

**Legal Empowerment: Capacity Building in Core  
International Crimes Prosecution through  
Technology Applications**



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*Deadline of submission: May 2011*

Number of words: 17,952

11.05.2011

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## **ABBREVIATIONS**

Commission of Experts - Commission of experts investigating violations of international humanitarian law in the former Yugoslavia

ICC – International Criminal Court

ICHL – International criminal and humanitarian law

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

NGO – Non-governmental organization

ODIHR - Office for Democratic Institutions and Human Rights (Organization for Security and Cooperation in Europe)

Office – Office of the Prosecutor of the International Criminal Court

OSCE - Organization for Security and Cooperation in Europe

PRD - Partido de la Revolución Democrática

Rome Statute – Rome Statute of the International Criminal Court

# 1 INTRODUCTION

Capacity to prosecute core international crimes of genocide, crimes against humanity and war crimes is emanating and concentrated at the international tribunals. What about other places making disturbing headlines in the media of suspected large scale crimes? Are they similarly equipped to conduct investigations of “...a level of complexity which dwarfs any domestic criminal proceedings, even the most complicated fraud cases”<sup>1</sup>. Domestication of core international crimes in the national jurisdictions through developing local capacities, the process widely referred to as “positive complementarity”, is a subject of the present research.

## 1.1 Research objective and questions

The thesis calls for a dialogue between professionals from three fields of study:

- (1) legal empowerment initiative emanating from development studies,
- (2) international criminal law and
- (3) legal information management through technology applications.

It examines the relation between the three fields through the following clusters of research questions.

1. Legal empowerment has up to date been focused on poverty eradication, property rights, and grass-roots initiatives distancing itself from the criminal justice perspective. Is legal empowerment expandable to international criminal justice? How does ability of individual states to prosecute core international crimes contribute to legal empowerment of the state as a whole?

2. International criminal law has accumulated abundant legal practice and examples of legal reasoning. The need to transfer capacity for international criminal prosecution to national authorities has been recently set out through a concept of

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<sup>1</sup> Judge Peter Murphy and Lina Baddour, “International Criminal Law and Common Law Rules of Evidence”, in Karim A. A. Khan, Caroline Buisman, and Cristopher Gosnell (eds.), *Principles of evidence in international criminal justice*, Oxford University Press, 2010, p. 152.

*positive complementarity*. The thesis seeks to trace a synergy between legal empowerment and positive complementarity of international criminal justice.

3. The challenge ahead is to efficiently and effectively introduce international criminal jurisprudence to different stakeholders in national jurisdictions. Technology applications that improve retrieval, management, documentation and exchange of legal information between the networks of relevant stakeholders serve that goal. Which technology applications may feed the process of legal empowerment through international criminal justice?

## **1.2 Structure of thesis**

The thesis seeks to describe the emergence of consensus to spread international criminal justice among individual states in Chapter 2. Chapter 3 introduces a danger of legal imperialism that may be associated with the spread of international criminal justice. By countering this critique, the author sets the framework for legal empowerment.

In chapter 4 and 5 I define the term “legal empowerment” and argue that the spread of international criminal justice empowers the state. Chapters 6 and 7 substantiate how international criminal justice serves the goals of empowerment: via its immediate effects (retribution, restoration, deterrence, professional development) and spill-over effects, that are indirect but foreseeable positive effects. Immediate and spill-over effects should be of interest to a range of actors (national authorities, international community, media and civil society).

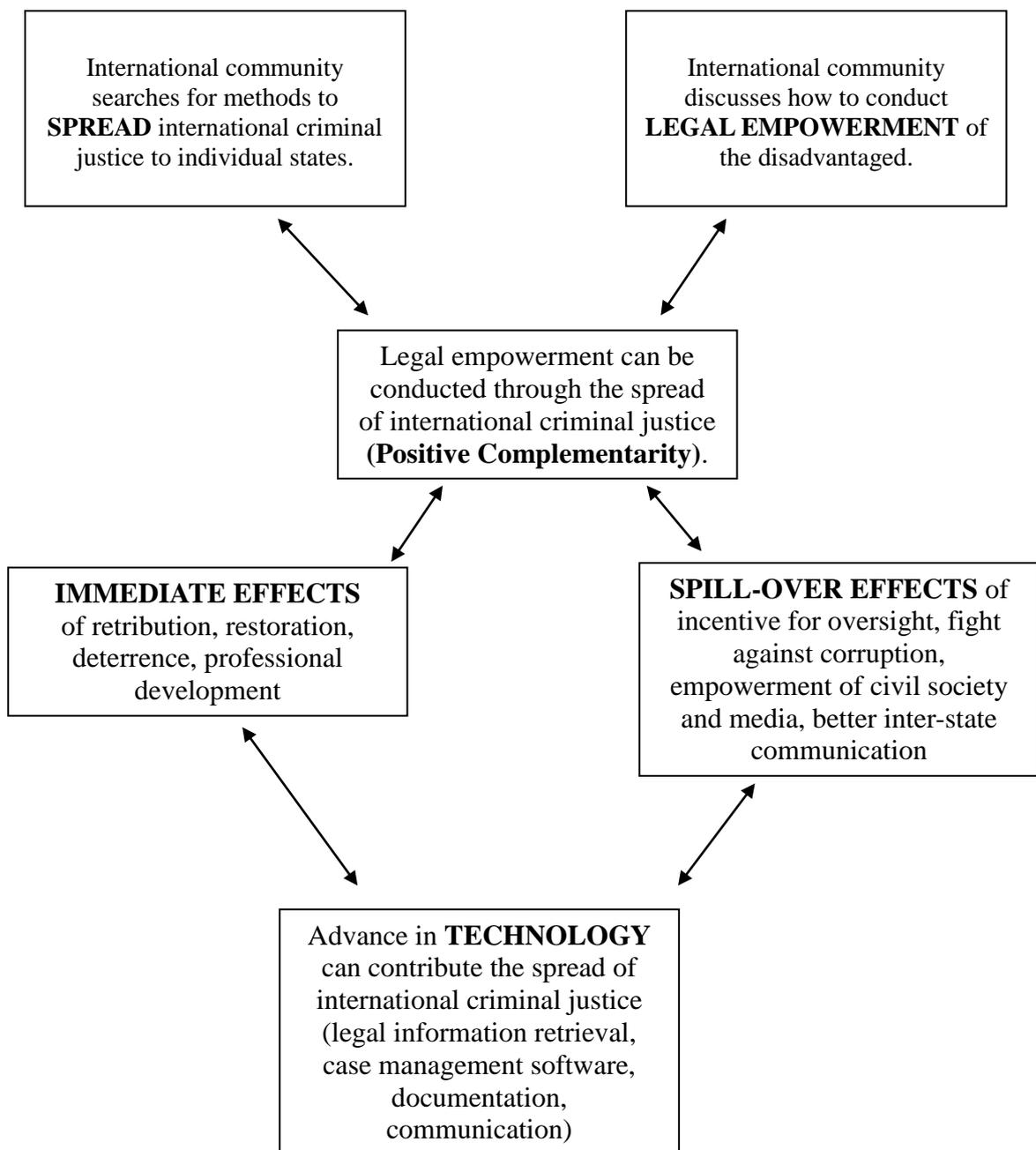
Chapter 8 seeks to show how technology can be used to create ability of national states to prosecute core international crimes, thereby advancing the goals of positive complementarity (which emanates from international criminal justice) and legal empowerment (which emanates from the development community).

## **1.3 Methods and literature review**

Due to the novelty of the thesis, few primary sources were found. These are mainly the Rome Statute, resolutions of International Criminal Court’s Assembly of States Parties and conference documents, several judicial decisions, and governing documents of European Union’s Judicial Cooperation Unit.

Secondary sources are used abundantly. I sought after publications of legal experts, descriptions of work process, opinion as to the effects, problems and perspectives of international criminal justice or legal empowerment, and notable examples from the media. Additionally, a number of technology applications which are available on internet or accessible due to my work have been referred to in chapter 8 in order to illustrate how technology contributes the processes.

Based on the researched material I engaged in discourse argumentation. It follows the logic:



I aim to show the specialists and policymakers why legal empowerment and domestication of international criminal justice are interrelated and how technology may assist in advancing their common agendas. I am also committed to the idea that attention and investment into these agendas bring about the desired immediate and spill-over effects that are necessary for stabilization, development, responsibility, and better governance.

## 2 SPREAD OF INTERNATIONAL CRIMINAL JUSTICE STATEWISE THROUGH POSITIVE COMPLEMENTARITY

Prior to the adoption of the Rome Statute, suppression of core international crimes has for a long time been within the exclusive domain of national courts. Punishment of war crimes domestically can be traced back for centuries<sup>2</sup> and national prosecutions of genocide and crimes against humanity occasionally occur<sup>3</sup>. Due to high political sensitivity and difficulties associated with prosecution, states however remained reluctant to proceed with core international crimes most of which were left unpunished as a result. The prosecutorial efforts have shifted to the international community.

The efforts to bring perpetrators to justice through international cooperation needed to be taken either by agreement of states (Nuremberg and Tokyo Tribunals after WWII, International Criminal Court (ICC) in 2002), by the decision of UN bodies (International Criminal Tribunal for former Yugoslavia (ICTY) in 1993, International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone, Special Panels for Serious Crimes in East Timor, Extraordinary Chambers in the Courts of Cambodia) or by an ad hoc international institution such as High Representative for Bosnia and Herzegovina that prompted the establishment of War Crimes Chamber to enable effective war crimes prosecution.

The difficulties of international response to mass violation of human rights amounting to international crimes are apparent. International community needs time to

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<sup>2</sup> Jann F. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford, 2008, p. 34.

<sup>3</sup> For a comprehensive overview of national prosecutions of core international crimes see ICC Legal Tolls, collection National Cases Involving Core International Crimes at [www.legal-tools.org](http://www.legal-tools.org), Prevent Genocide International at <http://preventgenocide.org/punish/domestic/index.htm>, The Hague Justice Portal at <http://www.haguejusticeportal.net/ecache/def/6/579.html>, all last accessed on 16 March, 2011.

reach consensus and substantial resources to finance the mechanism<sup>4</sup> (international or internationalized judicial body, truth commission, or investigative mission) to challenge impunity. The resultant international or internationalized court has to come to grips with the challenges of administering justice in foreign environment: unfamiliarity with factual circumstances surrounding commission of crimes, foreign language, remoteness from the crime scenes, reluctance of national authorities to cooperate<sup>5</sup>, absence of a “sense of ownership” by the communities which the court seeks to address<sup>6</sup>. International(ized) courts find it difficult to leave lasting legacy for the national authorities in order to empower the latter to conduct investigations of core crimes independently<sup>7</sup>. Finally, the tenure of international(ized) tribunals has a time limit.

The permanent ICC was founded on the principle of its complementarity to national jurisdictions. Complementary jurisdiction of the ICC allows it to interfere only if national court does not exercise its jurisdiction or when the exercise does not meet the standards of willingness or ability as demonstrated by article 17 of the Rome Statute below.

The ICC will never be able to prosecute all those responsible. The prosecutor needs to focus on situations of greatest concern and on people bearing the greatest responsibility. If states fail to address impunity on their own accord, horizontal impunity gap may develop “between situations that are investigated by the ICC and situations that for legal and jurisdictional reasons are not” as well as vertical gap

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<sup>4</sup> On the cost of international and internationalized criminal tribunals see Thordis Ingadottir, “The Financing of Internationalized Criminal Courts and Tribunals” in Romano, Nollkaemper, Kleffner (eds.), *Internationalized Criminal Courts and Tribunals*, Oxford University Press, 2004, pp. 281-289.

<sup>5</sup> Antonio Cassese, “The role of internationalized courts and tribunals in the fight against international criminality”, in *Ibid*, pp. 7-9.

<sup>6</sup> Ramesh Thakur and Peter Malcontent (eds.) *From Sovereign Impunity to International Accountability: In search for Justice in a World of States*, UN University Press, 2004, pp. 217-218.

<sup>7</sup> Thordis Ingadottir, see *supra* note 4, p. 284.

“between those most responsible brought before the Court and other perpetrators who are not”<sup>8</sup>.

In accordance with article 17 of the Rome Statute, the case is inadmissible to the ICC where:

- (a) The case is being investigated or prosecuted by a state, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a state and decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
- (c) The person concerned has been tried by the court and the proceedings of the court were not for the purpose of shielding and were not otherwise conducted independently or impartially;
- (d) The case is not of sufficient gravity to justify further action by the court.

Concession of priority to national jurisdiction was conceived to encourage states to conduct genuine national proceedings. The Rome Statute conveyed a message: “*Prosecute or risk international interference*”<sup>9</sup>. The reality is, however, that national institutions prove all too frequently to be unable or unwilling to address international crimes, while feasibility of ICC, a single institution, to prosecute core international crimes is severely limited.

Therefore, assumptions governing complementary relation between the ICC and national jurisdictions have shifted from classical complementarity referring to competition between international and national jurisdiction to positive (or proactive)

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<sup>8</sup> ICC Review Conference of the Rome Statute, *Report of the Bureau on Stocktaking: Complementarity. Taking stock of the principle of complementarity: bridging the impunity gap*, 2010, para. 14.

