



CAPACITY DEVELOPMENT IN INTERNATIONAL CRIMINAL JUSTICE: A MAPPING EXERCISE OF EXISTING PRACTICE

BY ALEJANDRO CHEHTMAN AND RUTH MACKENZIE

DOMAC/2, SEPTEMBER 2009

ABOUT DOMAC

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

THE DOMAC PROJECT is a research program funded under the Seventh Framework Programme for EU Research (FP7) under grant agreement no. 217589. The DOMAC project is funded under the Socio-economic sciences and Humanities Programme for the duration of three years starting 1st February 2008.

THE DOMAC PARTNERS are Hebrew University, Reykjavik University, University College London, and University of Amsterdam.

REYKJAVÍK UNIVERSITY
HÁSKÓLINN Í REYKJAVÍK



ABOUT THE AUTHORS

Dr Alejandro Chehtman is Research Associate at the Centre for International Courts and Tribunals, Faculty of Laws, UCL. He received his PhD from the LSE (2009) for his thesis on the “Morality of Extraterritorial Punishment”. He has taught Public International Law at the LSE as a Teaching Fellow since 2005 and, previously, Criminal Law and Criminal Procedure Law at the University of Buenos Aires. Dr Chehtman worked as a legal clerk at the Criminal Appeals Chamber, and at the Public Defender Office in Argentina. He is a member of the Research Panel at Matrix Chambers, London.

Ruth Mackenzie is Senior Lecturer in International Law at the Department of Advanced Legal Studies, University of Westminster, London, and Senior Associate and Deputy Director of the Centre for International Courts and Tribunals, Faculty of Laws, UCL. She was formerly Principal Research Fellow in the UCL Faculty of Laws. She is a member of the DOMAC Steering Committee, and a co-director of the Project on International Courts and Tribunals.

ACKNOWLEDGEMENT

We are indebted to Shireen Fisher, Yuval Shany, Silvia Borelli, Vic Ullom, to two members of DOMAC’s Scientific Committee, Prof. Geir Ulfstein and Prof. Albin Eser and to other colleagues in DOMAC for their useful comments and suggestions on previous drafts of this piece. We are also grateful to Sabina Cehajic for her valuable research assistance throughout the preparation of this study; to Marika Giles, Melina Padron and Alejandra Torres Camprubi for their detailed work on the Annex to this paper; and to Tom Barratt and Mihaela Ivan-Cucu for research assistance in the initial phases of the study. Of course, responsibility for any errors or omissions remains with the authors.

This paper represents not the collective views of the DOMAC, but only the views of its authors.

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Published by DOMAC

Reykjavik University

Ofanleiti 2, 103 Reykjavik

Iceland

www.domac.is

EXECUTIVE SUMMARY

The purpose of this mapping paper is to identify the different criminal justice capacity-development initiatives which have been performed in the aftermath of mass atrocities, situate them within a broader narrative of international criminal justice, and design a plausible theoretical framework to understand and assess their impact on domestic legal systems, or lack thereof. Section 2 defines capacity development in the context of criminal prosecutions for international crimes. Section 3 provides an analysis of initiatives that concentrate on the transfer of knowledge. These include formal training programmes, but also more informal mechanisms such as mentoring schemes, working meetings, symposia, internships, etc. Section 4 concentrates on the provision of supplies and the development of infrastructure. Section 5 examines the ways in which the institutional design of specific international or internationalized tribunals can promote or undermine their potential to develop local capacity. Section 6 addresses other indirect means that arguably have a significant impact on capacity development initiatives, such as political or economic pressure, basic security concerns, etc. Section 7 situates this paper within the broader literature on capacity development and examines some of the theoretical tools that will be needed in the next phase of our research.

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LIST OF ABBREVIATIONS

ABA.....	American Bar Association
BiH.....	Bosnia and Herzegovina
EC.....	European Commission
ECC.....	Extraordinary Chambers in the Courts of Cambodia
COE.....	Council of Europe
DFID.....	UK Department for International Development
DRC.....	Democratic Republic of the Congo
HRW.....	Human Rights Watch
ICC.....	International Criminal Court
ICRC.....	International Committee of the Red Cross
ICTJ.....	International Center for Transitional Justice
ICTY.....	International Criminal Tribunal for the Former Yugoslavia
ICTR.....	International Criminal Tribunal for Rwanda
IFC.....	International Finance Corporation
IHT.....	Iraq High Tribunal
JSDP.....	Justice Sector Development Project
MONUC.....	United Nations Mission in the Democratic Republic of Congo
OECD.....	Organisation for Economic Cooperation and Development
OHR.....	Office of the High Representative in Bosnia and Herzegovina
OKO.....	BiH War Crimes Chamber's Criminal Defence Office
OSDE.....	Organisation for Security and Co-operation in Europe
OTP.....	Office of the Prosecutor
RoR.....	Rules of the Road Agreement
SSR.....	Security Systems Reform
SCSL.....	Special Court for Sierra Leone
STL.....	Special Tribunal for Lebanon
UNDP.....	United Nations Development Programme
UNHCHR.....	United Nations Office of the High Commissioner on Human Rights
UNMICRI.....	United Nations Interregional Crime and Justice Research Institute
UNMIK.....	United Nations Mission in Kosovo
UNTAET.....	United Nations Transitional Administration in East Timor
USAID.....	United States Agency for International Development
WCC.....	War Crimes Chamber

