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The Three Year Plans & Strategies of the Registry in respect of complementarity for an effective Rome statute system of international criminal justice

**Discussion Paper By
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Introduction

The Rome Statute created an international legal/judicial system to prosecute and try the international crimes of genocide, crimes against humanity and war crimes, as well as the crime of aggression when defined (hereinafter international crimes). The primary responsibility for these prosecutions and trials lies with national jurisdictions, and only when national courts are either unwilling or unable to prosecute does the jurisdiction of the International Criminal Court (hereinafter the Court) arise.

As the Court develops, the current reality of this system is setting in. Many of the states over which the Court has asserted its jurisdiction are states that do not have the capacity to conduct fair national proceedings. This stands to reason as much conflict literature has identified the lack of rule of law as a cause for the commission of atrocities. Further, the Court does not have the capacity to handle but a few of the most serious cases in each situation country. What has been identified as an impunity gap is a real prospect as many national systems do not have the capacity to process international crimes committed by subordinates, where their leaders are being tried before the Court. The long term solution is clearly to develop national legal systems so that they can conduct fair and genuine trials for international crimes.

There is a large number of actors that contribute to the development of national legal/judicial systems, bilateral and multilateral. They all need to play a part in developing the Rome Statute system. Further, a key issue is how to coordinate these various actors so that their work is coherent and effective. Another issue is what place, if any, the regional courts play in this system, as well as what have been termed as hybrid courts, that is national jurisdiction with an international assistance component.

These are very broad issues, and I hope that the conference will shed further light on the possible role of, as well as concrete plans for each actor in ensuring that there is a coherent and encompassing international system for the prosecution of international crimes. For my part, I will focus on the role that the Registry of the Court can play. I must stress here that developing national capacity is not the main focus of the Registry's work. The Registry has many statutory functions in respect of managing the non-judicial aspects of the Court, which it must give primary focus to. Using existing resources creatively, and armed with good will and the knowledge that the Court operates in a wider system on which it also depends, the Registry has nevertheless been able to develop some initiatives for the coming years on how to develop complementarity further.

The Registry plays a central role within the Court in ensuring fair trials, from court services such as translation and interpretation, to defence representation, legal aid, detention conditions and enforcing the presumption of innocence to witness protection, victim participation and ensuring efficient proceedings through court management processes. On both the unwillingness and inability limbs of the admissibility test, the capacity of a state in all these areas is crucial to the issue of its capacity to conduct fair trials. To move forward the Rome Statute system, as indicated above, I am therefore focusing on how the Registry can both ensure fair trials at the Court itself, as well as how it can share its expertise so as to assist national jurisdictions in assuming their responsibilities to prosecute and try international crimes credibly and in accordance with fundamental rights.

Under this broad theme of fair trials, I will now highlight the distinct components where the Registry has responsibility and how, if at all, it can assist national jurisdiction in their capacity to conduct fair trials for serious international crimes. This will hopefully provide a map both internally for the Registry and for other actors active in the Rome Statute system so that there can be an alignment of priorities and actions.

Strengthening legal representation

Good defense representation at the Court is essential for credible trials, bearing in mind the nature of proceedings and the gravity of the crimes. Not only will it ensure that defendants' rights are adequately protected and fair trials promoted, but it also improves efficiency in proceedings and helps the court develop a strong body of jurisprudence. Similarly, effective victims' representation is key to fulfilling one of the more ambitious and progressive aspects of the Rome statute, namely the right of victims of atrocities to be able to participate in the judicial proceedings before the Court. Only with experienced and dedicated counsel will the jurisprudence on the scope and depth of victim participation be properly and fully developed.

After much internal and external consultation, the Court decided that it was key to have external legal representation available to both defendants and victims, supported by two internal and functionally independent offices for public counsel for the defense and for victims. The court considered that using external counsel brought significant benefits to the Court and the fairness of the proceedings, especially when supported by internal Court mechanisms. External counsel would be more geographically diverse, closer to the defendant or victims in question, respect the defendant or victims freedom to choose their lawyers and bring a wider range of skills and experience to the Court proceedings. The Offices for Public Counsel of Defense and Victims would assist and support such counsel with issues of Court procedure and latest jurisprudence, thereby adding the benefits of a focused in-house counsel, and some of the economies and efficiencies that follow. This composed system is still under review by the Assembly of states Parties, especially as far as it concerns the legal aid system.

Any counsel who wishes to practice before the Court, either on behalf of defendants or on behalf of victims, must be inscribed in the list of counsel administered by the Registry. To this end, the Registry has contacted States Parties and local and international bar associations to publicize the requirements for inclusion and to encourage eligible counsel to apply. To date, there are 282 persons on the list of counsel, 226 men and 56 women from 49 different countries, including 77 from Africa, 5 from Asia, 7 from Eastern Europe, 189 from the Group of Western and Other States, and 4 from Latin America and the Caribbean.