<sup>9</sup> Jo Stigen, *The relationship between the ICC and National Jurisdictions*, Martinus Nijhoff Publishers, 2008, p. 473.

complementarity<sup>10</sup>. The table below shows the difference between the concepts.

COMPLEMENTARITY OF THE ICC	POSITIVE COMPLEMENTARITY
Complementarity preserves domestic jurisdiction	The ICC and domestic jurisdiction share a common burden
The role of the Court is tied to the failure of domestic jurisdiction	The desirability of ICC action is not exclusively determined by state failure, but influenced by comparative advantages
Complementarity enhances compliance through threat	Complementarity is not only built on threat-based compliance by states, but leaves room for cooperation and assistance from the ICC to domestic jurisdiction

The working definition of positive complementarity adopted during the Review Conference of the Rome Statute in 2010 is “*all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute*”<sup>11</sup>.

The actual nature of actions, responsible actors and allocation of burden between them are subjects of current research by a number of organizations<sup>12</sup>. “However, more

<sup>10</sup> The shift of assumptions was illustrated by Carsten Stahn, “Complementarity: a tale of two notions”, in *Criminal Law Forum*, 2008, pp. 96-103.

<sup>11</sup> ICC Review Conference of the Rome Statute, *Report of the Bureau on Stocktaking* see *supra* note 8.

<sup>12</sup> Among them are international research project “The ICC and complementarity: from theory to practice”, Grotius Centre for International Legal Studies; DOMAC project - impact of international courts on domestic criminal procedures in mass atrocity cases.

can be done to better bring together and coordinate different activities, to raise awareness of opportunities and to mainstream international criminal law throughout existing rule of law programs”<sup>13</sup>.

Carsten Stahn and William Burke-White present positive complementarity as a relation between the ICC and national jurisdictions with respect to their shared responsibility to prosecute<sup>14</sup>. Legal substantiation of sharing responsibility is as follows.

Domestic jurisdictions have a duty to prosecute international crimes due to para. 6 of the preamble of the Rome Statute, while the ICC prosecutor shall “take appropriate measures to ensure effective investigation and prosecution of crimes within the jurisdiction of the Court” due to art. 54(1) of the Rome Statute. Thus, the obligation is shared by both the national authorities and the ICC.

Art. 54(3)(d) of the Rome Statute in turn allows the ICC prosecutor “to enter into such arrangements and agreements [...] as may be necessary to facilitate cooperation by a state”. This provision enables the Prosecutor to arrange a platform of dialogue between the ICC and the states. Art. 93(10) contains a non-exhaustive list of cooperation venues, “transmission of statements, documents, or other types of evidence obtained in the course of ICC investigation or a trial conducted by the Court”, and “questioning of any person detained by order of the Court” for the state. Ultimately, once the ICC assisted the national authorities in investigation, it can exit investigation pursuant to art. 53(2)b, because the state is undertaking an independent investigation owing to the ICC assistance and the case is no longer admissible under art. 17 of the Rome Statute.

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<sup>13</sup> Judge Sang-Hyun Song, the President of the International Criminal Court, Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation, ICC Press Release, 3 June 2010.

<sup>14</sup> Carsten Stahn, see *supra* note 10, and William W. Burke-White, “Proactive complementarity: The ICC and national courts in the Rome system of international justice”, *Harvard International Law Journal*, Volume 49, Number 1, 2008.

Informal expert paper issued by the ICC office of the prosecutor<sup>15</sup> (Office) asserts that ICC shall partner with domestic jurisdictions. The partnership shall however be limited by the principle of vigilance, to ensure that the ICC assists genuine trials not intended to shield the accused from responsibility. The range of assistance the ICC was eager to render covered:

1. Transfer of information and evidence obtained during ICC investigation;
2. Technical advice about international legal issues and practical issues of investigating and prosecuting;
3. Training (crucial but carefully limited because it is not contemplated in the mandate and budget of the ICC);
4. Brokering assistance between states that can help each other to conduct investigation.

The latest stance of the ICC as to the positive complementarity is “without involving the Office directly in capacity building or financial or technical assistance”<sup>16</sup>. ICC approach includes:

1. “Providing information collected by the Office to national judiciaries upon their request pursuant Article 93(10)[...]; sharing databases of non-confidential materials or crime patterns;
2. Calling upon [specialists] from situation countries to participate in OTP investigative and prosecutorial activities [...]; inviting them to participate in the Office’s network of law enforcement agencies [...]; sharing with them expertise and trainings on investigative techniques or questioning of vulnerable witnesses;
3. Providing information about the judicial work of the Office to those involved in political mediation [...]; and
4. Acting as a catalyst with development organizations and donors’ conferences

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<sup>15</sup> ICC Office of the Prosecutor, *Informal expert paper: Principle of complementarity in practice*, 2003.

<sup>16</sup> ICC Office of the Prosecutor, *Prosecutorial Strategy 2009-2012*, 2 February 2010, p. 5

to promote support for relevant accountability efforts”<sup>17</sup>.

Positive complementarity was one of the key topics of the ICC Review Conference in June, 2010. The task of assisting states to prosecute international crimes was relegated to states parties through international assistance. The concept of positive complementarity has grown from a partnership between ICC and domestic jurisdiction to a partnership between domestic jurisdiction in question and international community at large.

The Assembly of States Parties in their resolution recognized “the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level”<sup>18</sup>.

Notable view is that while the primary responsibility of mutual assistance and capacity building in synergy with current development and rule of law programs lies with the international community, “a small dedicated unit or person should be tasked within the Court working on this issue and acting as a facilitator or broker”<sup>19</sup>. The concept of positive complementarity has therefore transformed from cooperative relation between the ICC and a state to a new task on today’s development agenda resting on states, international organizations and civil society.

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<sup>17</sup> *Ibid.*

<sup>18</sup> Review Conference of the Rome Statute, *Resolution on “Complementarity”*, RC/Res.1, 8 June 2010, para 5.

<sup>19</sup> Interview with Ambassador Kirsten Biering on positive complementarity, *ICC Newsletter*, ASP Special edition 10, January 2010.

### **3 DOES INTERNATIONAL CRIMINAL JUSTICE SERVE LEGAL IMPERIALISM OR BRING ABOUT LEGAL EMPOWERMENT?**

The new agenda of positive complementarity may be criticized for advancing legal imperialism, that is an effort to transpose an alien legal framework (legal notions, standards, sources, *et cetera*) by international community on weaker states without taking into account national contexts for the purpose of extracting a benefit or augmenting power over a state. In other words, dissenting voices may argue that encouragement of positive complementarity may force an alien legal system upon the state. Legal imperialism has been referred to in the context of “massive efforts to transplant Western institutions” through a “missionary drive”<sup>20</sup>. The very concept of human rights is criticized for being West-centric and/or rationalizing interventionist policies<sup>21</sup>.

ICC has also been equivocally accepted by the states. Notable criticism has been expressed by the United States. U.S. Ambassador for War Crimes described the ICC as “an attempt to impose a justice mechanism”<sup>22</sup> on the world. The Rome Statute has been referred to as “a product of fuzzy-minded romanticism,” and “not just naive, but dangerous” by the US senior state officials<sup>23</sup>.

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<sup>20</sup> James Q. Whitman, “Western Legal Imperialism: Thinking About the Deep Historical Roots”, *Theoretical Inquiries in Law*, Volume 10, Number 2, July 2009.

<sup>21</sup> Yasuaki Onuma, “Towards an intercivilizational approach to human rights”, in *Debates on Issues of Our Common Future*, Wilhelm Kull (ed.), 2000, p. 47.

<sup>22</sup> Pierre-Richard Prosper, Remarks at the Harvard Colloquium on International Affairs, 13 April 2002, on file with William W. Burke-White, cited in William W. Burke-White, “A community of courts: toward a system of international criminal law enforcement”, in *Michigan Journal of International Law*, Volume 24:1, 2002, p.5.

<sup>23</sup> John R. Bolton, Under-Secretary of State for Arms Control, quoted in Neil A. Lewis, U.S. is set to renounce its role in pact for world tribunal, *New York Times*, 5 May 2002, cited in *Ibid*, p.5.

Without addressing the issues of state intervention, the effort of this thesis is to show that building capacity of states to prosecute core international crimes may alternatively serve the agenda of legal empowerment, and the benefits of it outweigh the risks of undue influence upon the states.

International criminal law reflects the fundamental reactions of society onto the most serious crimes. The counterclaim to the legal imperialism critique is that the reach of criminal justice (selection of crimes, reach of the modes of liability and rules of evidence) reflect the universal values, irrespective of the cultural, historical, and other contexts. The differences, disagreement, and misconceptions may arise only due to insufficient awareness, lack of exchange of information, inability or lack of capacity to prosecute core international crimes. Creation of ability to prosecute core international crimes is to address such disagreement.

Positive complementarity should ensure that the capacity building efforts reach up to the standard of art. 17 of the ICC Statute:

*The case is inadmissible to the ICC “unless the State is ... unable genuinely to carry out investigation or prosecution”.*

Capacity building efforts should therefore reach the threshold of admissibility set out by art.17 of the Rome Statute making the case inadmissible to the ICC because the state is able to genuinely carry out these activities. Art.17 threshold may very well serve as an indicator of legal imperialism that is activity far exceeding what is necessary to create an ability to investigate or to prosecute.

In order to place legal empowerment efforts in the discourse on the dangers of legal imperialism, it is necessary to note that positive complementarity is addressed to states that are either *unwilling* or *unable* to prosecute. While legal imperialism is transplanted onto the states that are *unwilling* to adopt a particular concept, the legal empowerment proposals are addressed to states that are *unable* to prosecute. Thus, the agenda of positive complementarity, insofar as it deals with *inability* to prosecute, represents not a legal imperialism, but the legal empowerment. Lack of comprehensible legal information may not be an excuse for renouncement of prosecutorial and investigatory efforts, although it is more often than not a reason for the lack of national

prosecution, and even interest in international criminal law.

Spread of international criminal justice, as argued in this thesis, represents legal empowerment. It is addressed to:

- National prosecutorial and judicial authorities through capacity building;
- Citizens benefiting from the state capable to address most serious crimes fairly and from more disciplined and answerable state officials;
- Civil society documenting violations of human rights and pressuring the state to take action with regards to the most vagrant of violations;
- International community through enhanced inter-state cooperation.

The chapters to follow describe how each of the abovementioned stakeholders can contribute to the legal empowerment of states through positive complementarity.

## **4 DEFINITION OF LEGAL EMPOWERMENT**

Legal empowerment refers to a wide ranging development strategy which has accumulated considerable amount of scholarship. It does not bring about an entirely new vision of development. Rather, it emphasizes commonalities among the existent development projects which proved to have positive impact. Legal empowerment may go by other names and includes a variety of projects which in one way or another implements human rights framework and entitles population to assert their rights. Development literature counts several definitions of legal empowerment, as for example: *“Empowerment is the process whereby disadvantaged groups acquire greater control over decisions and processes affecting their lives. Legal empowerment is ... brought about through the use of legal processes”*.<sup>24</sup>

Legal empowerment is looked upon as an alternative to “rule of law” strategy. While the latter *“top-down, state-centered approach concentrates on law reform and*

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<sup>24</sup> Lorenzo Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects in Africa*, International Institute for Environment and Development, London, 2007, p. 18.

*government institutions, particularly judiciaries... ”, legal empowerment is described as “a manifestation of community-driven and rights-based development, grounded in grassroots needs and activities but can translate community-level work into impact on national laws and institutions. It prioritizes civil society support because it is typically the best route to strengthening the legal capacities and power of the poor”<sup>25</sup>.*

Legal empowerment gained momentum with the establishment of UN Commission on Legal Empowerment of the Poor and is therefore widely discussed in the context of poverty eradication. The commission envisions the route of development via inclusion of estimated 4 billion of the world poor into the realm of law in order for them to generate capital. Its report “Making the law work for everyone” sets out the agenda to legally empower the poor to function effectively on the market. Four pillars were selected to address the needs of the poor:

1. Access to justice and rule of law;
2. Property rights;
3. Labor rights;
4. Business rights.

The disenfranchised poor need not only protection of their property and business, but also an economic opportunity to leverage them on the market. The range of legal reforms advanced by the commission is designed to bring business and property from the shadow of extralegal economy to the light of legal framework and market. The reform includes inter alia comprehensive registration of property rights, guarantees of enforcing commercial contracts, and a range of measures to guarantee rights at work.

The Commission recognizes that the first pillar “access to justice and rule of law” guarantees all other pillars. The reform is therefore premised on the genuine government effort to bring about the desired change: *“Where just laws enshrine and enforce the rights and obligations of society, the benefits to all, especially the poor, are beyond measure. Ensuring equitable access to justice, though fundamental to progress,*

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<sup>25</sup> Stephen Golub, *Beyond rule of law orthodoxy: the legal empowerment alternative*, Carnegie Endowment for International Peace, 2003, 41, p. 3.

*is hard to achieve. Equal access to justice can only be realised with the commitment of the state and public institutions*”<sup>26</sup>.

The efforts of the commission in this domain are inter alia:

- Creating state and civil society organizations and coalitions who work in the interest of the poor;
- Facilitating legitimate state monopoly on the means of coercion, through, for example, effective and impartial policing;
- Ensuring more accessible formal judicial system, land administration systems, and relevant public institutions...
- Encouraging courts to give due consideration to the interests of the poor<sup>27</sup>.

