Government were neither living in Sierra Leone, nor likely to work in its judiciary once the Tribunal closed down. Although defense teams have been generally composed both by national and international members, this “arrangement has caused considerable problems in some cases.”<sup>74</sup> This general policy triggered serious complaints from the local legal profession, and it ended up being reversed. Yet, the feeling of most of those who came on board was still that the Court was “purely a foreign affair”.<sup>75</sup>

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<sup>70</sup> See Sigall Horovitz, “Rwanda: International and National Responses to the Mass Atrocities and their Interaction”, DOMAC/6 (September 2010), available at <http://www.domac.is/reports/> (last accessed on 20 June 2011).

<sup>71</sup> See, eg, Marieke Wierda, “Comparison of the legacy of the Special court for Sierra Leone and the ICC Intervention in Uganda from a Practical Perspective”, 103 *Proceedings of the Annual Meeting (ASIL)* (2009), 220.

<sup>72</sup> Interview B-13.

<sup>73</sup> Interview B-20.

<sup>74</sup> David Cohen, “‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: ‘Lessons Learned’ and Prospects for the Future” *Stanford Journal of International Law* 1 (2007), 12.

<sup>75</sup> Interviews B-14 and B-17.

The Court of BiH fared somewhat better in this respect.<sup>76</sup> National and international judges shared participation in panels and, crucially, local judges were appointed into what it would become a purely national institution. Moreover, several national judges considered that the influence of their international counterparts has been overall positive and that it has worked at different levels.<sup>77</sup> At the Prosecutor's Office of the Court of BiH (POBiH), by contrast, this "hands-off" approach to peer-to-peer transfer of knowledge did not work, partly due to its different structure –prosecutors work alone with their teams.<sup>78</sup> Initially, it was expected that by "rubbing shoulders" with international prosecutors, "watching how they worked", etc, "local prosecutors would learn how to prosecute war crimes cases; this unsurprisingly didn't work".<sup>79</sup> It was only when new management was appointed and certain concrete policies were adopted in order to enhance interaction between nationals and internationals that some form of transfer of knowledge started to take place.<sup>80</sup>

Accordingly, this traditional take on "informal" transfer of knowledge as a mechanism to develop local capacities has concrete limitations. But "cohabitation" or "mentoring" is not all it is or should be about. In several of these cases, internationals contributed to enhancing local capacity by developing institutional tools. One of the international judges working at the Court of BiH, for instance, drafted appeal guidelines which received praise by several of the local judges.<sup>81</sup> Similarly, at the POBiH, a mechanism for reviewing indictments was developed, which entailed that every indictment that was filed had to go through a "quality control" process by the person in charge of the office and another prosecutor.<sup>82</sup> This process was not conducted on an *ad hoc* basis; all prosecutors needed to present and defend all their indictments. This had an obvious impact on the way in which prosecutors developed their understanding and experience with the legal and evidentiary elements of complex cases. It also involved

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<sup>76</sup> See Donlon, "From the International Criminal Tribunal of Yugoslavia".

<sup>77</sup> See, eg, interview A-3.

<sup>78</sup> Interviews A-18 and A-23. The only exception to this framework being the team created to deal with the Srebrenica cases.

<sup>79</sup> Interviews A-18 and A-23.

<sup>80</sup> Interestingly, both in BiH and in Sierra Leone informal relationships between the internationals at the Court of BiH or the SCSL and their local colleagues working at the entity and cantonal courts in BiH, or at the local Courts in Sierra Leone have been negligible. The adoption of the War Crimes Strategy at the end of 2008 possibly exercised a positive, albeit still limited influence in this respect (interview A-3).

<sup>81</sup> Interview A-3. These guidelines, however, were not institutionalized.

<sup>82</sup> Interviews A-18 and A-23.

internationals having to adapt to the way in which indictments are drafted in BiH, even if they found it counterintuitive from the point of view of their own legal tradition.<sup>83</sup> This form of contribution can also be seen in the drafting of guidelines, or protocols to be applied internally.<sup>84</sup> Working with practical guidelines on thorny or complex issues arguably can make the work of prosecutors more effective. Moreover, they can become useful improvements in systems that are not used to working with them. The more complicated issue is, admittedly, to create the right incentives to make institutions use these guidelines.<sup>85</sup>

One thing seems clear, though. Getting experienced national judges and prosecutors to work with internationals on the same cases and under a common institutional and legal framework may provide the former with useful tools, but it hardly suffices to ensure that their capacities are enhanced. There are several obstacles that interfere with this process. First, there are admittedly a number of doubts raised in relation to the experience of some of the international judges appointed in hybrid or internationalized courts.<sup>86</sup> Reportedly, not all of them have the relevant skills required for the specific type of work, or the necessary commitment.<sup>87</sup> Second, experienced local professionals are not always willing to take “lessons” from their foreign colleagues.<sup>88</sup> The mere suggestion that capacity development should be taking place in this context undermines their position and triggers resistance to any form of incorporation of new skills or tools. Thirdly, not all locals hired by the *ad hoc*s, the SCSL, or the ICC would go back to work in the local judiciary. People from the relevant jurisdictions who went and worked at these tribunals do not normally want to go back (at least not immediately).<sup>89</sup> In fact, there are few incentives placed by local governments in terms of real opportunities in their countries. It is reportedly harder to find a job in the justice sector in BiH coming from the ICTY or other similar experience than by staying and working there. The low

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<sup>83</sup> For a conflicting view, see Tolbert and Kotic, “Final Report of the ICLS Experts on the Court of BiH,” 29.

<sup>84</sup> The POBiH elaborated guidelines on charging, plea-bargaining, evidence, etc. (interviews A-18 and A-23).

<sup>85</sup> On these incentives, see Section 5.

<sup>86</sup> Interviews A-3, A-15, A-25, B-16, D-1. To this, some local would add “their unfamiliarity with the domestic system, with the historical context, with the constitutional structure of BiH, and with its political context” (interview A-11).

<sup>87</sup> Interestingly, this has improved with the transfer of the selection process from the judge’s own country to the HJPC (Tolbert and Kotic, “Final Report of the ICLS Experts on the Court of BiH,” 31).

<sup>88</sup> Interview A-36. This commentator suggested that, in this respect, the Serbian or Croatian approaches were more effective in building the confidence of local legal professionals.

<sup>89</sup> Interview A-28. See, more forcefully, Chandra Kekha Sriram, “Wrong-sizing International Justice? The Hybrid Tribunal in Sierra Leone” *Fordham International Law Journal*, 29 (2005-2006), 503.

level of salaries and poor working conditions work as a great disincentive for locals to work as prosecutors or judges in Sierra Leone.<sup>90</sup>

The most serious obstacle to effective capacity development in this context, however, is the legal and institutional context to which individuals employed in these tribunals return to. In short, many professionals who have worked at an international, hybrid or internationalized tribunal have found that none of the relevant knowledge they may have acquired while working there is easily transposable to the local environment in which they now work.<sup>91</sup> One reason for this is the common resistance to change, particularly when this change is associated with a foreign institution.<sup>92</sup> But more fundamentally, the issue is connected with the lack of incentives to make relevant changes. For instance, it is argued that in Cambodia the fundamental problem is not necessarily the lack of knowledge or lack of training of judges and prosecutors, but rather “the determination of key political players to prevent training and knowledge from being put to use against their fundamental political and economic interests.”<sup>93</sup> Similarly, almost every single Sierra Leonean working at the local level we interviewed considered that at the very least the SCSL’s practice on disclosure of evidence should be incorporated to Sierra Leonean criminal procedure law. Yet the project for a new criminal procedure code that was elaborated to put this (among other things) into practice has been reportedly withheld at the General Attorney’s office, with little prospect of it being sanctioned in the short term. Something similar obtained with the Bill to implement the Rome Statute under Sierra Leonean Law.<sup>94</sup>

## 4.2 TRANSFER OF FILES AND INFORMATION

A further element that works as an indirect way to developing local capacity is the transfer of information and evidence, sometimes through the transfer of files to the national legal system. The ICTY is perhaps a paradigmatic case in hand. The triggering mechanism to this transfer was its Completion Strategy. Under this policy, the ICTY transferred a significant number of cases to local courts, including cases which had

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<sup>90</sup> Interviews A-26, B-14 and B-15.

<sup>91</sup> See, eg, interviews B-1, B-2 and B-14.

<sup>92</sup> Interview D-2.