This open list system has allowed the Court to develop a dynamic list of counsel to draw from to provide quality defense and victims' representation in proceedings before the Court. The list is also open to lawyers from states that are not parties to the Statute. Enlistment of such lawyers is beneficial to the Court as it allows professionals from states not party to the Statute to better understand the Court, which will hopefully create a spill-over effect in the state concerned and foster better understanding of, and hopefully increased engagement with, of the Rome statute system and issues of international criminal justice.

The Registry organizes a yearly seminar for counsel, where all counsel on the list are updated on the latest Court jurisprudence and other topical issues. This is followed by a training course for counsel, where a smaller group of counsel, especially those from situation countries, are briefed on the Court, its jurisdiction and applicable procedure.

This system created by the Registry of the Court not only ensures that the goal of ensuring fair trials at the ICC is promoted through effective legal representation of the defendants and the victims, but it also fosters complementarity in important ways. First, counsel so trained will have the ability to prosecute or defend international crimes in national jurisdiction. Second, they will also form a local lobby in their countries in order to advocate for the prosecution of these crimes, thus putting increased pressure on national governments to do so.

Future focus:

In order to further these effects, the Registry is looking to include more specific complementarity issues into its seminar and training for counsel. Also, the Registry will be introducing a “train the trainer” component so that these training sessions can be replicated nationally by the lawyers themselves, further spurring national ownership of these issues.

Witness protection programmes

Witness protection is one of the crucial areas contributing to the conduct of fair trials. The Registry has worked over these initial years to systematically develop its witness protection capabilities and has at its disposal a variety of mechanisms to ensure protection of witnesses in the countries where the Court operates. This includes developing witness protection capabilities in the situation countries, by cooperating with local law enforcement on local security arrangements, for example by setting up an Immediate Response Mechanism for any emergencies. In DRC, the Court has worked mainly through special units trained by the UN civilian police under MONUC. On top of that, the Court gave specific witness handling training to this special unit. So the Court is trying as much as possible to foster the development of a national capacity on witness protection, so that a national solution can be found. This strengthens both the ability of the Court to conduct fair trials in The Hague, as well as the local capacity to conduct fair trials in-country.

As a last resort, however, the international relocation of protected ICC witnesses is the only solution where the threat does not permit internal resettlements. For these international relocations the Court has to rely on the cooperation of the States Parties. The focus of the Registry has so far been to encourage States Parties to enter to witness relocation agreements with the Court and to implement them in an expeditious manner. The number of relocation agreements that the Registry has managed to enter into, however, has been limited despite the obligation of the States Parties under the Rome Statute to cooperate in this area. The framework of the Rome Statute makes it mandatory upon States Parties to cooperate to help achieve the mandate of the Court, and States Parties are obliged to providing cooperation and judicial assistance as envisaged in Part 9 of the Statute.

Future focus:

Part of the problem is that the states that have advanced witness protection programmes and funds to accept protected witnesses of the Court usually are not willing to pay the domestic political cost of doing so. They also argue that a regional solution is better for the witnesses themselves. However, regional countries argue they

have no witness protection programmes, and they lack the necessary funds. In order to break this impasse, the Registry is developing a number of different modalities to increase cooperation in this area. In essence, the Court is seeing whether it can match countries that have capacity, skills and resources with countries that have the willingness to accept protected witnesses, but no capacity or resources for doing so. Through a voluntary trust fund, the Court would receive contributions to strengthen national capacity of willing states to protect Court witnesses. Programmes to strengthen national capacity would either be implemented directly by the Court, depending on need, or be channeled through multilateral partners active in the area, such as the UN Office of Drugs and Crime.

Similarly, the Court could also access bilateral programmes by states to strengthen protection capacity in third states. This scenario would, however, require a medium to long term commitment and continuing involvement of a witness protection unit of the “sponsoring” state. In Europe some countries have been involved in such “parenting” of emerging units in other European countries.

This new approach from the Registry will further the objectives of fair trials in the ICC, as well as supporting the strengthening of national capacity for fair domestic proceedings. The states targeted will generally be those within the region of situation countries. This spreads the ability of states to protect witnesses internally and regionally, thereby further enabling states to hold credible and fair national trials for international crimes.

Court management

Effective court management processes are crucial to providing fair trials, from archiving and document management to translation, interpretation and judicial support functions. This area is commonly referred to as the engine room of courts and judicial proceedings. The Court has been developing “state of the art” court management support, including the e-Court system whereby all documents in the proceedings are available to all parties electronically and remotely, subject to classification and security parameters of course. As we near the end of a first trial, we are learning from the experiences and constantly fine tuning the court management systems and tools, including the Court Capacity Model which assists with the budgetary implications of proceedings. This is crucial to our delivery of fair trials.