The commission recognizes its very limited capacity to address its first pillar which boils down to the fight against corruption, good governance and democratization. Its approach is limited to convincing the governments. Commission’s viable proposals in the areas of property and economic rights are therefore doomed to failure as long as its addressees pay lip service to their commitments<sup>28</sup>.

Others view the legal empowerment in a broader and more multifaceted way, criticizing commission’s approach as the “magic pill for alleviating poverty”<sup>29</sup>.

Stephen Golub makes inquiry into which activities constitute legal empowerment summarizing them into the following tentative formula: “Legal

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<sup>26</sup> Commission on Legal Empowerment of the Poor, *Making the law work for everyone*, 2008, Volume I, pp.5-6

<sup>27</sup> *Ibid.*

<sup>28</sup> Dan Banik, Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication, *Hague Journal on the Rule of Law*, 2009, pp. 117-131.

<sup>29</sup> Stephen Golub (ed.), *Legal Empowerment: Practitioners’ Perspectives*, International Development Law Organization, 2010, № 2.

empowerment is the **use of law to specifically strengthen the disadvantaged**<sup>30</sup>.

The examples of legal empowerment initiatives embrace:

1. Monitoring by local NGOs the delivery of medical services.
2. Reforming customary justice systems used by the poor by decreasing their biases and increasing their respect for human rights standards.
3. Legal services NGO consulting those in need about housing, income, health care, government accountability, etc<sup>31</sup>.

The question of how to motivate a state to implement the legal empowerment commitments remains vibrant, while those working at the forefront welcome new initiatives.

The patchwork of legal empowerment initiatives has been viewed in the light of international human rights law. *“It enables us to draw upon the existing human right instruments and draw upon principles which have now been clearly established in the international community”*<sup>32</sup>.

International human rights law in turn has by now acquired its counterpart, international criminal law, which ensures that substantive human rights obligations are implemented. As the legal empowerment is concerned with putting into practice international human rights, international criminal law puts them into practice through prosecution of its serious breaches.

The copious jurisprudence of international criminal tribunals has elaborated extensively on what types of behavior constitute international crimes, removed immunity from high-ranking state officials, clarified which modes of liability are criminalized and achieved a great deal in institutionalizing criminal justice and creating momentum for it.

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Arjun Sengupta, “The Political Economy of Legal Empowerment of the Poor” in Dan Banik (ed.), *Rights and Legal Empowerment in Eradicating Poverty*, London, Ashgate, 2008, p. 35.

By strengthening national capacity to administer criminal justice for international crimes, international community may empower population of that state legally and thus ensure the implementation of further legal empowerment initiatives.

## 5 LEGAL EMPOWERMENT THROUGH CREATING ABILITY TO PROSECUTE CORE INTERNATIONAL CRIMES

Perspectives of *international* criminal justice in legal empowerment were not afforded much attention in the literature. The closest instance of a link between empowerment of the poor to access *national* criminal justice was reported by Paralegal Advisory Service in Malawi<sup>33</sup>. A number of local paralegals were commissioned with providing legal advice to prison population about speeding up processing of a case against them. Empowering prisoners to argue for bail, to enter a plea in mitigation, conduct their defense and cross-examine witnesses, the paralegals service eliminated unnecessary detention, accelerated processing of cases, reduced case backlogs, improved equality of arms in court and reduced remand population. Gaining access to police stations and prisons, paralegal advisory service could monitor arrests and reduce the number of cases flowing into the system and hampering it. According to the author commenting on such practice, it benefits the vulnerable entitling to national constitutional guarantees and catalyses reform changing institutional attitudes.

Legal empowerment was separated from the discourse on international criminal justice partly due to a preconception reiterated throughout the literature that over-reliance on the international criminal justice will cause “*the large share of the international community’s available resources ... be drawn into reactive rather than proactive strategies thus enabling states to refrain from more complex, costly and time-consuming protective initiatives geared towards addressing the structural causes of human rights violations*”<sup>34</sup>.

Ability to prosecute core international crimes, as argued in this thesis, can and

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<sup>33</sup> Adam Stapleton, “Empowering the poor to access criminal justice: a grassroots perspective”, in Stephen Golub (ed.), *Legal empowerment: practitioner’s perspectives*, see *supra* note 27.

<sup>34</sup> George J. Andreopoulos “Violations of human rights and humanitarian law and threats to international peace and security” in Ramesh Thakur and Peter Malcontent (ed.), see *supra* note 6, p. 91.

should instead be permanently entrenched within local institutional framework not only reacting to crimes, but also preventing them. Moreover, the process of empowering to prosecute core international crimes shall have spill-over effect on other areas of rule of law initiatives.

In order to increase the willingness of states to prosecute, it is necessary to explore what promises ability to prosecute international crimes. Each state has a different set of interests<sup>35</sup>.

#### **A. States where no international crimes have been committed**

Enhanced ability to prosecute core international crimes will serve the following functions within that state:

- 1) Enhanced ability prepares a state to address international crimes in the future.  
*“This will be a purely preventive endeavor to ensure impunity gaps will not develop in the future and deter the commission of future crimes”*<sup>36</sup>
- 2) *“[S]uch assistance may... enable the state to combat illegal activities undertaken on its territory or by its nationals that are linked to the commission of the most serious crimes abroad”*<sup>37</sup>
- 3) It reduces the number of safe havens where perpetrators may reside and thus sends a message to perpetrators travelling on their territory about the risk of being apprehended;
- 4) It helps states to comply with their obligations under the Genocide Convention, the Hague Conventions 1907, the four Geneva Conventions and Additional Protocols, ICC Statute, Convention against Torture and customary international law ensuring that the obligations are not rendered naught by their non-application;

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<sup>35</sup> The situations A, B, C, D are based on ICC Review Conference of the Rome Statute, *Report of the Bureau on Stocktaking* see *supra* note 8, pp. 17-18.

<sup>36</sup> *Ibid*, p. 17.

<sup>37</sup> *Ibid*.

- 5) Prosecution by these states causes “Pinochet effect”. The term denotes the investigative efforts that have been undertaken throughout the whole of Latin America in the wake of criminal proceedings in Europe in the 1990s and 2000s. *“The Pinochet effect shows that bystander states’ prosecutions can enhance compliance through a combination of a wake-up call and embarrassment”*<sup>38</sup>;
- 6) Enhancing ability to prosecute international crimes entails constructing avenues for cooperation between states. This provides institutional platform for cooperating in other matters, such as organized crime, money laundering, terrorism, etc.;
- 7) Supervision of governmental institutions, military, law enforcement agencies may be enhanced. Violations not amounting to core international crimes (such as corruption, human rights violations of individual persons, and abuse of power) may be addressed through capacity to prosecute more serious crimes.

**B. States which are experiencing or emerging from a conflict.**

- 1) Such situations offer early opportunities to catalyze domestic proceedings by capturing the evidence abundant in the wake of clashes. This can be done as a part of any ongoing peace building;
- 2) See also sp. 1, 4, 6, 7 of point A above

**C. States where international court/tribunals are investigating and prosecuting international crimes**

- 1) Domestic jurisdictions should be empowered to deal with minor perpetrators reducing the impunity gap, or alternatively;
- 2) International court/tribunals should share a burden of prosecution with domestic jurisdictions with regards to each case;

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<sup>38</sup> Cedrik Ryngaert, “Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations”, in Morten Bergsmo (ed.), *Complementarity and the exercise of universal jurisdiction for core international crimes*, Torkel Oppsahl Academic e-publisher, Oslo, 2010, p. 185.

3) See sp. 1, 4, 6, 7 of point A

**D. States where international court/tribunals have concluded their prosecutions**

1) Domestic jurisdictions should be empowered to deal with minor perpetrators reducing the impunity gap;

2) See sp. 1, 6, 7 of point A

**E. States whose situations are investigated or prosecuted by third states**

1) Domestic jurisdictions should closely assist foreign jurisdiction in investigation through sharing and transfer of evidence thus reducing costs of investigation for both states.

2) See sp. 1, 4, 6, 7 of p. A

**F. States which can contribute to the investigation/prosecution happening elsewhere**

1) Domestic jurisdictions should closely assist foreign jurisdiction in investigation through transfer of evidence.

2) See sp. 1, 4, 6, 7 of point A above

**G. States which acquiesce or are not willing to prosecute crimes**

1) Ability to collect information for the purpose of future prosecution should be created for NGOs, human rights defenders and media;

2) International community should motivate the violating state to prosecute by creating willingness to prosecute, or alternatively

3) Third states should undertake proceedings based on the evidence collected by professional NGOs, human rights defenders, and media based on sp. 1 above;

4) Should sp. 2 and 3 above prove unviable, ICC needs to intervene;

5) See sp. 1, 4, 6, 7 of point A above

## 6 IMMEDIATE EFFECTS OF INTERNATIONAL CRIMINAL JUSTICE ON LEGAL EMPOWERMENT

How does international criminal justice empower population of a state to assert its rights thereby contributing to the process of legal empowerment? Although no targeted research has been made to date, the following thoughts can be extracted from diverse sources. The following is a patchwork of effects international criminal justice may produce within a state. The effects are intertwined and may be of different importance for each jurisdiction based on its experience of a conflict.

### 6.1 Retribution

The notion of retribution is extrapolated from the theory of punishment substantiating national prosecution. In the situation where a particular community emerges from a conflict, accountability of perpetrators has a deep psychological impact. *“Deep-seated resentments ... are removed and people on different sides of the divide can feel that a clean slate has been provided for coexistence”*<sup>39</sup>. This observation is unequivocal where all fractions of society agree on the guilt of perpetrators.

However, people can also differ radically on their judgments of recent history as to what went wrong and who is responsible. Retribution of one party to a conflict may harm another detrimentally affecting mutual reconciliation. *“Each is thus obliged – by circumstance, not shared morality – to engage the other in hopes of persuading a more general public, and perhaps even an immediate opponent, of the superiority of a favored historical account. To be persuasive to anyone, one must display a measure of civility, even towards those one would prefer, in ideal circumstances simply to kill or suppress”*<sup>40</sup>. Mark Osiel argues that in such circumstances solidarity may be achieved through civil dissensus: *“It is precisely the genuine uncertainty of result that gives a liberal show trial both its normative legitimacy and the dramatic intensity so*

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<sup>39</sup> Kingsley Chiedu Moghalu “From sovereign impunity to international accountability” in Ramesh Thakur and Peter Malcontent (eds.), see *supra* note 6, p. 216.

<sup>40</sup> Mark Osiel, *Mass atrocity, collective memory, and the law*, Transaction Publishers, 1997, p. 41.

*conspicuously absent where conviction on all charges is a foregone conclusion*”<sup>41</sup>.

Prosecution of perpetrators of core international crimes individualizes the guilt through individual criminal responsibility as opposed to collective punishment of certain fractions of society claimed to be responsible.

## **6.2 Restoration**

Apart from moral satisfaction, international criminal justice is able to restore by providing compensation to the victims. A move to reparations is taken by the Rome Statute. Victims may express their views via legal representatives when their personal interests are affected. The ICC can order reparations (including restitution, compensation and rehabilitation) commensurate with loss or injury to or in respect of victims based on articles 68 and 75 of the Rome Statute. Articles 94-98 of the Rules of Procedure and evidence entitle the court to order award on its own motion either individually or through a Trust Fund for victims.

Another perspective of international justice seeking redress for its victims is the adoption by the UN General Assembly of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2006, which is however yet to be applied on the international and national level.

Implementation of reparation initiatives have been spotty up to date due to a large amount of harm caused by the crimes as opposed to limited resources of a state or accused. It was suggested that “*reparation programs should always include a number of different measures rather than a single one and should combine individual and collective, material and symbolic reparations. These characteristics are greater determinants of success than the actual amount of monetary reparations, which will in most cases not approach the tort-damages ideal*”<sup>42</sup>.

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<sup>41</sup> *Ibid*, p. 280

<sup>42</sup> Erik Wiebelhaus-Brahm, “Summary of regional and thematic studies”, in M. Cherif Bassiouni (ed.), *The pursuit of international criminal justice: a world study on conflicts, victimization, and post-conflict justice*, Intersentia, 2010, p. 121.

The type of restoration international criminal justice can achieve is the one entitled “constructive accountability” in international human rights law and “restorative justice” in national criminal law. Central to the latter philosophy are the ideas about repairing harm and resolving conflicts rather than punishing the offender and allocating blame<sup>43</sup>. The former concept describes the process whereby a state determined to be responsible for violations of human rights is obliged to report to human rights bodies on the measures taken to prevent further violations.

The illustration of an entity aiming for restorative process is the Commission for Reception, Truth, and Reconciliation in East Timor. The Commission is charged with truth-seeking on human rights violations. It can hold hearings and has broad investigatory powers to request information and summon witnesses. Noteworthy is the reconciliation process whereby perpetrators guilty of less serious crimes are allowed to reconcile with victims and communities, while the credible evidence of serious crimes revealed during public hearings is directed to prosecutor<sup>44</sup>. Apart from punitive accountability which international criminal justice ought to entail, its restorative contribution is the explanation of why violence was resorted to and where it emanated from.