<sup>93</sup> “The Khmer Rouge Trials: Is it worth it and for whom?, A public discussion held in Phnom Penh”, 17 November 2004, cited in Linton, “Putting Cambodia’s Extraordinary Chambers into Context”, 207.

<sup>94</sup> Interviews B-9, B-14, B-15 and B-17. See also, Thierry Cruvellier, “From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test” (ICTJ, 2009), 34.

reached an indictment before ICTY (Rule 11*bis* cases), others that had been investigated by the ICTY but which had not reached that stage,<sup>95</sup> and those which had originally been investigated before local courts, but which had been sent to the ICTY for revision under the Rules of the Road Agreement.<sup>96</sup> These cases created an immediate backlog domestically, but they ultimately enhanced the possibilities to effectively conducting trials locally in virtue of the information and evidence contained in those files, and the working relationships and initiatives they created with the ICTY.<sup>97</sup> In December 2008, for instance, the ICTY launched its new content-enhanced Website, which enabled local legal practitioners in BiH, *inter alia*, to access all public court records from Tribunal since 1994 and has, since, developed mechanisms together with the local jurisdictions to enhance collaboration.<sup>98</sup> Similarly, the ICTY has been considering producing transcripts from the Tribunal's trials in Bosnian/Croatian/Serbian (BSC), which would make them directly accessible to local legal professionals who do not read English.<sup>99</sup> BiH, on its part, enacted relevant legislation to be able to better use these materials.<sup>100</sup>

The impact of these materials on BiH's capacity to process war crimes cases was very significant. The general background of the crimes was obviously the same, and often there were overlaps of facts and evidence between cases before both tribunals.<sup>101</sup> Furthermore, a significant part of the evidence required for these cases was out of the reach of local courts, either in Croatia (HVO) or in Serbia (VRS). The ICTY was the only way to access them, since neither Croatia nor Serbia would grant BiH access.<sup>102</sup> Similarly, the ICTY provided local courts with access to witnesses who were under its

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<sup>95</sup> These are commonly referred to as "Category 2" cases. The OTP transferred to BiH fourteen cases involving approximately forty suspects (see POBiH's Briefing Book, Sarajevo, July 2009).

<sup>96</sup> On the Rules of the Road, see Section 5.

<sup>97</sup> See, eg, Daryl Mundis, "The Judicial Effects of the 'Completion Strategies' on the *ad hoc* International Criminal Tribunals", AJIL, 99 (2005), 146.

<sup>98</sup> "Assessment and report of Judge Patrick Robinson, President of the ICTY, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 November 2008 to 15 May 2009" (available at [http://www.icty.org/sections/AbouttheICTY/ ReportsandPublications](http://www.icty.org/sections/AbouttheICTY/ReportsandPublications)), 14. Before this, the Registry had already given remote access to the internal judicial database so that they could search from BiH (interview A-34).

<sup>99</sup> This is, of course, not simply a linguistic issue. The audio record of many testimonies was BSC, but it "has not been cleared of any closed sessions or of confidential information uttered inadvertently during public sessions". Thus, they need to be redacted accordingly.

<sup>100</sup> Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts of BiH (2004, amended 2006).

<sup>101</sup> Abdulhak illustrates this by reference to the case of *Prosecutor v Kunarac* (IT-96-23&23/1) and the fact that his co-perpetrators were tried before the Court of BiH (see his "Building Sustainable Capacities", 350).

<sup>102</sup> Interview A-20.

protection, and who otherwise would have also been entirely out of reach.<sup>103</sup> The relevance that local judges give to adjudicated facts at the ICTY is a clear illustration of the importance of this.<sup>104</sup>

Yet obtaining evidence for processes was not the only way in which this transfer of information enhanced the capacity of the Court of BiH. A significant aspect of this transference process, and of the concrete interest that the ICTY had in these cases being handled effectively, was the establishment of institutional links and working relationships between the relevant personnel at the ICTY and at the Court of BiH.<sup>105</sup> Local prosecutors or judges started travelling to The Hague not only for “protocol” or “study” visits; they went with concrete questions about concrete files or problems, which went from basic certification issues of evidence, organizing video links with protected witnesses, to more complex issues.<sup>106</sup> For example, it took significant time for both tribunals to create a procedure and find a “common language” to deal with requests for assistance, and only this type of contact enabled them to speed up the turnaround time for a response.<sup>107</sup> In June 2009 a new project allowed for liaison prosecutors from BiH (Croatia and Serbia) to be assigned at the ICTY on a permanent basis, to assist investigations before the local courts.<sup>108</sup> These developments also contributed to a greater sense of collaboration by creating the feeling of everyone being embarked on a common task, thereby enhancing horizontality in the relationships between the international and the domestic courts.

Although this process was particularly useful in the context of BiH or the other former Yugoslav republics, the work performed by other international or internationalized tribunals can significantly enhance the capacity of local courts by separating relevant evidence, establishing certain facts, and identifying key sources that would allow them to

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<sup>103</sup> Interview A-36.

<sup>104</sup> Interviews A-15 and A-34. See also Art. 3 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH.

<sup>105</sup> The ICTY added a new Rule 75 (H) to its Rules of Procedure and Evidence, which allowed local courts, prosecutors and defence counsel to obtain confidential ICTY material. It also gave electronic access to non-confidential OTP investigative material to a number of domestic war crimes prosecution offices based on a MoU (interview A-41).

<sup>106</sup> Interviews A-32, A-33 A-34.

<sup>107</sup> This collaboration meant also, for instance, that the local courts would be able to voice their needs in a useful way. A judge from the BiH Court, for instance, suggested the Registry creating a Web page with instructions on how to file a request for assistance, something which was taken on board at The Hague.

<sup>108</sup> See, eg, the 2009 Annual Report of the ICTY, July 2009, A/64/205–S/2009/394, 19 (available at <http://www.icty.org/sections/AbouttheICTY/ReportsandPublications>).

sustain complex charges against political or military leaders. Tribunals such as the ICTR, the SCSL, or the ICC would also normally be in a position to facilitate relevant evidence to the local courts system, should these systems require so in order to pursue their own investigations.<sup>109</sup>

There are, of course, certain important limitations to the possibility of sharing this kind of material, and developing this kind of relationship between international and local courts. Most significantly, perhaps, disclosure of evidence can only work if there are national systems in place for the effective protection of witnesses and preservation of evidence, as well as guarantees that evidence will not be used to shield individuals from investigation by the international tribunal. But also, this kind of information sharing requires sensitivity to the local context and a significant degree of consideration for local legal systems. The ICTY, for example, never considered that the evidence it was collecting would eventually be needed for processes before local courts, so absolutely no attention was paid to existing local laws. This made some of the evidence harder to use effectively before local courts.<sup>110</sup> Put differently, for this type of contribution to actually enhance the capacity of local legal systems, not only must local courts be able to provide the international or internationalized tribunal with certain assurances; the international or internationalized tribunal would also have to somewhat take into consideration the local perspective in terms of collection and preservation of evidence. Joint investigations with local authorities as those being timidly explored by the ICC in DRC may be a positive development in this respect.<sup>111</sup>

### 4.3 LEGISLATIVE CHANGES

A final aspect of this “indirect” capacity development worth considering has to do with certain legislative amendments or normative influences on the local legal system. Sometimes these amendments are envisaged as a way to ensure compliance with

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<sup>109</sup> The ICTR has not accepted the transfer of any cases to Rwandan local courts under Rule 11 *bis*. However, since 2005 its Prosecutor has transferred several case-files (“dossiers”) which had been investigated but not indicted by the ICTR and it has also provided information to local courts for domestic investigations. See, Letter from ICTR Prosecutor to HRW Executive Director (22 June 2009), available at: [www.hrw.org/sites/default/files/related\\_material/2009\\_06\\_Rwanda\\_Jallow\\_Response.pdf](http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf) (last accessed 20 June 2011), 2.

<sup>110</sup> David Schwendiman, “Primacy and the Accountability Gap: A View from Bosnia and Herzegovina,” in *Presentation at the 2009 ASIL Conference* (Washington D.C.: 2009), 2.