Another area under the responsibility of the Court Services Division in the Registry is that of detention. This is another area essential to fair trials as the proper management of the detention facility, and the respect of the detainee’s rights, minimises delays in the Court proceedings and ensures that the detainees are treated in accordance with international norms, respecting their presumption of innocence.

Future focus:

An area which I have just begun to explore is how the Court's expertise in court management systems and best practices can be transferred to situation countries, thereby leaving a positive footprint in national legal systems. Certainly, one way of transferring the Court's capacity to national systems would be to have more *in situ* hearings, whereby the Court's court management services would have to work together with national counterparts in setting up and supporting a hearing. Although all the more hi-tech services may not be available to support *in situ* hearings, the expertise of our multi-cultural staff, coming from different judicial systems, will strive to carve out local solutions within existing resources. I would hope that *in situ* hearings would act like quick impact projects, giving local court staff new ideas and solutions to immediately apply domestically.

Whether there will be such *in situ* hearings is, however, a matter for judicial decision. The Registry will be developing the framework within which any such decision can be taken, and will be drafting a protocol on modalities for *in situ* hearings. This would ensure that all stakeholders in the Court are aware of the issues, implications and benefits arising from conducting *in situ* hearings, as well as generate a healthy internal discussion on this issue.

Another important way of using the Court's expertise in court management is through the use of its archives. Ensuring national access to Court archives is an essential component of transitional justice, allowing the facts and issues which come out of trials to be part of the historical record of the transition country. Although this initiative is still in its early stages, I am working to see how best to leave a copy of the archives of a situation to the country concerned, and how to best advise on its safekeeping and general access. This is an issue which our field offices will be able to engage in, and I will describe this further below.

In terms of complementarity, this would again increase local knowledge and stimulate demand for local prosecutions of international crimes, as well as provide a model for national document management and archiving.

Finally, as with witness relocations, the Registry is now exploring the possibility of developing the detention facilities in regional states close to the Court's situations, using a voluntary trust fund to which states that have the resources and will to assist with the enforcement of sentences, but not in their territory, can contribute to. Capacity building could be done bilaterally by states, or through multilateral partners such as the UN Office of Drugs and Crime and the UN Office of the High commissioner for Human Rights. The complementarity effect of this initiative is clear, with an increase in the national capacity to have pre-trial detention meet international standards, and thus its ability to conduct fair and credible trials.

Public information and outreach

Ensuring that justice is not only done but also seen to be done is a basic tenet of conducting fair trials. In this respect, the Court has mainly been focusing on disseminating information about the Court itself, its mandate and the situations and cases before it. It has done so as a two way communication, seeking not only to bring the trials closer to the affected communities but also the voices of the affected communities closer to the Court so that its policies and priorities can be steered accordingly.

Future focus:

There is still much work to be done in both broadening and deepening the Court's outreach efforts. Much of our plans to expand this work is subject to the availability of resources and the Court is preparing a strategy for the states to consider funding. One change that can be brought about quickly and cheaply, however, is to emphasise in our outreach efforts where the Court fits in with the Rome Statute system, and to emphasise the priority that this system gives to national proceedings and to avoiding the impunity gap. Of course, it will be a great challenge to ensure that this information is disseminated in a simple and effective way, and to ensure that the information needs of the local populations are sustainably addressed, but our Public Information and Outreach section are working hard on this by developing creative and interactive means of imparting this information, such as in listening clubs in rural area, or through drama performances.

Not only do these outreach activities impact on fair trials at the ICC, they also foster fair trails domestically. As with other area of rule of law, reform efforts can be classified as supply side and demand side. Together with stimulating counsel, the Registry's role in public information and outreach is another very useful tool in stimulating demand for the national prosecution of international crimes, and therefore to create a domestic political will for doing so.

Field offices

The Court opened its first office in Kampala, Uganda in the first ½ of 2005 and it now has 5 field offices in 4 countries. The field offices of the Court are essentially logistical support structures for the Prosecutor's investigations and for Registry activities such as outreach and public information, witness protection, defense counsel investigation, victim participation drives as well as to support activities and missions of the Trust Fund for Victims. They thus play a key role in supporting fair trials in The Hague by giving us a direct operational link with the situation countries.

At the start of my mandate, I felt that the Court's field operations needed to be reviewed and upgraded. I therefore ordered their review by a panel of external experts, which was conducted at the end of last year. The conclusions they came to outlined the risk faced by the Court as a result of the increase in the workload, complexity and level

of responsibilities of field offices. The recommendations made highlight the importance of clearly defining reporting lines, and conclude that field offices would benefit from a head of office with sufficient authority to deal with internal coordination and external representation.