### **6.3 Deterrence**

No empirical data exists to date to support the proposition that prosecution of international crimes has brought about deterrence and prevented their further commission, although “*human experience reveals that [deterrence] works best when the likelihood of prompt punishment is somewhat certain*” and effective system of

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<sup>43</sup> Marc Groenhuijsen, “Victim’s rights and restorative justice: piecemeal reform of the criminal justice system or a change of paradigm?”, in Hendrik Kaptein and Marijke Malsch (eds.) “*Crime, Victims and Justice*”, Ashgate, 2004.

<sup>44</sup> Beth S. Lyons, “Getting untrapped, struggling for truths: The Commission for reception, truth and reconciliation (CAVR) in East Timor” in Romano, Nollkaemper, Kleffner (eds.), see *supra* note 4, pp. 99-121.

apprehension and prosecution is in place<sup>45</sup>. The answer to the question is notably challenging within the ambit of international criminal justice when determining whether prosecution of core international crimes committed in one jurisdiction may deter their commission in another.

It is aptly noted however, that in order for deterrence to evolve, threat of prosecution should focus on the leaders of armed forces (whether military or civilian) or leaders of law enforcement agencies. In conflict situations “*where the group leader exercises absolute control over members of the group, those within such groups are at a mercy of their respective leaders*”. Moreover, deterrence seems to be more effective where discipline, command and control exist within the group<sup>46</sup>. These assumptions lead to conclusion that prevention takes its effect when leaders of armed forces enforce discipline and humanitarian law within the group due to the threat of their potential prosecution. The probability of prosecution should therefore increase through enabling national authorities of their home states and third states to exercise jurisdiction.

The relation between international criminal prosecution and stabilization has been traced by Payam Akhavan, arguing that “*political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow. Whether their downfall comes through political overthrow or military defeat, the vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of ... future political rehabilitation*”. He argues that both ICTY and ICTR marginalized nationalist political leaders and other forces allied with ethnic war and core international crimes committed at that time. They “*changed the civic landscape and permitted the ascendancy of more moderate political forces backing multiethnic coexistence and nonviolent democratic process*”<sup>47</sup>.

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<sup>45</sup> M. Cherif Bassiouni “Assessing conflict outcomes: accountability and impunity” in M. Cherif Bassiouni, see *supra* note 42, p. 28.

<sup>46</sup> *Ibid*, p.29.

<sup>47</sup> Payam Akhavan, “Beyond impunity: Can international criminal justice prevent further atrocities”, *The American Journal of International Law*, Volume 95-7.

Others forcefully argue that individual perpetrators are products of states and other organizations that augment their cost-benefit calculation before resorting to the commission of crimes. Motivation arises in collectivity itself and not in its agents. Therefore, perpetrators “*are convinced of the rightness of their goals and develop corresponding neutralization techniques like denying responsibility, blaming the victim, and rejecting the reality of victimization*”<sup>48</sup>.

Current national criminal justice institutions are not prepared to discern and prosecute the root cause of large pattern of violence, which lies in a wrongful decision-making of state or non-state actors. They do not therefore deter the commission of core international crimes as much as they are able to deter commission of regular violence.

Finally, prosecution of core international crimes committed by the previous leaders form a collective memory of the community that experienced it and judgments may serve as a legal precedent. The study of collective memory of Holocaust in Germany indicates that network of agencies cooperating in the aftermath of it based on international law, could build constructive narrative without demising facts to the benefits of political expedience<sup>49</sup>. The limitations of international criminal justice in forming a collective memory are represented by the risks of overly broad or overly narrow reading, however. Overly broad application of a narrative told by a past judgment to any quotidian situation risks misinterpretation by the general public, which can easily extrapolate the lessons to today’s similar yet differing conditions. Overly narrow individualization of guilt mitigates accountability of a larger circle of those responsible<sup>50</sup>. “*In seeking to influence collective memory...judges and prosecutors need*

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<sup>48</sup> Peer Stolle and Tobias Singelstein, “On the aims and actual consequences of international prosecution”, in Kaleck, Ratner, Singelstein, Weiss (eds.), *International prosecution of human rights crimes*, Springer, 2007, p. 42.

<sup>49</sup> Mary J. Gallant and Harry M. Rhea, “Collective memory, international law, and restorative social processes after conflagration: the Holocaust”, *International Criminal Justice Review Online*, 28 April 2010.

<sup>50</sup> Mark Osiel, see *supra* note 40.

to be able publicly to acknowledge and explain law's limits and potentialities".<sup>51</sup>

#### **6.4 Professional development of police, prosecutorial authorities, defense, judges and military forces.**

Ability to prosecute international crimes requires a number of specialists from the national corpus to be trained, to have access to well elaborated databases designed for prosecution of international crimes, and possibly to work for a special national agency for prosecution of core international crimes, which will accumulate large amount of professional knowledge. The capacity accumulated within one unit needs to be shared with other regions of the country and with other specialists through internships, rotation, short term contracts. Thus, the large corpus of national governmental staff within a state will be trained to prosecute core international crimes. What professional advantages does it bring to the national jurisdiction?

As opposed to national criminal justice, international criminal justice is linked to:

- international or internal armed conflict, or absent of such a conflict
- political or ideological issue besetting the state, and
- is connected to (instigated, influenced, tolerated, or acquiesced in) the behavior of state authorities or organized non-state groups or entities.

International criminal jurisprudence has developed means to investigate and link responsibility of state authorities or other entities and groups to the resultant violence through modes of liability, as opposed to national criminal justice, focusing at best on the responsibility of immediate perpetrators. Through complex and scrupulous means of proving complicity (or co-perpetration, solicitation, instigation, partaking in joint criminal enterprise, *et cetera*) state or non-state leaders can be brought to criminal justice in conformity with *nullum crimen sine lege* principle.

International crime requires one to prove commission of underlying acts and contextual elements. Such underlying acts as killing, causing bodily or mental harm,

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<sup>51</sup> *Ibid*, p.164.

enslavement, unlawful deprivation of liberty, etc. are familiar to national authorities on a routine basis. International criminal justice in turn enables national authorities to unify the pattern of underlying criminal acts into a larger picture through contextual elements of core international crimes<sup>52</sup>:

<b>Genocide</b>	Victims of underlying acts belonged to particular national, ethnical, racial and religious group;
	The perpetrator intended to destroy that group, as such;
	The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.
<b>Crimes against humanity</b>	The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
	The perpetrator knew that the conduct was part of or intended the conduct to be a part of a widespread or systematic attack directed against a civilian population.
<b>War crimes</b>	The conduct took place in the context of and was associated with an international or internal armed conflict;
	The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The voluminous international criminal jurisprudence interpreting *inter alia* “manifest pattern”, “widespread or systematic attack”, “armed conflict”, “in the context of” enables the national authorities to systematize massive information about a crime focusing on the larger picture and the root cause of violence bedeviling that state.

International criminal law to a large extent derives from international customary law prohibiting certain forms of behavior<sup>53</sup>. Therefore, information about the developments in customary humanitarian law, human rights and criminal law may be channeled easier through national units empowered to enforce their norms by means of investigation and prosecution of the most serious violations thereof at the national level.

International criminal jurisprudence has to a large extent been regarded up to date an alien enterprise. Most national authorities prefer opening investigation applying

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<sup>52</sup> Elements of crimes of the International Criminal Court, 9 September 2002.

<sup>53</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, Second Edition, 2008, p. 17.

national criminal law rather than international in order to minimize the error and flawing the legal system<sup>54</sup>. The reasons for this preference are, *inter alia*:

- Lack or imprecision of national law implementing international offences;
- Unfamiliarity with international criminal and humanitarian law. For most prosecutors and courts, ordinary crimes “*are better developed and yield more precedents to rely on*”<sup>55</sup>;
- Easiness of proving multiple counts of murder rather than genocidal intent or existence of armed conflict in case of genocide and war crimes;
- Concerns about insufficient foreseeability of international criminal and humanitarian rules. The lack of their precision endangers *nullum crimen sine lege* principle of criminal justice.

Apart from importing these international offences into national legal system, the manageability of humanitarian and criminal law can be properly addressed through systematic classification of case law of international tribunals. “*These different sources certainly do not address all areas of confusion, and sometimes contradict each other... Yet, the abundance of codification, case law and doctrine in core crimes law does mitigate its complexity to a considerable extent*”<sup>56</sup>.

The recent report of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE on the best practice in knowledge transfer of international criminal justice indicates that in the states that conduct core international crimes investigation

“(a) *Considerable divergence of opinion exists ... on key questions of substantive law (except Serbia and, perhaps, the former Yugoslav Republic of Macedonia);*

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<sup>54</sup> For a comprehensive study of this tendency see Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, Asser Press, The Hague, 2006.

<sup>55</sup> *Ibid*, p. 105.

<sup>56</sup> *Ibid*, p. 108

*(b) Only a small minority of investigators, prosecutors, and investigative judges in the said jurisdictions have experience investigating (and proving) modes of liability other than direct perpetration and certain forms of accomplice liability;*

*(c) Oftentimes insufficient capacity exists to access and manage the large quantities and specific nature of ICHL-related evidence”<sup>57</sup>.*

There is a sufficient evidence adduced that Croatian prosecutors and investigative judges have approached allegations of war crimes as multiple killing with no nexus to a state of armed conflict, ignoring the evidence betraying the guilt of the perpetrator’s direct superior<sup>58</sup>.

The general recommendations offered by the ODIHR to construct ability of national institutions to tackle large scale offences include the support of judicial and prosecutorial training academies, increasing analytical capacity of the support staff through study visits and internships, and creation of legal research tools such as the Case Matrix and jurisprudential digests such as the ICTY Appeals Chamber Research Tool (which will be discussed further) with training on their use<sup>59</sup>. The legal research tool for local jurisprudence is also sorely needed. The national courts pronouncing on the international criminal and humanitarian law matters in their judgments (from the region’s trial, appellate and supreme courts) need a tool to share their jurisprudence with one another. The need in case management training and software (exemplified by the aforementioned Case Matrix) has also been indicated.

Trainings aimed at strengthening domestic jurisdictions to investigate and prosecute Rome Statute crimes are conducted occasionally<sup>60</sup>. What may also be found

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<sup>57</sup> OSCE ODIHR Final Report, *Supporting the Transition Process: Lessons Learned and Best Practice in Knowledge Transfer*, September 2009, p. 25.

<sup>58</sup> *Ibid*, p. 26.

<sup>59</sup> *Ibid*, p. 58.

<sup>60</sup> Review Conference of the Rome Statute, *Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*, 30 May 2010.

useful is awareness raising campaigns and training in international criminal and humanitarian law of law enforcement, military and governmental officials, which are the potential subjects of international criminal investigation.

*“There are normally stark limitations to what foreign actors can effectively and legitimately do [...], especially if they are states or non-governmental organizations with a human rights or policy agenda. The latter will in many situations not get access to public institutions in states that are affected by core international crimes or at risk of becoming territorial states. Armed forces constitute one key cluster of national public actors that often need to strengthen capacity in international humanitarian and criminal law. But armed forces are frequently quite autonomous – if not detached – socio-political systems, with internal training and capacity building mechanisms”*<sup>61</sup>.

Notable success in cooperation with armed forces has been reached by the Indonesia program at the Norwegian Center for Human Rights, University of Oslo<sup>62</sup>.

Finally, dissemination of information between the national governmental and military authorities enhances foreseeability of the law in each state thus mitigating the risk of violating *nullum crimen sine lege* requirement.

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<sup>61</sup> Forum for International Criminal and Humanitarian Law, seminar programme *Building Capacity in International Humanitarian and Criminal Law in Foreign Armed Forces: Some Experiences from Indonesia* accessed at [http://www.fichl.org/fileadmin/fichl/activities/110112\\_Seminar\\_on\\_capacity\\_building\\_\\_Seminar\\_concept\\_and\\_programme.pdf](http://www.fichl.org/fileadmin/fichl/activities/110112_Seminar_on_capacity_building__Seminar_concept_and_programme.pdf) on 1 October 2010.

<sup>62</sup> *Ibid.*

## **7 SPILL-OVER EFFECTS OF INTERNATIONAL CRIMINAL JUSTICE ON LEGAL EMPOWERMENT**

### **7.1 Incentive for oversight of law enforcement**

In order for the agenda of enabling core international crimes prosecution to be enforced, the national units charged with prosecution need greater access to governmental institutions. Thus, transfer of facilities and capacity to national institutions shall be conditioned on their corresponding obligations to make national law enforcement more transparent.

National units trained in detection of core international crimes must be entitled to visit, interview and question, access information about, among other things, treatment of detainees in prisons, military activities the state is engaged in, internal orders issued by governmental officials in the areas where crimes may be committed.

The function of monitoring law enforcement is performed by such organizations as UN Human Rights Committee and such treaty-based bodies as Committee against Torture and Committee on elimination of all forms of racial discrimination through reports submitted by states parties, inter-state and individual complaints, special rapporteurs.