<sup>111</sup> Interview D-3. And yet, a military official complained that cooperation with the OTP “was only working in one direction”, that is, “while the DRC military ... always provided immediate assistance to the ICC..., the latter ... never responded to requests for information regarding domestic cases”. Cited in Witte, “Putting Complementarity into Practice”, 26.

international human rights standards. In Sierra Leone, for instance, it was argued that there were no protective provisions for witnesses under the national law.<sup>112</sup> At other times it is the legal provision of international crimes that is at stake. One of the standard claims in Sierra Leone, both by national and foreign legal professionals working there, is about the lack of appropriate legislation concerning international crimes (and sometimes even certain domestic offences) and important deficiencies in terms of the procedural and evidentiary rules. For instance, local criminal trials have been consistently described as ‘trials by ambush’.<sup>113</sup> The fact that no substantive or procedural rules applicable by or before the SCSL since its creation and the absence of an Act of parliament implementing the ICC Statute demonstrate the scarce impact that the Special Court ultimately had in this important respect.<sup>114</sup>

A note of caution is in order here, though. Even assuming that some of these normative changes tend to put local jurisdictions in a better position to effectively process war crimes cases, we must not overlook the real costs for local legal systems. In particular, there is a significant risk that legal transplants may end up weakening domestic legal systems in terms of their capacity to process complex cases effectively. A particularly case in point is that of BiH. As part of its push for reconstruction of the rule of law, the OHR was embarked in a comprehensive process of legal and judicial reform which included the establishment of a new Criminal Code and a new Criminal Procedure Code.<sup>115</sup> Among the most notable features were the change from an inquisitorial system to a more adversarial system, detailed provisions on war crimes and crimes against humanity, and the introduction of plea-bargaining.<sup>116</sup> It has been argued that certain of these reforms ultimately helped to speed up trials and enhance the effectiveness of BiH’s legal system.<sup>117</sup>

However, the positive effects of these new codes may have been outweighed by the negative ones. In 2007, for instance, 39 detainees went on a hunger strike in protest against the application of the 2003 Criminal Code to the 1992-1995 events illustrating the

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<sup>112</sup> Interview B-14.

<sup>113</sup> Eg, interviews B-1, B-9, and B-14.

<sup>114</sup> Interview A-38.

<sup>115</sup> This reform process was under way before war crimes trials became a reality in BiH. However, its impact on them and on the BiH judicial system has been significant (interviews A-3, A-7, A-25, among others).

<sup>116</sup> Barria and Roper, “Judicial Capacity Building in Bosnia and Herzegovina”, 325.

<sup>117</sup> Interviews A-15 and A-23.

level of resistance to this new law.<sup>118</sup> Similarly, the new code provided for the abolition of investigating judges and their roles being taken up by prosecutors, cross-examination of witnesses, a ban on private prosecutions, and certain adversarial techniques regarding the presentation of evidence.<sup>119</sup> These reforms often created confusion and frustration among local professionals, triggering also widespread resentment.<sup>120</sup>

Much of these adverse reactions had to do with the fact that several of the reforms were entirely foreign to the Bosnian legal traditions. Yet the shape these reforms ultimately took, and the lack of local ownership over them, may be traced to the way in which the new code was actually established. The need for a more adversarial procedure had been endorsed by most of the international actors operating in BiH in the aftermath of the conflict. The first project had been drafted by a group of entirely foreign lawyers and included a significant number of adversarial institutions.<sup>121</sup> In Lord Ashdown's own words, it "was a mess and paid little attention to local Bosnian traditions. So [he] brought in a former Bosnian law professor ... to assemble and coordinate a team of local lawyers to rewrite Bosnia's legal codes, starting with the criminal code."<sup>122</sup>

Interestingly, the fact that it was a team of Bosnian lawyers who drafted the new code was ultimately of little consequence. This code was generally perceived as internationally imposed.<sup>123</sup> This may have been partly because of the connections it had with ICTY's Rules of Procedure and Evidence, and the fact that it was ultimately enacted by the OHR. However, the crucial element was arguably that the local legal profession had hardly been consulted, let alone involved in the process. Rather, the perception had been that local legal traditions were regarded with contempt by international institutions, and not properly understood.<sup>124</sup>

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<sup>118</sup> Tarik Abdulhak, "Building Sustainable Capacities", 343.

<sup>119</sup> *ibid.*, 41-54.

<sup>120</sup> An OSCE report based on the monitoring of over one hundred trials indicated that over 25% of judges, prosecutors, and defence attorneys were "not accomplishing a shift" to the new procedure (OSCE, "OSCE Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina" (2004), 27-34).

<sup>121</sup> Similarly, the criminal procedure code enacted in the Brcko District had been almost entirely drafted by an American lawyer (Michael G. Karnavas, "Creating the Legal Framework of the Brcko District of Bosnia and Herzegovina: A Model for the Region and Other Postconflict Countries" *AJIL* 97 (2003), 123).

<sup>122</sup> Ashdown, *Swords and Ploughshares*, 249.

<sup>123</sup> Interview A-24.

<sup>124</sup> It is suggested, for instance, that the "JSAP repeatedly exhibited a condescending attitude toward BiH's legal culture ... declaring the country's historic (and entirely rational) emphasis on determining the material truth a product of an 'old legal philosophy.'" (UN Mission in BiH, Judicial Assessment Programme, Thematic Report X: Serving the

## 5. ACCOUNTING FOR EFFECTIVE CAPACITY DEVELOPMENT IN THE JUSTICE SECTOR: INSTITUTIONAL INCENTIVES AND CONSTRAINTS

Developing local capacities is a complex task. This report argues that it is not merely the result of successful (or less successful) initiatives. It is, by contrast and to a large extent, determined by structural factors and institutional dynamics. This section identifies some critical elements that need to be taken into consideration, and elaborates on how they have played out in different situations. It argues that it is these considerations that ultimately determine the level of impact that the international community has had in different contexts. At the most superficial level, the impact of both international and internationalized courts on the capacity of local legal systems is negative. If only, as Fidelma Donlon suggests, because of “the vast financial and human resources” that the international or internationalized court diverts “away from building a domestic war crimes capacity”.<sup>125</sup> Yet these courts have a myriad of both positive and negative influences over domestic legal systems that it is worth examining in more detail. For clarity of exposition, we shall first concentrate on certain institutional features of the relevant tribunals, and then move on to examine the balance of incentives upon the relevant actors.

### 5.1 INSTITUTIONAL FEATURES: POSITION, JURISDICTIONAL RELATIONS, APPLICABLE LAW AND EXIT STRATEGY

The geographical location of a particular international or internationalized tribunal would normally be expected to make a difference in terms of facilitating its relationships with the local judiciary and its potential influence over domestic courts. However, of more significance is arguably its *institutional* position vis-à-vis local courts. Namely, the fact that the SCSL was situated in Freetown hardly entailed that it would have a significant impact on local courts given the entire lack of institutional relationships between them even if its presence had a greater impact on the local population more generally.<sup>126</sup> This

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Public (2000), available at <http://www.hjpc.ba/docs/jasp/pdf/TR%20X%20delivery%20of%20justice%20-%20delays.pdf>, 43 (last accessed on 4 July 2011)).

<sup>125</sup> Donlon, “From the International Criminal Tribunal of Yugoslavia,” 269. See also Sriram, “Wrong-sizing International Justice?”, 499.

<sup>126</sup> Reputedly, Freetown inhabitants often threaten each other with taking him or her before the Special Court (Interview A-20).

point may be further illustrated by reference to the Court of BiH. With the exception of a few scattered cases, cantonal and district courts in BiH were not conducting genuine investigations for war crimes cases even long after the establishment of the Court of BiH.<sup>127</sup> And yet, the fact that it was keeping the vast majority of cases sent back from the ICTY was very significant in freezing cases before district and cantonal courts. When the POBiH reviewed these files and a decision was made that the cantonal and district courts would handle a great proportion of them, this created both political momentum and a significant transfer of information (sometimes originally gathered by the local courts themselves) for these cases to be pursued at the entity level.<sup>128</sup>

The position of the relevant international or internationalized court is also connected to its jurisdictional relationships with local courts. Most international or internationalized tribunals have concurrent jurisdiction with domestic courts. This includes the ICC, ICTY, ICTR, and Court of BiH. Others, by contrast hold exclusive jurisdiction either *de facto* (the SCSL) or as a matter of law (such as the ECCC, STL, IHT, or the special Panels in Kosovo). Concurrent jurisdiction seems critical for these tribunals to meaningfully contribute to enhancing local capacity. A tribunal which holds exclusive jurisdiction over international crimes cases in any given territory has no real incentive to seriously engage in domestic capacity development, unless it is established as some form of permanent institution.