As a result, I decided to move the headquarters Field Operations Section to my immediate office and asked them to prepare a work plan which, while supporting ongoing operations and preserving experience acquired, would manage a 2 years cycle of reorganization. A Strategic, Planning, and Coordination Unit is being created in that Office to better coordinate the management of each field office, and to ensure proper information flow between the field and headquarters. This Unit would also be able to advise on the scaling down of these offices in line with judicial activity in the proceedings, and the re-deployment of resources between field office to manage this scaling down. Once this has been implemented, I will recruit suitably empowered heads of office, decentralize further responsibilities to the field level as well as put in place a non permanent Operations Centre.

Future focus:

The idea is to move to a new level of field office, capable of representing the Registry in the country in question, and to join in the diplomatic and development dialogue in the situation country with objective and neutral ICC information to ensure that the ongoing debates about transitional justice and trying international crimes are well informed.

I must stress that the field offices will not be engaged in technical assistance projects. This is not their business, not is it the principal business of the Court. The idea is more modest, and aims at ensuring that the field offices leave a positive footprint behind when they leave the situation country. However, by merely engaging in a dialogue with bilateral and multilateral actors working on rule of law reform issues, as well as directly with the Government, the Registry would be able to push other actors into including the mechanisms needed for the prosecution of international crimes in rule of law reform initiatives. Field offices could also be in a position to be able to coordinate Court staff to advice on any aspects of such trials, should the situation country or interested donors so request.

Implementing legislation

I wish to conclude with the issue of implementing legislation, which is crucial to both ICC trials and national trials for atrocities. The Court relies on cooperation from states in order to conduct fair and effective trials. Without cooperation from states, there would be no arrests or surrenders of suspects to the Court, there would be no witnesses, there would be no asset tracking and freezing for the purposes of legal aid and restitution. In short, fair trials would not be possible. The foundation of any cooperation between the Court and national jurisdictions is the adoption of national implementing legislation

which not only incorporates the crimes into national law, but also Part 9 of the Statute. It is interesting to note that the Rome Statute is a two way system in this respect, and not only does the court require national implementing legislation to be adopted by states, but it requires the Court to consider national laws as part of its applicable law. Ideologically, therefore, there is a kind of osmosis process envisaged.

Implementing legislation is not only crucial for fair trials at the ICC, however, it is also the anchor for domestic trials of international crimes, and thus for the principle of complementarity to be effective. Without this, states could be left in the position of prosecuting only for some of the constitutive acts of the crimes, such as murder and rape. This would undermine the basis of national prosecutions, and invite the ICC to take jurisdiction where this might not be needed. Further, implementing legislation renders “reverse” cooperation with the Court possible, whereby for instance the Court feeds back into national proceedings evidence it has collected.

Together with Nottingham University, the Registry is seeking to keep a database of all implementing legislation adopted by States Parties, and currently, that database reflects that only 39 states have adopted such legislation. It is imperative that all States Parties adopt effective implementing legislation which covers all the crimes, preferably where the definitions of those crimes are harmonious with the Statute, and where all the forms of cooperation that the Statute sets out are included.

I have to add here that, at the request of the Assembly of States Parties, the Secretariat of the Assembly has also been engaged with the issue and has been writing yearly to all States Parties seeking information on the status of any implementing legislation, any obstacles encountered and technical assistance needed, as well as to find out what efforts States Parties have undertaken to promote full implementation by other States Parties. These requests and the answers provided by States are posted on the website of the Court, and a database kept.

Future focus:

Aside from compiling this database, the Registry is still developing ideas on what role, if any, it should play on this issue. Other actors, however, have a more direct role either in advocacy or in technical advice. Together with the secretariat of the Assembly, the Registry is already trying to put in touch states that need technical assistance with organizations that can provide this assistance, such as the Commonwealth Secretariat or the ICRC. Greater coordination of the international system here would be beneficial.

Conclusion

In order for the Rome Statute system to become an effective reality, each of the participants in this discussion should be looking at how they can contribute to creating a sustainable and balanced system for the prosecution and trial of international crimes.

The basis of this system is national prosecutions, and there should be a coordinated push to develop both national capacity, and a political will to prosecute and try international crimes nationally. Each actor has a role to play here, and this should be factored into their plans of action for the coming years.

The Registry can play its role, through training counsel, developing witness protection capacity, stimulating effective domestic court management systems, informing national constituencies so as to stimulate demand for national prosecutions, and other actions as described above which all contribute to the achievement of fair trials, both at the Court and domestically. I would add here that a further task of the Registry is to develop indicators to measure the impact that these actions are having in the situation countries. This will be a challenging task, but would add an objective, verifiable quality to the aims of the Rome Statute.