*“[Treaty] bodies do not feel at ease to become part of a political process needed for coping with urgent situations. As Torkel Opsahl observed in 1988, criticisms of selectivity and of arbitrariness may harm the reputation and standing of “legal” bodies. Lack of resources and operational tools is also an obstacle for treaty bodies to further move in this direction. Therefore, other strategies and other means and methods are called for to tackle urgencies and emergencies.”<sup>63</sup>*

Optional Protocol of 2006 to the Convention against Torture obliges states parties to establish an independent national preventive mechanism at the domestic level which has also a mandate to inspect places of detention. Numerous fact-finding

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<sup>63</sup> Theo van Boven, “Political and legal control mechanisms revisited” in Morten Begsmo (ed.) “*Human Rights and Criminal Justice for the downtrodden: Essays in honour of Asbjørn Eide*” Martinus Nijhoff publishers, 2003.

missions of inter-governmental (such as the UN, International Labor Organization, Inter-American Commission on Human Rights)<sup>64</sup> and non-governmental organizations are also sent to inspect specific human rights situations.

OSCE missions conduct monitoring activities (through making inquiries with government officials, collecting publicly available information, receiving testimonies from individuals and making contact with other organizations) and investigations related to specific human rights violations. Neither in the first nor in the second example of monitoring activities the oversight institutions collect information for the purpose of criminal prosecution of perpetrators. *“Missions should always keep in mind that any investigation and inquiry is in the nature of fact finding, not judicial and prosecutorial. Except in rare circumstances, missions do not attempt to gather evidence for criminal prosecution”*.<sup>65</sup>

Fact-finding needs to be empowered to collect information substantively relevant for further criminal prosecution to be conducted by national units charged with suppression of core international criminality. At the same time, national units empowered to prosecute core international crimes need to enjoy access to inspect law enforcement.

In contrast to judiciary, which is relatively transparent owing to the public accessibility of trials and judgments, as well as equality of arms principle, law enforcement authorities are the least transparent branch. Their decision making is difficult to trace and easy to conceal through state secrecy and security laws. Creation of ability to prosecute international crimes is enhanced through control of law enforcement. Apart from visiting detention centers and prisons, permanent fact finding bodies charged with investigation of core crimes can resort to other mechanisms of inspection.

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<sup>64</sup> Hans Thoolen and Berth Vertstappen, *“Human Rights Missions: A study of the fact-finding practice of non-governmental organizations”*, Martinus Nijhoff Publishers, 1986.

<sup>65</sup> OSCE ODIHR, *Individual human rights complaints: A handbook for OSCE field personnel*, 2003.

The notable illustration of such oversight is the Mexican National Human Rights Commission which was organized in the wake of political assassination of party activists during the period between 1989 and 1994. This official governmental body was charged with investigation of post-electoral violence between the then ruling party and the leftist party Partido de la Revolución Democrática (PRD), the blame for which was mostly placed on the ruling party members and the guns hired by them. The Commission was to review in detail how the Mexican criminal justice system processed the crimes against the PRD victims.

The Commission analyzed the nature of complaints filed on behalf of PRD victims and asked the following questions:

*“(a) Was there a proper autopsy report carried out in the investigative phase? (b) Did the Social Representative of the Public Ministry within the Attorney General’s Office interview all the potential witnesses necessary to clarify the crime and/or put together sufficient elements to prosecute the crime as a homicide? (c) If a judge issues an arrest warrant on a criminal suspect, did the State Judicial Police execute it? (d) If a criminal is sentenced to prison, does he actually serve some/all of the sentence? These are the types of procedural steps the CNDH (Mexican National Human Rights Commission – author’s note) looks for in its review of each case”.*<sup>66</sup>

The commission revealed that despite the abundance of evidence and judicial action taken with respect to suspects, the police either failed to apprehend convicted state officials, policemen and hired guns or failed to adequately investigate crimes. The extent of impunity afforded to the perpetrators according to the Commission could not be justified by resource constraints as it recognized that the most vagrant failures occurred in response to the crimes against PRD party members *specifically*.

Reportedly, the homicides were committed by state officials and members of police, and in an extensive pattern of perpetuated impunity, the state was found to

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<sup>66</sup> Sara Schatz, “Disarming the Legal System: Impunity for the Political Murder of Dissidents in Mexico”, *International Criminal Justice Review*, 2008, p. 268, accessed at <http://icj.sagepub.com/cgi/content/abstract/18/3/261> on 31 May 2010.

acquiesce the homicides of the PRD party members<sup>67</sup>.

The commission issued recommendation to rectify the vagrant failures in state response to targeted killings of political activists.

*“The 90% failure rate of the various state attorney generals’ offices to respond to the [commission’s] recommendations and to correct the legal problem in numerous cases of the political murder of PRD members also reflects a disarmed judicial system in which agencies designed to protect civil rights cannot enforce their own recommendations”<sup>68</sup>.*

Despite the unfortunate fate of the Mexican commission’s recommendations, its efforts are illustrative of the way a pattern of law enforcement can be supervised and criticized for insufficient action. Creation of ability to prosecute core international crimes can be significantly enhanced through the establishment of permanent supervision over the most sensitive areas of law enforcement to each particular state.

The establishment of a body enabled to prosecute core international crimes and conferred upon the power and methodology of supervision, provides for an opportunity to detect other minor crimes (those not reaching up to the level of core crimes, but still induced by the state or non-state authorities), such as cruel treatment of prisoners or detainees, homicides of journalists, legal nihilism, state violence during public demonstrations, and the corresponding indifference to their prosecution.

The issue of oversight was potently raised in the area of security intelligence. The governments jealously guard that intelligence decision making is done in secrecy.

*“Who guards the guardians?” is the question to be answered. Just as intelligence agencies engage in surveillance to carry out their security and safety tasks, so overseers must carry out surveillance in order to ensure that the*

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<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid*, p. 286.

*agencies do not themselves threaten the security and safety of citizens*”<sup>69</sup>.

Oversight of intelligence is challenged by the fact that some techniques used by them, well exceeding the range of action that can be normally resorted to by the state for the purpose of governance, are by definition covert. The commentators argue however, that overseeing state agencies is possible as long as they operate as bureaucracy and one can understand the lines of authority and responsibility and conduct their auditing and inspection<sup>70</sup>.

## **7.2 Fight against corruption**

The entity enabled to collect information about the offences amounting to core international crimes and to monitor law enforcement should consequently be able to improve investigation and prosecution of minor offences. It is contended that the construction of ability to prosecute core international crimes builds capacity of a state to trace corrupt practices. It opens the law enforcement system and enables to trace the line of responsibility for the acts.

Although very few resources shed the light onto the overlap between the commission of international crimes and corruption of state officials, the following preliminary views have been expressed on their interrelationship.

Susceptibility of state officials to be complicit or to induce violence is more often than not coupled with their susceptibility to corrupt practices and institutionalization of criminal structures. Researches from different countries indicate that engagement in arbitrary arrests and detention, torture, rape by the police create a solid environment for police corruption and its cooperation with organized crime<sup>71</sup>.

Moreover, commission of large scale violence in itself is dependent on financing of it. Creation of ability to prosecute crimes assumes ability to uncover the source of

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<sup>69</sup> Peter Gill and Mark Phythian, *Intelligence in an insecure world*, Polity press, Cambridge, 2006, p. 149.

<sup>70</sup> *Ibid*, p. 149.

<sup>71</sup> Rick Sarre et al., *Policing corruption. International perspectives*, Lexington Books, Oxford, 2005, pp. 3-17.

financing and assess its legality<sup>72</sup>. Misappropriations of financial resources are possible once the ruling elite possesses the repressive forces to quiet dissent.

The vibrant example of it is the recent inter-ethnic violence which occurred after ousting the president of Kyrgyzstan, Kurmanbek Bakiyev, which occurred in April 2010. According to the prosecutor tasked with investigation of crimes, the evidence points at the presidential supporters of the ousted president, led by his family members that distributed money among the residents of the poorest regions of the country (35-50 dollars per day) for them to take part in mass action which led to violence and destruction. The massive distribution of money among population emptied the regional exchange offices in national currency as the presidential supporters were exchanging USD into national currency, soms. The amount of the restive population has thus exceeded the staff of national police and army from 20 to 30 times<sup>73</sup>. The interim government lost control of the masses and police forces and military reportedly joined the attack against civilian population in several episodes<sup>74</sup>.

The change of government in the Kyrgyz Republic made it possible to launch investigation of spoliation activities by the members of the ruling elite, uncovering illegal acquisitions, raiding of private companies, and unlawful privatization and estimate the amount of money channeled from the state budget to private accounts. The president and his son, who is also charged with corruption, are currently under protection of Belarus and the United Kingdom correspondingly.

The dissension of the states as to the extradition of officials (due to the fears of

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<sup>72</sup> According to the US secret cables, the ICC Prosecutor alleged the secret fortune of Omar Al-Bashir of USD 9bn, see <http://www.guardian.co.uk/world/us-embassy-cables-documents/198641> last accessed on 16 March 2010.

<sup>73</sup> Вадим Ночевкин “Конец империи Бакиевых”, “The end of Bakiev’s empire” (author’s translation), Delo No, 7 July 2010, last accessed on 16 March 2010  
[http://delo.kg/index.php?option=com\\_content&task=view&id=1509&Itemid=60](http://delo.kg/index.php?option=com_content&task=view&id=1509&Itemid=60)

<sup>74</sup> New York Times, Kyrgyzstan,  
<http://topics.nytimes.com/top/news/international/countriesandterritories/kyrgyzstan/index.html?scp=1&sq=kyrgyzstan%20police&st=cse>, accessed on January 1, 2011

not affording them a fair trial) leads to the revolving impunity of the Kyrgyz leadership. In March 2005 the first president of the independent Kyrgyz Republic Askar Akaev fled the country after a revolt due to the increasing discontent with the monopolization of the largest state enterprises in the hands of presidential family. He up to date resides in the Russian Federation. The impunity for embezzlement of state funds reinforces the confidence of the elite in their decision to spark the violence and struggle. Therefore, the agenda of a body entitled to collect information about core international crimes should be applicable to allegations of serious fraud and corrupt practices involving state officials as a preventive measure for further abuse.

The Kyrgyz situation calls for a precedent where the ruling elite is held responsible for embezzlement of state and private enterprises, the acts which can easily lead to genocide and crimes against humanity to be committed.

Earlier writings on what has been termed “international law of responsibility for economic crimes”<sup>75</sup> discuss the judicial barriers to holding heads of state individually liable for acts of indigenous spoliation within the ambit of general international law. The obstacles to recovery of assets include, inter alia, the defense of *forum non conveniens* (i.e. the consideration of more convenient forums for plaintiff’s action), the doctrine of acts of state, financial privacy laws of many states complicating recovery and linking of spoliated assets. One of the researches argues that fraudulent enrichment of state officials can be placed in the range of exceptions to sovereign immunity of a state. The range of action against state officials that have embezzled the state assumes civil action (class action, action by successor government, application by an individual citizen).

The recent thread of reasoning neighboring international criminal law and corruption argues that corruption in itself may amount to crime against humanity<sup>76</sup>. The

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<sup>75</sup> Ndiva Kofele-Kale, *International Law of Responsibility for Economic Crimes. Holding heads of state and high ranking government officials individually liable for acts of fraudulent enrichment*, Kluwer Law International, 1995, pp. 219-307.

<sup>76</sup> Ilias Bantekas “Corruption as an international crime and crime against humanity”, *Journal of International Criminal Justice*, number 4, 2006, pp. 466-484.

plethora of anti-corruption treaties have been adopted and ratified since 1995: the OECD's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the EU's 1997 Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States, UN's 2000 Transnational Organized Crime Convention, UN's 2003 Convention against Corruption, as well as regional instruments. The following scenarios where corrupt practices constitute crimes against humanity have been envisaged by one of the commentators:

1) "... [*Corrupted*] government forcibly displaced a local community without measures for their subsequent welfare in order to bestow land and mining rights to a foreign investor. In the process, many of those unwilling to leave have been murdered by security forces, while the underlying contract between the investor and the government rendered access to food and medicine for the civilian population for the next 10 years almost impossible"<sup>77</sup>. The author recognizes that at the level of corrupt practices, the direct intent to eventually destroy the population may be found absent. However, article 30(2) of the ICC Statutes makes awareness that the consequences occur in the ordinary course of events sufficient for the purpose of proving intent<sup>78</sup>.

2) Corrupt practices of state officials impoverish the population culminating in extreme poverty and famine, increased crime and death rate, the effects which may be even more devastating than the straightforward commission of violence. The effects of corrupt practices are however not immediately evident, the proof of a link is near to impossible, the victim of corruption is difficult to determine, since he may well become every citizen of a state.

If the international law is yet to answer the question of whether corruption may amount to crime against humanity, national units empowered to prosecute core international crimes can be assigned investigation of allegations of corruption for the prevention of core international crimes. Coverage of corrupt practices by the notion of

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<sup>77</sup> *Ibid*, p. 474.

<sup>78</sup> *Ibid*.

crimes against humanity allows to waive immunity of state officials charged with corrupt practices and to enforce universal jurisdiction against them.