The understanding in Sierra Leone was basically that the Lomé Agreement amnesty forbade local authorities to investigate and try anyone for international crimes perpetrated in the 2001-3 conflict in Sierra Leone.<sup>129</sup> Exclusive jurisdiction (even *de facto*) favoured lack of collaborative efforts, joint-investigations, and so on. In this respect, it was suggested that the only way in which the SCSL would have made a difference vis-à-vis the capacity of the Sierra Leonean judiciary would have been for it to form part of the local judiciary.<sup>130</sup> For instance, for a long period of time there was no clear, institutionalized communication with the Sierra Leonean authorities, including the

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<sup>127</sup> This is for a number of reasons, going from lack of local political will, to the quota system used to evaluate their work.

<sup>128</sup> Interview A-18. At the time of writing, it is still unclear what the impact of this will be in the years to come. For a more detailed analysis, see Chehtman, "Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'" *Journal of International Criminal Justice* (forthcoming, 2011), 17.

<sup>129</sup> Interviews B-6, B-14 and B-16 among others. Yet, see Antonio Cassese, "The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty", *JICJ* (2004) 2(4), 1130-1140 and, as interviewee B-17 recalls, "there were certainly quite a few crimes committed after the Lomé amnesty cut off point".

<sup>130</sup> Interviews B-2 and B-14.

judiciary.<sup>131</sup> Similarly, domestic tribunals also lacked any reason to engage in collaborative or capacity development efforts with a Court they perceived as foreign, which is situated outside their national judiciary, and which can in their view offer them no palpable benefits in their daily work.

Among tribunals with concurrent jurisdiction with domestic courts, their relationship has often classified between those working under the principle of primacy and those working under complementarity. The ICTY and ICTR characterize primacy over domestic legal systems. This means that “[a]t any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal” and they would be under a legal duty to comply with this request.<sup>132</sup> By contrast, the ICC system is structured around the principle of complementarity. This means that national jurisdictions are the main responsible for trying cases for crimes under the jurisdiction of the court, and the ICC only works as an *ultima ratio* tribunal, in charge of investigating crimes that the states themselves are either unable or unwilling to prosecute domestically.<sup>133</sup>

This may seem to suggest that complementarity has greater potential than primacy in terms of favouring domestic capacity development. Nonetheless, such assumption would be too quick. Despite the significance of this difference for the issue at hand, it seems that the most important consideration is the policy under which any such relationship is construed. Accordingly, the jurisdictional relationship and the impact of the ICTY upon the capacity of local courts changed dramatically from the Rules of the Road Framework to the prevailing idea behind the Completion Strategy. In a similar fashion, under its policy of ‘Positive Complementarity’ the ICC system has been devised to impact on individual state’s capacity to deal with war crimes cases domestically (both politically and technically). The specific impact of these different policies within the relevant legal frameworks is examined below.

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<sup>131</sup> Interviews A-38 and B-6. For early, though largely ineffective attempts, see Sriram, “Wrong-sizing International Justice?”, 501.

<sup>132</sup> Article 9(2) of the ICTY Statute. See also Article 8 of the ICTR Statute. During its first few years, the ICTR used its primacy powers to get cases from national jurisdictions (such as from Switzerland in, eg, *Prosecutor v Alfred Musema*, Case No. ICTR-96-5-D, Decision on the formal request for deferral presented by the Prosecutor (Trial Chamber), 12 March 1996). But it never attempted to get cases from Rwanda.

<sup>133</sup> See Article 17 of the ICC Statute.

The issue of the law applicable by the relevant international or internationalized court may also contribute to enhancing local capacity. Through their jurisprudence, these tribunals can help clarify and develop the local understanding of certain important legal concepts that would be used in the context of prosecutions for international crimes cases. In this respect, *ad hoc* Tribunals were in the weakest position to contribute to developing the jurisprudence of local courts, at least outside determinations of the content of customary norms. They can only rely on their prestige and on creating the right kind of incentives if they are to exercise any influence over them.<sup>134</sup> Despite being based on complementarity instead of primacy over domestic jurisdictions, the ICC may provide a more promising model in this context. By creating the obligation on its parties to implement the Rome Statute and criminalize domestically the conducts contained in it, it reverts the influence model provided for by the *ad hocs*.<sup>135</sup> That is, despite the fact that local authorities can go beyond the content of the Rome Statute while implementing it, the ICC parties have created conditions under which local judiciaries can more easily follow the ICC rulings, at least in respect of the applicable substantive law.<sup>136</sup>

Moreover, in certain circumstances the normative influence of the ICC can go even further. In a relatively short period of time the Colombian legal system changed drastically its approach to crimes against humanity from rejection to wide acceptance. Colombia lacks domestic provisions for crimes against humanity. In fact, a proposal to domesticate this area of international criminal law was recently rejected, and part of the reason for this is the inherent indeterminacy of such crimes under international law and its continuous reliance on international customary law.<sup>137</sup> And yet, the Colombian judiciary ended up applying the international law on crimes against humanity in domestic proceedings. To conceptualize them the Supreme Court went into particular detail to consider the content of Article 7 of the ICC Statute, which “codified figures contained in

<sup>134</sup> On how incentives have influenced the relationships between domestic courts and the *ad hoc* Tribunals, see below.

<sup>135</sup> See, eg, Harmen van der Wilt, ‘Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court’ ICLR 8 (2008), 229-272, and references in n 3 therein.

<sup>136</sup> Admittedly, “only 44 of the 111 States Parties are legally equipped to conduct national trials on Rome Statute’s crimes (ICC Review Conference, “Taking stock of the principle of complementarity: Bridging the impunity gap”, RC/ST/CM/INF.2, 26); and of the five current situations under ICC investigation only Kenya and the Central African Republic have incorporated the crimes provided in the Rome Statute in their domestic laws (the Ugandan ICC Bill has been adopted by Parliament on March 10 2010, and is pending to be signed into Law by the President).

<sup>137</sup> This would have created possible frictions with the principle of strict legality under Colombian domestic law. Alejandro Aponte, *El desplazamiento forzado como crimen internacional en Colombia. Reglas, principios y fórmulas de imputación*, Colección monográficos 1, Observatorio Internacional, DDR, Ley de Justicia y Paz, Centro Internacional de Toledo para la Paz, Bogotá, septiembre de 2009, 10-11, citing Cámara de Representantes, “Proyecto de ley n°142 de 1998” en: Gaceta del Congreso n° 450, 18 de noviembre de 1999, at 6.

other international treaties or pacts” (sic) and the relevant bits of the Elements of the Crimes.<sup>138</sup> Similarly, the Colombian Constitutional Court argued that given that crimes against humanity are not defined in any domestic statute, “judicial operators should refer to the Rome Statute of the International Criminal Court, in particular, to article 7, and to the ‘Elements of Crimes’ adopted by the Assembly of the States Parties”.<sup>139</sup>

The situation is not necessarily more straightforward in the context of internationalized or hybrid courts. The Statute of the SCSL, for instance, provides the Court with jurisdiction over certain domestic offences in accordance with Sierra Leonean law. These provisions, however, have never been applied by the Court.<sup>140</sup> Admittedly, it is far from clear that the jurisprudence of the Court would have been received by local courts for their own trials. But this lack of interest in the use of Sierra Leonean law was perceived negatively by local legal professionals who are acquainted with the work of the court.<sup>141</sup> The situation at the Court of BiH might seem simpler. Its jurisprudence, in theory at least, could influence decisions at the level of entity and cantonal courts on important points of law, even if the Court of BiH has no formal way of encouraging specific readings or interpretations of the relevant laws.<sup>142</sup> Yet the Court of BiH and the entity courts apply different procedural and substantive codes in war crimes cases.<sup>143</sup> Thus, while the Court of BiH has been developing its own jurisprudence on issues such as plea bargaining, crimes against humanity, joint criminal enterprise, command responsibility, etc., the cantonal and district courts followed different patterns.<sup>144</sup>

Finally, the exit strategy of any given tribunal has been increasingly acknowledged as an opportunity (and an incentive) for developing local capacity.<sup>145</sup> The completion strategies of the *ad hoc* tribunals have raised a number of questions, many of which

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<sup>138</sup> *Salvador Arana Sus*, Supreme Court, Criminal Cassation Chamber, Decision 32672 (3 December 2009), at 23. In support, see Interview C-6 and Aponte 2008, 210, referring to the influence of the ICC’s Statute on the position of the Prosecutor’s office.

<sup>139</sup> Constitutional Court of Colombia, Decision T-355-07, at 23.

<sup>140</sup> Some people suggest that the reason for this may be that some parts of Sierra Leonean criminal law is “unpalatable” vis-à-vis Western standards (Interview B-16). However, the main reason for this seems to be that to apply local criminal law in the type of war crimes cases that the Court was dealing with, namely, with the sort of international law on attribution of responsibility would have been an entire mess (Interview B-19).