### **7.3 Empowerment of civil society**

The most favorable condition for the agenda of creating ability to prosecute core international crimes to make headway is when the hosting state is willing to become a subject of permanent oversight and investigation of its high ranking officials. This unfortunately is rarely the case. The willingness to prosecute international crimes is subject to a correct balance between financial-political costs of prosecution and sovereignty cost of international intervention, according to a commentator<sup>79</sup>. The state suffers certain sovereignty costs once the crime within its jurisdiction is prosecuted by a third state or an international tribunal. “*States lose prosecutorial freedoms like the ability to determine specific charges, witnesses to be called, and evidence to be presented*”<sup>80</sup>. Moreover, states receive negative publicity and may be condemned for failure to suppress serious violations of human rights. The resultant sovereignty costs of non-willingness to prosecute should outweigh financial and political costs of international prosecution.

The agenda of legal empowerment to prosecute core international crimes should do the following to ensure the favorable balance of costs:

- By creating ability to prosecute, mitigate the cost of national prosecution of core international crimes;
- Through the spill-over effect of the ability to prosecute, which are contended in the present thesis, create an incentive for states to adopt policies and technology empowering to prosecute offences not amounting to core international crimes.
- Empower civil society and other non-state actors within a state to collect information substantively applicable for investigation and prosecution,

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<sup>79</sup> William W. Burke-White, “Proactive complementarity: The ICC and national courts in the Rome system of international justice”, see *supra* note 14, pp. 68-71.

<sup>80</sup> *Ibid*, p. 69.

thus creating an internal pressure within a state to treat seriously allegations of human rights violations.

NGOs are likely to be the closest entities to the area where atrocities occur and are ideally free from state-centric bias. Providing technical expertise to non-governmental organizations to collect evidence judicially relevant for the prosecution of core international crimes is another direction of the present agenda. NGOs have enjoyed some access to international criminal proceedings in international tribunals and courts, owing to for instance article 15.2 of the Rome Statute and article 18 of the ICTY Statute (by submitting any information to prosecutor and *amici curiae* briefs).

Empowerment of national authorities to prosecute core international crimes occurs once ability to document the crimes is created within the NGOs of that state.

*“Very often, survivors and witnesses are suspicious and fearful of formal bodies... This is particularly so in the area of sexual assault and gender-related crimes, and the role of many women’s organizations and networks has proven to be essential in creating trust and confidence for women to provide evidence to the ICTY and ICTR”*<sup>81</sup>.

For instance, the type of action that an Australian NGO did in response to the crimes committed in Yugoslavia was sending out questionnaires to the immigrants and refugees from the region with respect to events that they have witnessed during the conflict. The collected screening kits were faxed to the prosecutor with only the ID numbers of witnesses disclosed. Members of the ICTY Office of the Prosecutor identified and interviewed several witnesses as a result of NGO’s activity<sup>82</sup>.

M. Cherif Bassiouni in sharing the experience of the Commission of Experts investigating violations of international humanitarian law in the former Yugoslavia assessed the reports of NGOs as very helpful and *“the level of analysis they achieved*

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<sup>81</sup> Helen Durham “NGOs at international criminal tribunals” in Ramesh Thakur and Peter Malcontent (eds.), see *supra* note 6, p. 174.

<sup>82</sup> *Ibid*, 175-180.

*indicated a true effort and genuine commitment ... to produce verifiable facts*”<sup>83</sup>. However, many reports failed to provide sufficient details about the events.

*“Particularly troublesome was the consistent failure to identify the military units involved in alleged incidents, to provide information about “order of battle”, and to give details about the location of military units at a given time. Each of these related factors is critical in establishing “command responsibility””*<sup>84</sup>.

Many of the reports did not contain names and contacts of witnesses, did not disclose the original sources and did not even indicate whether original sources are available (such as affidavits, photographs, medical or autopsy reports). Some potentially very useful sources of first-hand information were stored in boxes piled up in a room, which hindered retrieval of relevant information. Thus, numerous reports contained allegations of victimization, but most of them did not provide legally relevant or admissible evidence of violations<sup>85</sup>.

To structure the dispersed data according to a common methodology and generate prosecutorial strategy, a database was compiled<sup>86</sup>. First, all the source documents were described and stored by a documentarian. The data analysts subsequently selected information about each incident according to the guidelines established by a legal staff (names, locations, alleged violations, *et cetera*). The database *“(1) generated reports by information category; and (2) made possible “context” sensitive searches (i.e. search by keyword – comment by the author)”*<sup>87</sup>. The database, however, was compiled in the United States by specialists who were not witnesses to the conflict and required considerable financial investment.

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<sup>83</sup> M. Cherif Bassiouni, *The Commission of Experts pursuant to Security Council Resolution 780*, in Roger S. Clark and Madeleine Sann (eds.), “The Prosecution of International Crimes”, Transaction Publishers, 1996, p.88.

<sup>84</sup> *Ibid*, p.82.

<sup>85</sup> *Ibid*, p. 80-84.

<sup>86</sup> *Ibid*, 74.

<sup>87</sup> *Ibid*, p.78.

This illustrates the need to set out common guidelines and a common electronic platform for all NGOs in the proximity of the conflict to document evidence. In particular, NGOs should be informed about a common methodology of systematizing evidence of core international crimes violations. They should be trained to provide verifiability and details of the data that they find. They should be trained as to the relevance and admissibility of particular pieces of evidence. Thus, it is important that both prosecutorial agencies and civil society speak the same language of legal requirements when making allegations that core international crimes occurred. The language NGOs speak should be familiar to both national authorities they address, third states that may exercise universal jurisdiction, and international courts, so that one of them could exercise jurisdiction upon the call of the NGO equipped with a sufficient evidence.

One of the reservations to this initiative is the fact that NGOs can act out of partisan motives collecting solely incriminating or exonerating evidence in a manner favorable to the party they may wish to protect. Creation of a list of NGOs empowered to perform investigation in particular area may serve as a guarantee of its competence and a contact point in respect of the crime.

#### **7.4 Empowerment of media**

*“The media (print, electronic, and broadcast) proved to be an invaluable source of leads, significant facts, and corroboration. Many incident reports contained in the IHRLI database are based on media accounts of violations. Media reports corroborated much of the information received by the Commission from other sources”<sup>88</sup>.*

Media coverage available to parties to the proceeding was one of the instrumental sources of evidence. Through television interviews, video footage, magazine articles and recorded speeches of military leaders, the prosecution and defense are able to determine such complex legal requirements and means of their proof

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<sup>88</sup> *Ibid*, p. 89.

as<sup>89</sup>:

- **Evidence of specific intent for the crimes of genocide and extermination:**

*“... an article was published in Srpska Vojska, on 25 August 1995, reflecting an interview General Krstić had given to Borislav Djurjević. General Krstić used ethnically inflammatory language, such as the term “Ustasha” and referred to the Muslims going back on their word about unconditionally laying down their arms following the take-over of Srebrenica”.*<sup>90</sup>

- **Awareness and acceptance of responsibility evidencing authority of the accused:**

*“The intercepts and eyewitness testimony to this effect are supported by a contemporaneous public statement made by General Krstić demonstrating an awareness and acceptance of responsibility for the transportation operation. In a television interview, given on 12 July 1995 at Potočari, General Krstić said: The Drina Corps has been conducting this operation successfully. We have not suspended this operation. We are going all the way to liberate the municipality of Srebrenica. We guarantee safety to civilians. They will be taken safely to a destination of their choice”.*<sup>91</sup>

- **Awareness of the fact**

*“The video of this interview shows buses moving past, although General Krstić said that, during the time he was stopped at the Potočari checkpoint, he did not see the refugee population or any signs of the buses transporting them. The Prosecution presented evidence that General Krstić was only about four or five bus lengths away from the refugees in Potočari when he gave the interview (Ruez, an investigator from the OTP, marked with two red arrows the area that he believes General Krstić*

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<sup>89</sup> *Prosecutor v. Radislav Krstić*, Judgment, Trial Chamber, IT-98-33-T, 2 August 2001.

<sup>90</sup> *Ibid*, para. 336.

<sup>91</sup> *Ibid*, para. 346.

was standing at the time of the interview). General Krstić maintained that he was only in Potočari for a very brief period and neither saw nor heard anything alerting him to the ongoing removal of some 20,000 Bosnian Muslim refugees”<sup>92</sup>.

- **Presence of troops**

“The Petrovic video of the Potočari area, filmed on 13 July 1995, shows an armoured personnel carrier with a military registration number matching that of a vehicle assigned to the Command of the Bratunac Brigade”<sup>93</sup>

These are few out of many instances the media coverage was used in the proceeding against General Krstić. It remains to be researched further how media collecting information in conflict areas can do that most effectively for further possible criminal proceedings (requirements as to the records, their storage, commentaries to them, the nature of questions and persons to be interviewed on site, the nature of photographs to be taken) as well as how media can better cooperate with national units prosecuting core international crimes and civil society.

This proposal seems even more warranted in the light of the UN General Assembly work on “Communication for development programmes in the United Nations system”<sup>94</sup> which considers how to develop specific media strategies to address the development challenges of vulnerable communities. They recognize that “*professional communication practice is limited and professional journalistic practice is to some extent compromised as a result of inadequate attention to communication capacities in development planning process...*”<sup>95</sup> In particular, UNESCO developed a set of indicators that make up free, independent, and pluralistic media, which includes the system of regulation, plurality and diversity of media, media as a platform for

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<sup>92</sup> *Ibid*, para. 348.

<sup>93</sup> *Ibid*, para. 150.

<sup>94</sup> UN General Assembly, *Communication for development programmes in the United Nations system*, 10 August 2010, A/65/276.

<sup>95</sup> *Ibid*, p. 10.

democratic discourse, *professional capacity-building* and *infrastructural capacity*.

### **7.5 Improvement of inter-state cooperation**

Although international crimes have peculiar characteristics distinguishing them from regular crimes, they share similar characteristics with other trans-border crimes in the need for international cooperation.

*“... Trafficking in human beings or other categories of organized crime, often bear characteristics similar to those of war crimes. It follows that capacity building efforts in ICHL can reinforce capacity building in those areas, and vice versa”<sup>96</sup>.*

Parallel between core international crimes, organized crime and serious fraud cases can be traced with respect to the need to relate overwhelming amounts of facts to the legal requirements<sup>97</sup>.

By constructing cooperation platform between states to assist each other in prosecution of core international crimes, the states will construct the cooperative environment for investigation and prosecution of other cross-border and factually rich crimes, such as terrorism, trafficking in human beings, drug trafficking, fraud and money laundering.

The type of cooperation required in core international crimes prosecution is (1) arrest and extradition of the accused from one state to another (2) production and exchange of evidence or assistance in investigation. The circumstances envisaging the inter-state cooperation in prosecution encompass the following:

- Several states suffered effects of core international crimes and prosecutorial authorities of several states launched investigations;
- State exercises universal jurisdiction with respect to a perpetrator present on its

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<sup>96</sup> OSCE ODIHR Final Report, see *supra* note 57, p. 15.

<sup>97</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, “Preserving the overview of law and facts: The Case Matrix” in Alette Smeulers (ed.), *Collective violence and international criminal justice: and interdisciplinary approach*, Intersentia, 2010, p. 420.

territory and needs evidence from third states for further criminal proceedings;

- A hosting state refuses to extradite an indicted perpetrator referring to the risk of torture occasionally used in the forum state. The forum state proposes the transfer of existing evidence to the hosting state and full cooperation with hosting state with regards to further investigation. Alternatively, his extradition is conditioned upon the establishment of joint investigation and prosecution teams and an independent judge from a third country presiding over the case in the forum state.

National units empowered to prosecute core international crimes need to be interoperable regionally and worldwide to ensure mutual legal assistance in core international crimes cases.

Particularly valuable to international criminal justice is the headway made by judicial cooperation agencies in Europe. Mutual legal assistance internationally is hindered by the problems which European Union's Judicial Co-operation Unit (Eurojust) has experienced before and which still exist to certain extent today<sup>98</sup>:

### **1. Non-performance of letters rogatory**

This may happen due to the quality in their drafting, language barriers, disparate requirements that need to be satisfied before the assistance may be granted, lack of organs responsible for execution of particular letters rogatory, unwillingness of some authorities to share intelligence with counterparts abroad, *et cetera*.

### **2. Difference in legislation**

Disparate procedural requirements for evidence gathering stipulated by each state and poor understanding between different jurisdictions, differences between inquisitorial and adversarial systems of justice, rigid adherence to formalism (insistence on authentication and originals by some states), delays in ratification and implementation of mutual legal assistance and extradition treaties, etc.

### **3. Absence of coordinating bodies**

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<sup>98</sup> These problems were described in *Pro Eurojust Report*, 2001, pp. 13-14.

Lack of coordination as to where the urgent request should be sent, absence of central body to bring the linked investigations together, etc.

International criminal justice does not enjoy the same level of integration and consensus in judicial cooperation as member states of the European Union, and the abovementioned barriers will be all the more evident.

Eurojust is aimed at stimulation and improvement of coordination between the national authorities<sup>99</sup>. It consists of national representatives who have access to criminal records, registers of arrested persons, investigation registers, DNA registers and other registers of each member states. States generally resort to mutual legal assistance between one another. If the requests are not responded to or require special consideration, states may request Eurojust to coordinate mutual legal assistance. In 2009, 1372 requests for assistance from national authorities were registered by Eurojust<sup>100</sup>.

Based on its mandate, Eurojust may ask national authorities to take specific casework action (for example, requests for judicial cooperation in respect of witnesses

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<sup>99</sup> “When Eurojust acts through its national members concerned, it: (a) may ask the competent authorities of the Member States concerned, giving its reasons, to: (i) undertake an investigation or prosecution of specific acts; (ii) accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts; (iii) coordinate between the competent authorities of the Member States concerned; (iv) set up a joint investigation team in keeping with the relevant cooperation instruments; (v) provide it with any information that is necessary for it to carry out its tasks; (vi) take special investigative measures; (vii) take any other measure justified for the investigation or prosecution; (b) shall ensure that the competent authorities of the Member States concerned inform each other on investigations and prosecutions of which it has been informed; (c) shall assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions; (d) shall give assistance in order to improve cooperation between the competent national authorities ...”. *Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, 15 July 2009, art. 6

<sup>100</sup> *Eurojust Annual Report 2009*, p.14

and victims, obtaining objects, data and documents), resolve the problem of extradition, and recommend which state is in a better position to prosecute the offence. With regards to the latter issue, Eurojust issued guidelines on the choice of jurisdiction in cross-border crimes, which may well be of guidance to national units commissioned with prosecution of core international crimes<sup>101</sup>.

Particularly encouraging is the practice of establishing joint investigation teams by agreement between participating states. The team of investigators may either be seconded to a state where most of the investigation activities will be carried out, or work from their member states. Each investigator may request its national authorities to undertake specific law enforcement action and take part in such action abroad pursuant to the powers provided for in the agreement on joint investigation team<sup>102</sup>. This practice has already yielded impressive results<sup>103</sup>.

Creation of networks of national authorities empowered to partake and execute requests of international judicial assistance (such as the Network of contact points in respect of persons responsible for genocide and crimes against humanity<sup>104</sup>, envisaged by European Council decision) and contact points for specific crimes regionally and internationally is an impending process which needs to be resorted to for the agenda of legal empowerment of core crimes prosecution to take firm roots. The integration and cooperation instances which have been implemented in combating global crime threats (terrorism, piracy, drug trafficking, *et cetera*) are increasingly called upon to be

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<sup>101</sup> Eurojust, *Guidelines for deciding which jurisdiction should prosecute*, Annual Report, 2003, Annex, p. 60.

<sup>102</sup> Joint Investigation Teams Manual, 23 September 2009.

<sup>103</sup> Eurojust, Eurojust contact point for child protection, in *Eurojust News*, Issue No.2, April 2010, p. 3.

<sup>104</sup> *Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes*, 13 June 2002, 2002/494/JHA.

extended to the action plan to end impunity using universal jurisdiction<sup>105</sup>.

With the decreasing role of international(ized) tribunals, the community of domestic courts must be self-aware of its powers and opportunities by building relationships and sharing information. To that end it has been argued that “*in a system in which information is power and in which compliance at the interstate level can be managed through collaborative guidance and assistance, regulatory norms and implementation guidelines will enhance the effectiveness of the overall system*”<sup>106</sup>.

Prospect of collaboration is more feasible once technological applications are geared towards interstate cooperation. The chapter to follow will address such applications.

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<sup>105</sup> Amnesty International, *Ending Impunity: Developing and implementing a global action plan using universal jurisdiction*, October 2009.

<sup>106</sup> William W. Burke-White “A community of courts: toward a system of international criminal law enforcement”, see *supra* note 22, p. 98.

## **8 TECHNOLOGICAL APPLICATIONS EMPOWERING PROSECUTION OF CORE INTERNATIONAL CRIMES**

Creation of ability to prosecute core international crimes by the national authorities represents a powerful legal empowerment of the population. Besides professional and financial investment input, a great deal can be achieved with the development of software tailored for the national units charged with prosecution of core international crimes and for civil society wishing to place political pressure on states to discharge their obligations under the Rome Statute. The applications provided below aim to either (1) provide better access to legal information, (2) ensure a better case management, (3) streamline contact between different actors, and (4) ensure that documented violations of human rights may be organized into criminal case evidence.

The stocktaking of current technology applications is aimed to bring about the immediate and spill-over effects of legal empowerment through enabling prosecutions under international criminal law. Table 3 is designed to indicate what type of technology application can create ability to prosecute core international crimes within each state.

### **8.1 Provision of access to legal information**

International criminal law owes its existence and development to international community, as its scattered application in domestic jurisdictions did not allow it to become a firm rooted field on the national level (as much as property, criminal, and administrative law). Access to and easier retrieval of legal information in international criminal law should therefore be at the forefront of the agenda of empowerment to prosecute core international crimes.

Access to legal information is pivotal for the very ability to prosecute the crime and ensure the quality of the process. *“The process of judicial cross-referencing between different tribunals has been thought to play part in increasing the quality of decisions produced by judicial institutions. The jurisprudence of established institutions may provide valuable guidance to newly created national and international mechanisms, which may be applying certain provisions for the first time. Furthermore,*

*it can serve to broaden the scope of ideas and approaches introduced by counsel and contemplated by the judiciary... ”.*<sup>107</sup>

Legal Tools project is a leading example in transfer of legal information in international criminal law strengthening national capacity to prosecute<sup>108</sup>. Legal Tools database can be accessed through search and browse functions on the website.<sup>109</sup> It classifies sources of international criminal law according to the nature of the source (case law, statute, treaty, commentary, report of NGO, *et cetera*), jurisdiction (national or international), state, type of tribunal, name of the accused, *et cetera*. Its international scope allows a user to make research across the states and across jurisdictions. For instance, specific search engine for national implementing legislation allows states to compare approaches taken with respect to implementation of core international crimes in the states that share their legal tradition.

A commendable direction in the development of effective retrieval of legal information is the classification of legal sources according the value, novelty and content of the legal rules they contain. Constantly evolving jurisprudence is contained in the voluminous judgments (each amounting to 300 pages in average), which may at times contradict one another. It is a daunting task for national authorities, especially those whose native language is not English, to keep abreast of the field.

Case Matrix, an electronic case management software discussed below, contains a valuable “Elements digest” that provides structured access to subject-matter law in the jurisprudence (approximately 700 pages) and “Means of Proof digest” that provides structured access to court’s deliberation as to the application of facts and evidence to the legal requirements of core international crimes and modes of liability (approximately 6400 pages)<sup>110</sup>, which are available to the Case Matrix users involved in prosecution of

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<sup>107</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, see *supra* note 97, p. 422

<sup>108</sup> Review Conference of the Rome Statute, *Focal points’ compilation...*, see *supra* note 60; OSCE ODIHR Final Report, see *supra* note 57, p. 56.

<sup>109</sup> [www.legal-tools.org](http://www.legal-tools.org) last accessed March 15, 2010

<sup>110</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, see *supra* note 97, p. 414

core crimes. Retrieval of the relevant jurisprudence becomes easier as the user is able to input the criteria of search (alleged crime and mode of liability of the accused). Another benefit of the digest is its non-partisan nature which does not favor particular jurisprudence (as opposed to textbooks and articles).

The development of database digesting core international crimes jurisprudence according to the legal requirements deliberated about by a judicial body is a necessary development for national authorities to access the law. An effort in this respect has been undertaken by the International Criminal Tribunal for the Former Yugoslavia which compiled Appeals Chamber Case-Law Research Tool<sup>111</sup>. It arranges leading Appeals Chamber's decisions and judgments according to the articles of the ICTY/ICTR Statutes, Rules of Procedure and Evidence, other instruments (such as Codes of professional conduct, Geneva Conventions, UN Charter's provisions, *et cetera*), and according to the notions referred to in the judgments. The following is an excerpt from the research tool:

Article 7(1) ICTY / Article 6(1) ICTR	Aiding and abetting	<a href="#">Blagojević and Jokić AJ</a>	9 May 2007
		<a href="#">Muhimana AJ</a>	21 May 2007
	Aiding and abetting <b>by omission</b>	<a href="#">Brdjanin AJ</a>	3 April 2007
		<a href="#">Orić AJ</a>	3 July 2008
		<a href="#">Mrkšić and Šljivančanin AJ</a>	5 May 2009
	Committing	<a href="#">Seromba AJ</a>	12 Mar. 2008
	Committing <b>By omission</b>	<a href="#">Orić AJ</a>	3 July 2008
	Instigating	<a href="#">Nahimana et al. AJ</a>	28 Nov. 2007
		<a href="#">Boškoski and Tarčulovski AJ</a>	19 May 2010
	Omission	<a href="#">Ntagerura et al. AJ</a>	7 July 2006
		<a href="#">Galić AJ</a>	30 Nov. 2006
		<a href="#">Orić AJ</a>	3 July 2008
	Ordering	<a href="#">Galić AJ</a>	30 Nov. 2006
		<a href="#">D. Milošević AJ</a>	12 Nov. 2009
		<a href="#">Boškoski and Tarčulovski</a>	19 May 2010

<sup>111</sup> [www.icty.org/sections/LegalLibrary/AppealsChamberCaseLawResearchTool2004onwards](http://www.icty.org/sections/LegalLibrary/AppealsChamberCaseLawResearchTool2004onwards), last accessed on 9 October 2010

		<a href="#">AJ</a>	
	Planning, instigating and ordering	<a href="#">Kordić and Čerkez AJ</a>	17 Dec. 2004
		<a href="#">D. Milošević AJ</a>	12 Nov. 2009
		<a href="#">Boškoski and Tarčulovski AJ</a>	19 May 2010
	Tacit approval and encouragement	<a href="#">Brdjanin AJ</a>	3 April 2007

The judgments and decisions referred to in the research tool are summarized. Additionally, ICTY website offers summaries of the most significant decisions, orders and judgments issued by the ICTY before 2004.

It is desirable that this approach is taken with respect to not only appeals but also trial judgments and decisions, across the national and internationalized jurisdictions. The feature of the research tool is to concentrate on the most important terms characteristic of a notion or an article. It however depreciates the value of derivative and more nuanced interpretations of each rule which are not considered to be major or which are pronounced in *obiter dicta*.

## 8.2 Case management software

One of the tools offered by the Legal Tools project is case management software Case Matrix, specifically designed for prosecution of core international crimes. This is by far the cutting edge program in international criminal justice<sup>112</sup>.

Case management software may be pivotal:

1. To ensure efficiency of the process

Inability to have a good oversight and arrangement of evidence “*may lead to cases being pursued which later fail for lack of evidence or weakness that were not apparent at an earlier stage of the process, and may encourage the handling of unnecessary evidence, making the process more burdensome for counsel and the judiciary*”<sup>113</sup>.

<sup>112</sup> Review Conference of the Rome Statute, *Focal points’ compilation...*, see *supra* note 60; OSCE ODIHR Final Report, see *supra* note 57, p. 56.

<sup>113</sup> *Ibid*, p.42.

2. To guarantee rights of the accused.

*“A precise approach to the handling of evidence and clarity as to how the evidence is intended to be linked to the legal requirements for conviction of the offence can contribute to the respect for the fundamental rights of the accused”*<sup>114</sup>.

At the start of 2010, the Case Matrix possessed the following functionalities<sup>115</sup>:

1. A framework for registering cases by country/situation, suspect, incident and legal classification;
2. Collection of key sources in international criminal law;
3. Elements and Means of Proof digests referred to above;
4. Database table where the user may relate particular piece of evidence (including audio or video files, electronic documents) to legal requirements of the alleged crime and the mode of participation in the crime.

The latter functionality provides a list of means to prove every legal requirement of a case, that is, types or categories of facts which can constitute evidence. Every mean of proof is linked to a digest analyzing the legal requirements of crimes and providing the cases where such means of proof were employed. Furthermore, the evidence can thereby be mapped to provide an “x-ray” overview of the evidentiary status of each case<sup>116</sup>. The environment can be customized according to the users’ role in the case (judges, investigators, prosecutor, defense counsel, victim’s representatives, NGOs). Therefore, the Case Matrix file is accessible to different actors as the case progresses from investigation to proceedings in the courtroom.

By following the logic of international criminal law, the Case Matrix solves the challenge of keeping overview of the facts and evidence as opposed to the legal requirements they satisfy. The logic of Case Matrix was endorsed by Pre-Trial Chamber

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<sup>114</sup> *Ibid*, p. 424.

<sup>115</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, see *supra* note 97, p. 414.

<sup>116</sup> See [www.legal-tools.org/en/what-are-the-icc-legal-tools/](http://www.legal-tools.org/en/what-are-the-icc-legal-tools/) accessed on 9 October 2010.

of the ICC in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (Situation in the Central African Republic) and *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Situation in the Democratic Republic of the Congo) where the Pre-Trial and Trial Chambers of the ICC directed the prosecutor to submit a table linking the evidence and facts prosecutor intends to rely on in the trial, to the constituent elements of charges against the accused and alleged modes of liability<sup>117</sup>.

National units empowered to prosecute core international crimes should be trained in international criminal law through the use of the Case Matrix. It is by now the most accurate way to keep the national authorities informed of the developments in international criminal and humanitarian law and construct their prosecutions in accordance with the standards set by the international practice. The evidence structured in the Case Matrix may not stay idle, even if the evidence is not enough for the full fledged conviction. The structured evidence may be used to construct a criminal case for human rights violations not amounting to core international crimes. The work of national units can therefore contribute to the prosecution of lesser crimes by transferring the information to other prosecutorial authorities.