<sup>141</sup> Interview B-1.

<sup>142</sup> These new laws are not in use before the entity courts for war crimes cases. The reason for this is allegedly to avoid retroactive application of the criminal laws.

<sup>143</sup> See the issues of institutional position and jurisdictional relationships above.

<sup>144</sup> Interview A-22.

<sup>145</sup> Heller, ‘Completion Strategies’.

relate to their concrete impact on the capacity of local legal systems to deal with cases fully or partially investigated by them. The SCSL also named its own exit strategy a “completion” strategy, but this hardly entailed a serious concern with a systematic efforts towards developing domestic capacities. Despite the fact that the ICC is a permanent institution, its involvement with any particular situation would be limited in time. Hence, just as the policy of ‘positive complementarity’ reflects a concern on the capacity of local legal systems to conduct prosecutions in accordance with international standards, the finalization of the work of the ICC in any particular country should also entail a concern for domestic prosecutions being conducted *also* when the ICC has left. In order to assess the particular possibilities or constraints of different models of exit or completion strategies it is useful to concentrate on previous experiences.

The ICTY, for instance, aims to wrap up its work in the near future. The deadline for new indictments was 31 December 2004, and “[e]stimates as of November 2010 suggest that of the ten cases in the trial or pre-trial stage, four will be concluded in 2011, ... five are anticipated to conclude in 2012 [and] [t]he case of Radovan Karadžić is expected to finish at the end of 2013. All appeals are scheduled to be completed by the end of 2014, although the recent, unavoidable delays in the Karadžić case suggest that this date will have to be re-assessed at an appropriate time.”<sup>146</sup> This means, in any event, that the Tribunal will be dismantled. There are a number of initiatives developed in this context allegedly directed to enhance local legal capacities, often termed “Legacy” issues. For instance, UNICRI and the ICTY published a Manual of Developed Practices which covers key areas such as investigation, indictment, case and trial management, judgement drafting, appeals, victims and witness protection, etc. Similarly, UNICRI, OSCE/ODHIR and the ICTY jointly organized a project on “Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer” with the “overall goal of identifying best practices in the knowledge transfer arena so as to improve markedly the delivery of future professional-developmental and capacity building programmes.”<sup>147</sup> It is too early to assess whether these specific initiatives will have an impact on the capacity of professionals in BiH (and elsewhere) to process war crimes

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<sup>146</sup> At <http://www.icty.org/sid/10016> (last accessed, 20 June 2011). This scheduled would depend on the case against Ratko Mladic, arrested in May 2011.

<sup>147</sup> Available at <http://www.icty.org/sid/240>, at 4 (last accessed on 20 June 2011).

cases. But there being no real incentives to put them into practice, there is reason to be sceptical about their actual potential to contribute to this goal.

Initially, the SCSL also lacked a plan. The awareness of it having to design a “completion strategy” in its case was also partially generated by the experience in the *ad hoc* Tribunals. There are three significant differences in its case. First, as a tribunal established in Freetown it would have been far easier for it to become part of the Sierra Leonean judiciary. This could have made a tribunal increasingly administered by Sierra Leoneans an interesting addition to the local judiciary in several respects. Yet these developments would have faced insurmountable legal and political obstacles. The second relevant difference was that the SCSL had no cases or files to transfer to any local courts (with the exception of that of Johnny Paul Koroma)<sup>148</sup> and local courts have neither jurisdiction over international crimes perpetrated in Sierra Leone nor there is any provision of international crimes under Sierra Leonean Law. As it will be examined at greater length below, this makes the capacity development aspect of its completion strategy far less important both to the Special Court and to local authorities than in the ICTY’s case. Finally, the completion phase of the work of the Special Court was also too late for a tribunal situated in Freetown to start becoming concerned with local capacity. It had not profited from any political capital it could have gained through working with the local judiciary since its creation.<sup>149</sup>

The Court of BiH, finally, provides for a different exit model altogether than the ICTY and the SCSL. Its transition from a mixed institution to an entirely national one planned around the phasing out of international involvement. The international personnel at the Court of BiH were initially set up to finalize their involvement by the end of 2009, i.e., five years after it started functioning.<sup>150</sup> Already in 2008 the majority of two internationals, and one local judge in war crimes trials panels was reversed for two nationals and one international and the number of internationals working at the POBiH and the Registry had also decreased. The advantages of this phasing out strategy over other forms of termination are numerous. Among them, we may highlight the development of physical and institutional structures outliving the Court’s international

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<sup>148</sup> Although JPK was assumed dead his body/remains have not yet been found. The Prosecutor is in contact with national authorities on an possible Rule 11 bis transfer (Email exchange with Interviewee A-38).

<sup>149</sup> Interviews B-12 and B-20.

<sup>150</sup> This deadline was extended until 2012.

involvement (and even war crimes cases) and the likelihood of local professionals staying at the Court. Therefore, it seems a more promising model in terms of enhancing the sense of ownership over the process of criminal accountability and its sustainability.

And yet, this experience has raised also a number of concerns. The ICLS Final Report on the Sustainable Transition of the Registry and the International Donor Support to the Court of BiH and the Prosecutor's Office of BiH in 2009 identified the following areas or issues as posing a serious, grave or substantial risk if internationals were to leave at the end of 2009 as initially planned: the adherence to international standards in issues of substantive international criminal law, or political pressure over judges and prosecutors and accusations of ethnic bias, and problems in securing adequate leadership and support with complex investigations within the POBiH, and with providing support and protection to victims and witnesses.<sup>151</sup>

Observers took issue with the timeframe initially provided.<sup>152</sup> One thing that must be noted is that the 5-year timeframe should be considered in the context in which it was agreed. At the time, most of the money allegedly came from the desire to shut down the ICTY by transferring 11 *bis* cases; it was not a bid to create local capacity in the long term.<sup>153</sup> Yet this timeframe was clearly too short to deal with the complex task that was put before the Court of BiH. This Court was a brand new institution, in a brand new legal framework, receiving an enormous amount of files (some of which had been investigated, some of which had not, many of which overlapped) to prosecute, classify, and in many cases transfer to other courts in the country. All in all, the phasing out strategy in this kind of internationalized tribunal would probably have worked better if it attached the end of the international involvement to progress (i.e. meeting certain benchmarks) rather than to a fixed date, and if it incorporated concrete incentives for the relevant actors (often financial) to get this progress achieved in a timely fashion.<sup>154</sup>

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<sup>151</sup> Tolbert and Kontic, "Final Report of the ICLS Experts on the Court of BiH," 40-46.

<sup>152</sup> See, eg, Abdulhak, "Building Sustainable Capacities", 348.

<sup>153</sup> Interview A-38.

<sup>154</sup> I am grateful to Judge Shireen Fisher for her insights on this matter.

## 5.2 INCENTIVES: IDENTIFYING THE RELEVANT ‘STICKS AND CARROTS’

This report argues that any comprehensive analysis of the impact of international or internationalized tribunals in developing local capacities in the justice sector should not be limited to the considerations examined in the previous sections. Effective capacity development is to a significant extent determined by actual incentives for both the international tribunal and the local legal system in the latter achieving certain concrete tools and ensuring certain basic standards.<sup>155</sup> More eloquently, it is submitted that impact can be appraised through the way in which institutional relationships between the domestic and the international system are structured, namely, whether they are relationships of collaboration, competition, resentment, or mere indifference. In sum, it is argued that these incentives are to a significant extent shaped by the prevalent division of labour between the international and the domestic tribunals.

The situation of the ICTY and its impact on BiH is a case in point. Through the 1990s, the prevailing narrative was one of international criminal law being largely self-sufficient. The ICTY had no concrete interest in there being working courts systems capable of dealing with war crimes cases in the region. Developing local capacity was not perceived as part of the ICTY’s mandate: they had “a job to do and they were doing it well, and by doing that they were making a substantive contribution.”<sup>156</sup> This mindset is consistent with the Rules of the Road Agreement (RoR), concluded in 1996.<sup>157</sup> The RoR accorded the ICTY the power to review case files before the domestic courts of BiH before they could issue an indictment.<sup>158</sup> This procedure was introduced to ensure that national courts met international legal standards in the light of growing concerns over the

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<sup>155</sup> For an illustration of this, see William W. Burke-White, "Proactive Complementarity" .

<sup>156</sup> See “The Legacy of the International Tribunals: Exchanging experiences and transferring the knowledge to the national jurisdictions”, paper by Judge Patrick L. Robinson in the Regional Conference on “Promoting the Legacy of International Tribunals”, Sarajevo, 15-16 June 2009.