Adoption of Case Matrix by the national authorities prosecuting core crimes worldwide creates a prospect for their collaboration in the future. Prosecutorial authorities of several states conducting investigation of the same incident or against the same suspects may communicate with one another through similar platforms, referring to similar legal requirements.

### **8.3 Documentation of violations**

As more functionalities of the Case Matrix are being developed<sup>118</sup>, more research is

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<sup>117</sup> Situation in the Central African Republic in the case of the Prosecutor v. Jeanne-Pierre Bemba Gombo “Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart Incriminatory Evidence”, 10 November 2008 (ICC-01/05-01/08-55); Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui “Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, 13 March 2009 (ICC-01/04-01/07-956).

<sup>118</sup> Morten Bergsmo, Olympia Bekou and Annika Jones, see *supra* note 97, p. 415.

necessary as to how civil society documenting human rights violations can structure the collected data according to legal requirements for crimes. To date, a number of software applications have been developed to help NGOs to collect and systematize testimonies about human rights violations suffered by individuals or members of affected groups.

For instance, Martus<sup>119</sup>, a software developed by Benetech<sup>120</sup>, is a database system which allows human rights organizations to describe each reported violation by filling out bulletins and grouping them according to certain criteria (by the nature of violation, geographic area, et cetera). To describe the incident, the NGO may enter certain amount of data (location, date, summary, nature of violation, keywords, source of information, victim information, information about perpetrator, attachments, etc.). The program allows exportation and importation of bulletin data, printing out reports, sharing reports with colleagues, and searching the database. The data stored in Martus can be encrypted and transmitted to a web server.

OpenEvSys, a database system developed by HURIDOCS<sup>121</sup>, offers similar functionalities as Martus, based on “Who did What to Whom” logic:

- Recording, browsing and retrieving information on events violations, victims, perpetrators;
- Extracting event reports;
- Searching data of abuse;
- Managing and tracking interventions into event (such as legal or medical aid);
- Placing an event into a chain of events.

Well elaborated software allowing browsing, searching and sharing of the documented data on violations, seems to be an expedient application for making *immediate* records of violations when interviewing the victims. However, to make *legally relevant* analysis linking massive records to allegations of who is responsible for

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<sup>119</sup> [www.martus.org](http://www.martus.org) accessed on October 9, 2010.

<sup>120</sup> [www.benetech.org](http://www.benetech.org) accessed on October 9, 2010.

<sup>121</sup> [www.huridocs.org/openevsys](http://www.huridocs.org/openevsys) accessed on October 9, 2010

the violence, who was targeted, what were the goals of perpetrators, that is, to explain the violations with the records and help officers bring about their legal consequences, does not seem to be possible with these database systems.

The subject of further research is how to approximate evidence gathered by NGOs to the law bringing about legal consequences of the violations. As mentioned in the section above, creation of a uniform software may create avenues for collaboration between several NGOs operating with the same violation, or share the legally relevant evidence with national units empowered to prosecute such crimes (whether in the same state or abroad under the head of universal jurisdiction).

#### **8.4 Communication between the actors**

The issuance and processing of cross-border requests usually occurs in the following manner<sup>122</sup>:

1. The prosecutorial authority checks if the request (request for documents, for evidence, for interrogations, including via videoconference, interception, arrest, joint investigation team) is likely to produce the expected result according to the legislation of the country where the request will be sent to (through research and contact with the authorities).

2. The requesting authority prepares a letter rogatory containing the list of petitions to the other country. If no agreement between judicial authorities exists, the requests for cooperation are transferred through ministries of justice or embassies.

3. The enforceability of the request is assessed by a judicial organ of the requested state, which in case of a positive decision, appoints the prosecutor's office in charge of investigation, as well as the legal officer.

In cases where states expect to cooperate in prosecution matters, or require taking law enforcement action in a third state, computer supported cooperative work will be pivotal. The mutual legal assistance tools developed by the European Judicial

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<sup>122</sup> Mauro Cislighi, Dominico Pellegrini, Elisa Negroni, *A new approach to international judicial cooperation through secure ICT platforms*, in "European Journal of ePractice", No. 5, October 2008, p. 2.

Network<sup>123</sup> between EU member states are valuable to adopt for inter-state cooperation on a larger scale.

#### **8.4.1 Database of competent authorities and contact points**

MLA tool Atlas<sup>124</sup> allows the identification of locally competent authority that can receive request for mutual legal assistance and provides a channel for the direct transmission of requests according to the selected measure.

The user chooses the state where the request is sent and answers questions narrowing the range of enforcement action possible, such as “Are particularly serious organized crimes and war crimes involved?”, “Are very serious economical or environmental crimes involved?”, “Location of enforcement action” and “Is the immediate reaction required?”, is led to a list of measures or inquiries the authority want to apply for. By selecting one of nearly 60 enforcement measures available in that country, an officer accesses contact of the responsible authority.

#### **8.4.2 Database of legislative requirements for enforcement action**

MLA Tool Fiches Belges<sup>125</sup> allows officers to be informed of the legislative framework for the particular enforcement action in a requested country. The user selects a country and the type of enforcement action needed. For instance, “Agents and informers – Infiltration” category in the state of Austria brings the following list of enforcement action:

- Infiltration by undercover agents of the requested State (201)
- Infiltration by agents of the requesting State in the territory of the requested State (202)
- Infiltration by an informer of the requested State (203)
- Handling of informers (204)

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<sup>123</sup> <http://www.ejn-crimjust.europa.eu/default.aspx> accessed on 10 October 2010

<sup>124</sup> [http://www.ejn-crimjust.europa.eu/atlas\\_advanced.aspx](http://www.ejn-crimjust.europa.eu/atlas_advanced.aspx) accessed on October 10 2010

<sup>125</sup> [http://www.ejn-crimjust.europa.eu/fiches\\_belges.aspx](http://www.ejn-crimjust.europa.eu/fiches_belges.aspx) accessed on October 10 2010

The user may select the enforcement measure and view the commentary as to the definition and scope of the measure, alternative measures with the same purpose, competent body, practical modes of execution of the measure, and conditions for assistance or participation of agents of the requesting State in the execution of the measure.

### **8.4.3 Compendium wizard<sup>126</sup>**

The wizard allows the user to draft rogatory letter online by following the structure of the wizard. First, the user checks whether the request for the specific measure is available in the country. The user selects the language of the letter rogatory, the contact point that will be charged with execution of the request, and the authority that sends the request. The nature of the request is described in the following categories:

- Persons concerned by the request;
- Urgency and confidentiality of the request;
- Conventions applicable to the case;
- Facts and legal qualification for free input of the text;
- Requested activity;
- Request to acknowledge the receipt of the letter rogatory;
- Requesting video conference.

The development of collaborative software between the different units charged with prosecution of core international crimes and empowered to respond to the letters rogatory when needed alleviates the problems related to the quality of drafting, language barriers and disparate legal requirements for law enforcement action in each jurisdiction.

Subject to the sufficient agreement between states and their commitment to appoint the contact points, judicial authorities will become more accessible. It remains to be a subject of further research how the infrastructure can be customized and tailored

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<sup>126</sup> <http://www.ejn-crimjust.europa.eu/compendium.aspx>, accessed on October 10 2010

for larger audience of states constructing ability to prosecute core international crimes.

#### **8.4.4 Judicial collaboration platform**

Notable development for judicial collaboration in international criminal justice is the effort to create Judicial Collaboration Platforms (JCPs) in the EU and pre-accession countries. The judicial platforms are to be built in accordance with the following logic:

- “A judicial case is a secure virtual workspace accessed by law enforcement and judicial authorities who need to collaborate ...
- JCP services are online services supplying various collaborative functionalities to the judicial authorities in a secure communication environment;
- User profile is a set of access rights assigned to a user. The access to a judicial case and to JCP services are based on predefined, as well as customized, role-based user profiles;
- Mutual assistance during investigations creates a shared part of the investigation folder ...”<sup>127</sup>

The cooperation platform secures the environment of each user working from its national jurisdiction. As soon as the prosecution activities need to be taken by another jurisdiction, the system creates collaboration gateway between the two officers responsible for prosecution in their home jurisdictions. Collaboration environment with shared documents and evidence is created between the two jurisdictions.

Access to the JCP is protected by means of a digital certificate issued by a certification authority, stored in user’s smartcard and protected by biometry. The infrastructure, effects and developments of these pilot projects may be helpful for developing avenues of communication between the national units tasked with prosecutions of core international crimes.

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<sup>127</sup> Mauro Cislighi, Domenico Pellegrini, Elisa Negroni, see *supra* note 122, p.4.

<i>Application</i>	<i>Examples</i>	<i>Users</i>	<i>Beneficiaries</i>	<i>Effects</i>
<b>Electronic access to legal information</b>	<ol style="list-style-type: none"> <li>1. Legal Tools project;</li> <li>2. Case Matrix;</li> <li>3. ICTY Appeals Chamber CaseLaw Research Tool.</li> </ol>	<ol style="list-style-type: none"> <li>1. Legal practitioners in national jurisdictions;</li> <li>2. Civil society;</li> <li>3. Research institutions, experts.</li> </ol>	<ol style="list-style-type: none"> <li>1. National authorities;</li> <li>2. Potential suspects and their legal representatives;</li> <li>3. Disempowered groups represented by NGOs.</li> </ol>	<ol style="list-style-type: none"> <li>1. Professional development of police, prosecutorial authorities, defense, judges, and military forces;</li> <li>2. Empowerment of civil society;</li> <li>3. Retribution/restoration/deterrence (prospectively)</li> </ol>
<b>Case management software</b>	Case Matrix	Institutions investigating, adjudicating, prosecuting international crimes and defending the suspects.	<ol style="list-style-type: none"> <li>1. National authorities;</li> <li>2. Suspects of international crimes;</li> <li>3. Disempowered groups able to have their interest represented properly.</li> </ol>	<ol style="list-style-type: none"> <li>1. Professional development of police, prosecutorial authorities, defense, judges;</li> <li>2. Easier oversight of law enforcement;</li> <li>3. Empowerment of civil society able to organize documents amounting to a judicial case.</li> </ol>
<b>Documentation of violations</b>	<ol style="list-style-type: none"> <li>1. OpenEvis</li> <li>2. Martus</li> <li>3. IHRLI database</li> </ol>	<ol style="list-style-type: none"> <li>1. Civil society documenting violations of human rights;</li> <li>2. Media;</li> <li>3. National authorities.</li> </ol>	<p>Victims of human rights violations represented by civil society or national authorities.</p>	<ol style="list-style-type: none"> <li>1. Retribution;</li> <li>2. Restoration;</li> <li>3. Empowerment of civil society;</li> <li>4. Empowerment of media.</li> </ol>
<b>Communication between the actors</b>	<ol style="list-style-type: none"> <li>1. Mutual legal assistance tool Atlas;</li> <li>2. Fiches Belges;</li> <li>3. Compendium wizard;</li> <li>4. Judicial collaboration platform.</li> </ol>	Institutions investigating, adjudicating, prosecuting international crimes	<ol style="list-style-type: none"> <li>1. National authorities;</li> <li>2. Civil society.</li> </ol>	<ol style="list-style-type: none"> <li>1. Improvement of inter-state cooperation;</li> <li>2. Ability of civil society to cooperate with other actors and national authorities through a common platform.</li> </ol>

Technology - addressee - effect

## 9 CONCLUSION

Creation of ability to prosecute core international crimes by the national authorities, which is otherwise referred to as positive complementarity, is essential towards bringing about retribution for the crimes, restoration of the victimized communities, deterrence of international crimes in both victimized communities and communities that did not experience serious human rights violations. These effects are hinged on the professional development of national police, prosecutorial authorities, defense, and judges.

Not immediate, but equally compelling function that national units empowered to prosecute core international crimes can undertake is a systematic oversight of law enforcement (in police, army, prosecutorial agencies and within the government) in the effort to trace the acts which may amount to an international crime.

Ability and ambition of a state to investigate and prosecute core international crimes is moreover indicative of the ability of that state to trace corrupt activities the officials resort to, since commission of core international crimes may oftentimes be linked to corrupt practices.

Civil society reporting, documenting and reacting towards human rights violations committed within their state or abroad (such as media and non-governmental organizations) should be actively involved in creating ability to investigate core international crimes. Voluminous reports, interviews and facts which they keep in archives need to be organized in a manner which allows judicially-relevant retrieval and communication of information. Creating ability of civil society to construct legally sound argument should affect the responsiveness and willingness of a state to prosecute the crimes.

The nature of core international crimes requires inter-state communication, and positive complementarity empowering prosecution of core international crimes may boost other issues of inter-state cooperation (such as trans-border crime, fugitives, crimes committed in several states, *et cetera*).

Different types of technological applications may empower prosecution of core international crimes. These applications resolve the following challenges of legal empowerment through prosecution of core international crimes:

1. Easier retrieval of legal information;
2. Case management;
3. Documentation of violations that may amount to core international crimes;
4. Communication between national authorities involved in prosecution of core international crimes.

Creation of ability of national actors to prosecute core international crimes through among other things technology envisaged above contributes to the agenda of legal empowerment.

It is my hope that this master thesis provides a solid background for future discussion and action in positive complementarity. It aims to justify a need in collaboration between specialists and policymakers working with legal empowerment initiative and international criminal justice with a view on technological aspects of their common agenda.

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