<sup>157</sup> Admittedly, the RoR Agreement was not intended to help develop local capacities or to guarantee fair trials.

<sup>158</sup> Although the RoR also applied to Croatia and Serbia, the driving force behind them was arguably the situation in BiH.

possibility of arbitrary arrests and unfair trials.<sup>159</sup> It is often suggested that it was largely successful, particularly with regards to ensuring freedom of movement in the region.<sup>160</sup>

Yet despite its important benefits in terms of preventing ill-founded arrests, this arrangement also created a backlog at the ICTY and a chilling effect both upon prosecutions by a few willing domestic authorities and upon judicial reform more generally. The RoR mechanism shaped not only the formal relationship between domestic courts and the ICTY, but also contributed to shaping a poor relationship of distrust, and even resentment, between legal professionals working at the national and the international level.<sup>161</sup> More importantly, the RoR relieved an expectation on the local authorities to conduct effective prosecutions and shifted the responsibility off the shoulders of BiH politicians and legal professionals. After all, the cases were in fact to be returned to what was presented as “a biased and frequently corrupt judicial system”.<sup>162</sup>

The whole structure of incentives changed for the ICTY after the early 2000s. Security Council members started to have serious concerns in relation to the rising costs of the ICTY and the potential infringement of rights due to slow trials.<sup>163</sup> An exit strategy became of the essence. In this context, the OTP started looking for alternative *fora* in which to try indictees, and the local courts in the region were the obvious candidates. New Rule 11*bis* of ICTY Rules of Procedure and Evidence provided that the ICTY could transfer cases with a confirmed indictment to the domestic judiciaries of local tribunals.<sup>164</sup>

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<sup>159</sup> See L.A. Barria and S.D. Roper, ‘Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY’, 9 *Human Rights Review* (2008), at 323; and U. Garms and K. Peschke, ‘War Crimes Prosecution in Bosnia and Herzegovina (1992-2002)’ 4 *Journal of International Criminal Justice* (2006), at 273.

<sup>160</sup> Interviews A-33 and A-40.

<sup>161</sup> Human Rights Center and International Human Rights Law Clinic, “Justice, Accountability and Social Reconstruction” (University of California, Berkeley and Sarajevo), 41. This study concluded that “these professionals viewed the ICTY as unresponsive and detrimental to the ability of Bosnian courts to conduct national war crimes trials” (at 36).

<sup>162</sup> Donlon, “From the International Criminal Tribunal of Yugoslavia,” 264.

<sup>163</sup> See, eg, Ralph Zacklin, “The Failings of *Ad hoc* International Tribunals”, JICJ 2(2) (2002), 545. Also, after the 9/11 attacks the interest in the conflict in the former Yugoslavia (and Rwanda) somewhat faded away.

<sup>164</sup> It was ultimately Rule 11*bis* cases that catalysed the ICTY’s heavy investment in developing local capacities. The incentive this kind of transfer creates is further illustrated by events in Rwanda. After the completion strategy at the ICTR was launched, Rwanda made several amendments to local laws, including the abolition of death penalty and solitary confinement, and created a particular procedural law applicable to cases transferred from the ICTR or other states. All of this was essentially in connection to the refusal of the ICTR to transfer cases under Rule 11*bis*. See Mujuzi, “Steps taken in Rwanda”.

The exit strategy quickly became a “completion” strategy, making the ICTY develop a prompt and strong incentive to enhance the capacity of local legal systems.<sup>165</sup>

This Completion Strategy is therefore crucial to explain why, and the extent to which the ICTY got involved in pushing for domestic prosecutions for war crimes. It entailed, for one, that the ICTY was heavily involved in creating and securing funding for the war crimes section at the Court of BiH.<sup>166</sup> It also started to conduct training sessions, provided technical support on the institutional framework of the Court of BiH, helped building working relationships, sending files and giving access to an enormous amount of information on war crimes occurred in the region. But the transfer of cases also created the relevant incentives for domestic actors to enhance their capacity to process war crimes cases.<sup>167</sup> Until 2002 Bosnia had “invested relatively few resources in judicial reform efforts.”<sup>168</sup> It was a matter of pride, and self-respect for BiH judiciary to re-claim the capacity to conduct themselves investigations and trials for this type of case; but this policy also favoured BiH’s broader political interest in ultimately being admitted to the EU.

Moreover, transfer of cases under Rule 11*bis* was subject to certain conditions – the referral bench needed to be “satisfied that the accused [would] receive a fair trial and that the death penalty [would] not be imposed or carried out”<sup>169</sup> and the Tribunal maintained the authority to recall a transferred case if any of these conditions was not met.<sup>170</sup> Even if it was relatively clear that the ICTY would not recall a case already transferred to a local court, this possibility still was perceived as a real threat; no state wanted to go through the political embarrassment of having a case recalled.<sup>171</sup> In fact,

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<sup>165</sup> Interviews A-12 and A-36.

<sup>166</sup> Interviews A-36 and A-38. See also the President’s role in advocating the need for the Court of BiH in Address of Judge Jorda, President of the ICTY to the Security Council (30 October 2002; ICTY Press Archives J.D.H/P.I.S/708e).

<sup>167</sup> It was certainly not the only incentive. Part of the appeal was also the possibility of BiH entering the European Union.

<sup>168</sup> William W. Burke-White, “The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina” (2007). *Scholarship at Penn Law* (Paper 185). For similar claims in Serbia and Croatia see Diane F. Orentlicher, “Shrinking the Space for Denial: The Impact of the ICTY in Serbia” (The Open Society, May 2008), 60, and Thierry Cruveiller and Marta Valiñas, “Croatia: Selected Developments in Transitional Justice” (ICTJ, December 2006), 14, respectively.

<sup>169</sup> These requirements were later specified. They included several procedural safeguards and a requirement that the trial process complied with international human rights standards (UN Doc. S/2002/678). See Jens Dieckmann and Christina Kerll, “UN *Ad hoc* Tribunals under Time Pressure - Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence”, ICLR 8 (2008), 100-01.

<sup>170</sup> Rules 9 (ii) and 11*bis* (F) of the ICTY Rules of Procedure and Evidence.

<sup>171</sup> Interviews A-16 and A-30, among others.

monitoring agencies and relevant organs at the ICTY allegedly “g[a]ve priority to strengthening the capacity of the national justice systems” in this context.<sup>172</sup> Ultimately, the division of labour between the ICTY and (in particular) the Court of BiH under the Completion Strategy, allowed for the creation of a particular balance of sticks and carrots which largely favoured effective capacity development in BiH.

The SCSL illustrates further the thesis defended here in quite a different way. Again, the prevailing self-understanding of the SCSL is of an international tribunal largely concerned with talking directly to the international community, absorbed by its own problems and difficulties, and completely divorced from the situation in local courts in Sierra Leone.<sup>173</sup> These elements, together with the usual funds and time constraints, explain the extremely few capacity development initiatives undertaken by the SCSL. Furthermore, the Sierra Leonean government strategically distanced itself from the court as a political statement of it having nothing to do with the trials going on there.<sup>174</sup> Local courts and legal professionals had generally little interest in the SCSL and it becoming involved in local capacity development. In fact, there was some kind of mild hostility towards the Court fuelled by the way it was established, its comparatively privileged material conditions, its indifference towards local courts, and perhaps best illustrated by the challenge before the local court’s system of its primacy over the local judiciary.<sup>175</sup> Accordingly, it is often suggested that outside the limited context of Witness and Victim’s protection and the training of police officers, the most the SCSL contributed to SL capacity is by the creation of a glossary containing most legal terms in local languages.<sup>176</sup> In the blunt words of a local lawyer “whatever benefits have been [delivered] to the national system, they’ve been entirely incidental.”<sup>177</sup>

Yet what it is more illustrative of the Sierra Leonean case is that this trend did not change with the adoption of its “Completion Strategy”. There were at least three concrete differences with the situation at the ICTY that largely account for its little impact on local

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<sup>172</sup> Pipina Th. Katsaris, “The Domestic Side of the ICTY Completion Strategy: Focus on Bosnia and Herzegovina”, *International Review of Penal Law* 78, no. 1-2 (2007), 190. No case was transferred back to the ICTY even after Stankovic’s escape in May 2007.

<sup>173</sup> Interviews B-2, B-11, B-15, B-16, and B-18.

<sup>174</sup> Eg, interviews B-12 and B-17.

<sup>175</sup> Interviews A-38, B-1, B-11 and B-15.

<sup>176</sup> Interviews A-38, B-7 and B-12. Already in its First Annual Report of the President of the SCSL, the OTP noted its involvement in developing local capacity in this respect (available at <http://www.scs-l.org/LinkClick.aspx?fileticket=NRhDcbHrcSs%3d&tabid=176>, 15 last accessed on 20 June 2011).

<sup>177</sup> Interview B-15.

capacities. First, it was generally considered that no cases would be transferred to Sierra Leonean Courts; the only possible transfer under Rule 11 *bis* would have been the case of Johnny Paul Koroma –although assumed dead, his remainings were never found–, and it was perceived as largely implausible. Secondly, because of the amnesty contained in the Lomé Agreement and the lack of political will in the Sierra Leonean authorities, there could be no new domestic prosecutions for the events that had taken place during the conflict. Accordingly, the Sierra Leonean Government has been often characterized as a free-rider on the work of the Special Court.<sup>178</sup> And finally, donors were not prepared to invest heavily in Sierra Leone and its judiciary after the completion of trials.<sup>179</sup> This combined picture resulted in a lack of real incentives both for the SCSL engaging in capacity development, and for the local courts being receptive, let alone welcoming, to such an endeavour.<sup>180</sup>

The ICC is the hardest case to assess in this respect. Before an investigation is launched, its position could be perceived as roughly akin to that of the ICTY under its Completion Strategy. Under the complementarity principle, which entails that the ICC may only assert jurisdiction over a case that has not been already investigated or prosecuted by a local court, its main interest would be for *local* courts to conduct impartial and reliable investigations.<sup>181</sup> This seems particularly true under the policy of “positive complementarity”, which entails that rather than compete with national jurisdictions, the ICC will encourage national proceedings wherever possible.<sup>182</sup> On the basis of its impact on the Colombian judiciary, the contribution of the ICC in terms of developing local capacity has been suboptimal. This may be unsurprising since, as it is

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<sup>178</sup> Similarly, it has been often claimed that in East Timor the rationale for internationalized tribunals under UNTAET was “to externalize the political and diplomatic costs of prosecution” vis-à-vis Indonesia from the weak East Timorese authorities onto international actors. See also Alejandro Chehtman and Ruth Mackenzie, “Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice” DOMAC/2 (September, 2009) 31, available at <http://www.domac.is/media/domac-skjol/DOMAC2-2009.pdf> (last accessed on 20 June 2011).

<sup>179</sup> Interview A-38.

<sup>180</sup> It is interesting to note precisely why witness and victims protection has been an exception in this respect. The difference can be explained by a number of elements entirely consistent with the framework advocated here. For one, the Special Court’s unit was largely staffed by locals (with the exception of its head). But more importantly there was an awareness that the service would have to be provided after international involvement is gone and there was a concrete interest among local authorities in the recently created Anti-Corruption Agency developing this kind of knowledge for its own purposes (interestingly this agency was headed by a former Special Court’s local staff). See interview B-7.

<sup>181</sup> See paragraph 10 of the Preamble to the Rome Statute and Articles 1, 15, 17, 18, and 19.

<sup>182</sup> Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps The Hague, Netherlands (12 February 2004), available at [http://www.icc-cpi.int/library/organs/otp/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf) (last accessed on 10 December 2010). Currently “Positive complementarity” seems to be less about the ICC influencing local actors and more about horizontal collaboration between states (see, eg, <http://www.icc-cpi.int/NR/exeres/0A7DEDDE-4308-4487-992D-1ED77AB5CAAE.htm>). This interpretation will be examined below.

commonly argued, the ICC lacks an explicit mandate to engage itself in capacity development initiatives.<sup>183</sup> But the ultimate explanation of the overall failure of the ICC in this respect seems to lie in the type of relationship developed between the ICC and the Colombian judiciary, which in turn is governed by the incentives each of these actors has.

Admittedly, in some cases this positive approach to complementarity would involve altering the balance of incentives that an unwilling state faces, such that it would decide to initiate domestic prosecutions.<sup>184</sup> The ICC's approach to developing local capacity in Colombia has been largely connected with the 'threat' of it opening an investigation. This could very well obtain, according to the general perception among Colombian authorities (and observers) if they did not carry out serious and reliable trials for international crimes.<sup>185</sup> This approach is eloquently illustrated by the messages conveyed by the ICC prosecutor at specific critical junctures of the transitional justice mechanism established in Colombia to deal mainly with crimes committed by paramilitary forces, namely the Justice and Peace Law (JPL) process.<sup>186</sup> Quite tellingly, the ICC is commonly referred to as "el Coco" in the local jargon –an ogre in children's fairy tales– indicating a policy perhaps too focused on providing sticks as its preferred way to ensure compliance.<sup>187</sup> At its most explicit, the Supreme Court of Colombia even argued that "in the event that any authority seeks impunity for the crimes tried in the present case, copy of those proceedings will be sent to the International Criminal Court so it can proceed to investigate them, as that would show that there are institutions in Colombia which obstruct the effective administration of justice."<sup>188</sup>

This has reportedly had some positive effects over Colombia's transitional justice process of accountability. It may have provided the original JPL framework, which

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<sup>183</sup> Interviews C-13 and D-3.

<sup>184</sup> William W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice" *Criminal Law Forum* 19 (2008), 70.

<sup>185</sup> Interviews C-3 and C-12.

<sup>186</sup> See, eg, letter to the Colombian Parliament when the Justice and Peace Law was being debated (on file with author).

<sup>187</sup> Interviews C-2, C-4, and C-12.

<sup>188</sup> Supreme Court, Criminal Cassation Chamber, Arana Sus, at para. 11.3: "La presente decisión es una muestra de las posibilidades que tiene la justicia colombiana de investigar y sancionar graves crímenes que repugnan a la humanidad. Sin embargo, en el evento en que alguna autoridad pretenda la impunidad de los hechos juzgados en el presente asunto, se remitirá copia de la actuación a la Corte Penal Internacional para que avoque su conocimiento en tanto se demostraría que algunas instituciones en Colombia obstruyen la eficacia de la administración de justicia." (my translation).

contained essentially nominal penalties, with more serious sanctions and a more ambitious framework for developing a historic record of the atrocities. It is also suggested that it has favoured certain progress in the legal treatment of this kind of gross human rights violations. This has obtained, for instance, by it encouraging the incorporation of evidentiary standards sensitive to difficulties as in the case of sexual offences,<sup>189</sup> pushing for investigations into the systematic forms of criminality and patterns of violence, and enhancing procedural rights for victims. It may have also encouraged the use of international crimes, such as crimes against humanity, even if they were not explicitly provided for as a matter of domestic criminal law.<sup>190</sup>

But there are also negative effects connected with this particular “sticks-only” approach; the incentive this threat creates for Colombian authorities “may end up undermining the whole process by directing it towards unrealistic goals”.<sup>191</sup> The Supreme Court of Colombia, for instance, has decided against the use of partial attributions of facts, forcing prosecutors to conduct investigations into the full facts disclosed by defendants. This would imply, critics argue, that in a case such as that against aka *El Iguano*, who has reputedly been implicated in around 4,000 crimes, the Prosecutor’s Office would have to document each of them in order to bring him to trial under the JPL framework.<sup>192</sup> But the most serious implication is arguably the antagonizing effect it has over the relationship between domestic authorities and the ICC. As it has been put by an interviewee, “this ‘observation’ phase is an obnoxious term; ... [i]t is perceived as the kind of strategy the IMF follows, and which is often strongly resisted domestically.”<sup>193</sup> The shared sense in Colombia seems to be one of hostility towards the ICC, rather than collaboration.

Moreover, if the OTP were to decide to take Colombia out of the list of situations under observation, thereby taking this “stick” away, this may have a powerful detrimental effect on ongoing domestic process.<sup>194</sup> It is quite widely believed that if the ICC were to open an investigation on Colombia, this would also lift a significant part of the political

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<sup>189</sup> Interview C-2.

<sup>190</sup> In all these relevant respects, however, the role of the ICC as a triggering influence for them is shared by the Inter American Court of Human Rights (see previous section). See also interviews C-4, C-9, and C-12.

<sup>191</sup> Interview C-9. See also, interviews C-6 and C-11.

<sup>192</sup> Interview C-6.

<sup>193</sup> Interview C-3.

<sup>194</sup> Anonymous interviewee.

incentive to push for investigations and trials domestically.<sup>195</sup> Intervention would be perceived by the local judiciary as a statement of inability<sup>196</sup> and would create the temptation to free-ride on the work of the Court.<sup>197</sup> The sense is that intervention by the ICC would weaken the domestic legal system in terms of its capacity to conduct investigations locally, i.e., it would have a destabilizing effect.<sup>198</sup>

A possible way out of this juncture would be to add some “carrots” to this overall framework, namely, to foster interaction between local authorities and the ICC in order to develop trust and establish some sort of working relations, albeit loose or informal ones. The *Consejo Superior de la Judicatura* has the power to create new dependencies. So without the need for a direct intervention of the ICC, it could create a unit of international support even within the Supreme Court and the Prosecutor’s Office. This could stabilize the investigation and trial of this kind of cases. They would hugely benefit from advice and consultants on the right approach to these cases.<sup>199</sup> These developments might be considered even a positive indicator vis-à-vis the complementarity test and create positive synergies even in the case the ICC were to open a limited investigation. It is also possible for the OTP to establish relationships with local judicial and prosecutorial authorities (and not only with the executive branch).<sup>200</sup> The OTP has even established good working relations with civil society organizations, including victims’ organizations.<sup>201</sup> It could also develop guidelines on complementarity and protocols contributing to local jurisdictions’ practice of investigating, charging, and trying individuals for this type of crime.<sup>202</sup> Finally, it could establish a special division within the OTP to liaise with local authorities on a permanent basis.<sup>203</sup>

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<sup>195</sup> Interviews C-3, C-4 and C-6 among others. Certain more skeptics, however, would argue that this in fact begs the question; for they never had any expectations on the outcome of this process, in terms of justice, truth and reparations.

<sup>196</sup> Interview C-3.

<sup>197</sup> Burke-White, "Implementing a Policy of Positive Complementarity", 82.

<sup>198</sup> Interview C-2. It has been standardly argued that the only thing the Colombian administration, the Constitutional Court, and the Supreme Court have had in common with regards to the JPL and parapolitics issues is their shared view regarding the need to avoid an intervention by the ICC (Interviews C-2, C-3, C-14 among others).

<sup>199</sup> Interview C-3.

<sup>200</sup> Burke-White, "Implementing a Policy of Positive Complementarity", 72.

<sup>201</sup> Interviews C-4 and C-12.

<sup>202</sup> Interview C-2.

<sup>203</sup> Interview C-3.

## 6. CONCLUSION

This report advocates a holistic approach to capacity development in international criminal justice. It provides a critical account of existing efforts and suggests that there are significant difficulties in coherence, coordination and sequencing of capacity development initiatives, and that efforts have been too focused on “training” individuals without looking enough at the context in which they function. It also argues that successful policies directed at enhancing the capacity of local legal systems are connected with there being the right kind of incentives for both local and international institutions developing collaborative or constructive relationships and achieving justice at the local level. For this to obtain, however, there are several concrete elements at the level of institutional arrangements which need to be carefully considered, such as their institutional position of the international or internationalized tribunal, its jurisdictional relationship to local courts and consideration of local laws, and the clear design of an adequate exit strategy.

## LIST OF INTERVIEWEES\*

Ms Evelyn Anoya, *Court Management and Support Section – ICTY*  
 Gabriel Arias, *ICTJ Colombia*; Mr Mohamed Bangura  
 Ms Stephanie Barbour, *OSCE*  
 Judge Snezhana Botsusharova-Doicheva, *Court of BiH*  
 Judge Nicholas Browne-Marke, *Sierra Leone’s High Court*  
 Mr Leonardo Augusto Cabanas Fonseca, *JPL Prosecutor*  
 Mr Toby Cadman, *POBiH*  
 Ms Montserrat Carboni, *OTP – ICC*  
 Ms Claire Carlton-Hanciles, *Defence Attorney – SCSL*  
 Mr Amir Cengic, *Chambers – ICTY*  
 Prof. Manuel José Cepeda, *former Judge of the Colombian Constitutional Court*  
 Prof. Andrés Cifuentes, *University of Los Andes*  
 Mr Tunde Cole, *Solicitor-General – Sierra Leone*  
 Ms Clare Da Silva, *Defence team – SCSL*  
 Mr Francesco De Sanctis, *OSCE*  
 Ms Carla del Ponte, *Prosecutor of the ICTY and ICTR*  
 Ms Ana Díaz, *Researcher Comisión Colombiana de Juristas*  
 Ms Lucia Dighiero, *Registry & Witness Support Section at Court of BiH*  
 Ms Bozidarka Dodik, *Prosecutor at the POBiH*; Judge Teresa Doherty, *SCSL*  
 Ms Fidelma Donlon, *OHR and Deputy Registrar at the Court of BiH and SCSL*  
*Advisor for Residual Issues*  
 Ms Neda Dojcinovic, *ICRC-BiH*  
 Mr Lansana Dumbuya, *Sierra Leonean Barrister*  
 Judge Shireen Fisher, *Court of BiH , SCSL*  
 Judge Lester M. González, *JPL – Colombia*  
 Mr Carlos González, *OAS – Colombia*  
 Mr Raffi Gregorian, *OSCE*  
 Mr Fabricio Guariglia, *OTP – ICC*  
 Ms Diana Guzman, *Researcher at Dejusticia*  
 Mr Matias Hellman, *Office of the President – ICTY*  
 Mr Refik Hodzic, *ICTY Office in Sarajevo*  
 Mr Kevin Hughes, *Legal Officer at Court of BiH*  
 Mr Manuel Iturralde, *University of Los Andes, Colombia*  
 Ms Nerma Jelacic, *Media Outreach – ICTY*  
 Judge Uldi T. Jiménez López, *JPL – Colombia*  
 Ms Hilda Juracic, *Victims and Witness Section – ICTY*  
 Mr Abdul Serry-Kamal, *former Minister of Justice and Attorney General – Sierra Leone*

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\* This list does not include a few individuals who have requested to remain anonymous.

Judge Jon Kamanda, *SCSL*  
Ambassador Allieu Ibrahim Kanu, *former Sierra Leone's Ambassador to the UN*  
Ms Musu Kamara, *Registrar of Court of Appeals – Sierra Leone*  
Ms Pipina Katsaris, *OSCE*  
Judge George Gelaga King, *SCSL*  
Mr Zdravko Knezevic, *Chief Federal Prosecutor of BiH*  
Mr Stephen Kostas, *Legal Officer – SCSL*  
Judge Minka Kreho, *Court of BiH*  
Mr Aleksandar Kontic, *OTP - ICTY*  
Ms Marta López, *OAS – Colombia*  
Ms Haylen Maldonado, *Defensoría del Pueblo, Colombia*  
Ms Catherine Marchi-Uhel, *Chambers – ICTY*  
Mr Liam McDowal, *Registry – ICTY*  
Ms Gabrielle McIntyre, *President's Office – ICTY*  
Mr Easmon Ngukai, *Deputy President of the Bar Association, Sierra Leone*  
Mr Gabriel Oosthuizen, *Consultant ICLS*  
Mr Zoren Pajic, *Legal Advisor – Professor of Law*  
Judge Branko Peric, *Court of BiH*  
Ms Jasmina Pjanic, *OKO*  
Judge Fausto Pocar, *ICTY*  
Ms Biljana Potparic, *Registrar – Court of BiH*  
Ms Elma Prcic-Bilic, *UNDP - BiH*  
Ms Margriet Prins, *OHR*  
Judge David Re, *Court of BiH*  
Ms Edina Residovic, *Defence Lawyer – BiH*  
Mr Kenneth Roberts, *Chambers – ICTY*  
Ms Camilla Sudgen, *DfID*  
Mr Mirsad Tokaca, *President of the Research and Documentation Centred – BiH*  
Mr Pascal Turlan, *OTP – ICC*  
Ms Julia Sarkodie-Mensah, *High Court Registrar – Sierra Leone*  
Mr David Schwendimann, *POBiH*  
Ms Alison Smith, *No Peace Without Justice*  
Mr Mohamed Suma, *Sierra Leone Court Monitoring Programme*  
Mr Victor Ullom, *OSCE – UNICRI – ICTY Consultant*  
Mr Saleem Vahidy, *VW Unit – SCSL*  
Ms Vasvja Vidovic, *Defence Lawyer – BiH*  
Judge Patricia Whalen, *Court of BiH*  
Ms Maria Warren, *OTP – SCSL*  
Mr Yada Williams, *Sierra Leonean Barrister*  
Judge Renate Winter, *SCSL*



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