1. INTRODUCTION

In some post-conflict situations, the domestic justice system is in a state of collapse; in others, doubts exist as to whether alleged perpetrators of international crimes would be prosecuted effectively, or as to whether they would receive a fair trial. International penal interventions are therefore envisaged as the way to assure individual accountability for international crimes. This goal is part of (re)establishing the rule of law in such contexts, and is usually considered of significant importance to secure a long-lasting peace. Yet, it has become increasingly clear that these international or “internationalized” tribunals lack themselves the capacity to deal with the vast majority of alleged perpetrators. Thus, if their impact is to be enhanced, they would need to rely on support by the national legal system, i.e., the same system whose situation led to the creation of the international tribunal in the first place. The way out of this circle, it is now often suggested, is for the international or “internationalized” court to rebuild, enhance or develop the capacity of local legal systems to handle criminal cases for international crimes effectively.¹

The issue of capacity development has, therefore, come to the forefront of debates on the international criminal responses to mass atrocities. As we see from the information gathered in the Annex to this paper, different actors have been significantly involved in a large number of different kinds of initiatives seeking to develop the local capacity to conduct prosecutions for international crimes in these contexts.² The difficulties that development of local capacities presents, even beyond the area of prosecutions for mass atrocities, can hardly be exaggerated. “In recent years, about a quarter of donor aid, or more than USD 15 billion a year, has gone into technical co-operation, the bulk of which is ostensibly aimed at legal capacity development. Despite the magnitude of these inputs, evaluation results confirm that development of sustainable capacity remains one of the most difficult areas of international development practice.”³ Some of the existing challenges to effective capacity development can be

¹ See, e.g., Varda Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals', *Virginia Journal of International Law*, 45/2 (2005), 547-83.

² This information remains a work in progress on which we aim to build during the course of our research in the next phase of the project.

³ OECD, 'The Challenge of Capacity Development. Working Towards Good Practice', *DAC Guidelines and Reference Series* (Organisation for Economic Co-operation and Development, 2006) at 11.

easily identified. They include resistance to change, political interference, corruption and nepotism, lack of focus on oversight, lack of strategic management capacity, lack of basic skills, insufficient funding and poor use of existing resources. Moreover, capacity development as a practice arose as part of the process of decolonisation.⁴ Thus, we must be aware of the delicate balance that needs to be struck if the perception of imposition of foreign values is to be avoided, and a minimum level of legitimacy is to be attained.

The purpose of this mapping paper is to identify the different capacity-development initiatives which have been performed in the aftermath of mass atrocities, situate them within a broader narrative of international criminal justice, and design a plausible analytical framework to understand and assess their impact on domestic legal systems, or lack thereof. A few words about the methodology we have used are in order. For this initial stage of our research we have relied mainly on desk research. We have summarily reviewed the existing literature on capacity development generally, and in particular within a range of (criminal) justice reform initiatives. Our primary information, moreover, was gathered essentially from the websites of the relevant governmental bodies, intergovernmental or international and non-governmental organizations. We have also used several interviews carried out as part of the DOMAC project.⁵ In the course of this research it has become apparent how difficult it is to gather some of the relevant information from these sources. Information is usually incomplete in almost every respect: from the actual projects or programmes, their content and outputs, and the assessment of their results. The websites of the relevant local public institutions (notably the Ministry of Justice, or local judicial bodies) and other institutions in the different jurisdictions are not always accessible and usually out of date. The data they contain is often difficult to find, and at best partial. In some cases, only the title of the programme/project is provided. These problems are less acute with international, and governmental or intergovernmental organizations, but even then accessibility was less than perfect and information usually incomplete. In any event, even if the raw information on which this paper is based is far from complete, it provides a sample of some of the

⁴ Sultan Barakat and Margaret Chard, 'Theories, Rhetoric and Practice: Recovering the Capacities of War-Torn Societies', *Third World Quarterly*, 23/5 (2002), 817-35 at 823.

⁵ These interviews have been conducted mostly in the context of other areas of the project. We shall conduct in-depth interviews specifically on the issue of capacity development in the second phase of our research and on the basis of the findings of this mapping paper.

initiatives actually performed on the ground. During the second phase of our research we aim to complement the list of initiatives that have taken place or are currently taking place (at least with regards to the jurisdictions we shall cover in greater detail) and validate our current, preliminary findings.

The scope of this mapping paper should be clarified in two relevant respects. First, it is based on a survey of several jurisdictions where some form of international or internationalized response has been at least considered. It includes several countries in Africa (Rwanda, Sierra Leone, DRC, CAR, Sudan, and Uganda), the Americas (Colombia), Asia (East Timor, Cambodia, Lebanon and Iraq) and Europe (Serbia, Croatia, Bosnia and Herzegovina and Kosovo). Not all of them have been surveyed with the same level of detail, but they have all provided us with important information and insights. Secondly, although this paper puts the emphasis on capacity development initiatives by or with the participation of international or internationalized criminal tribunals, at this stage we shall also take into consideration other bilateral or multilateral programs conducted or supported by states, international and local governmental and non-governmental organizations. These will include, most certainly, programmes or projects organized by different UN bodies (UNDP, UNHCHR, UNMIK, UNTAET, etc.), multilateral organizations, different supranational or regional bodies (EU, EC, OECD, OSCE, European Union Police Mission, etc.), several national bodies (USAID, International Bar Association, American Bar Association, etc.) and other non-governmental institutions (HRW, ICTJ, etc.). The reason for this broad approach is that it will allow us to identify other key players in the area and also draw on their experience and initiatives in order to get a better understanding of the role that international or hybrid tribunals can play.⁶

In Section 2 we provide a conceptual clarification of what capacity development means for our enquiry. Section 3 is concerned with initiatives for the transfer of knowledge. These include formal training programmes, but also more informal mechanisms such as mentoring schemes, working meetings, symposia, internships, etc. Section 4 concentrates on the provision of supplies and the development of infrastructure. Section 5 examines the ways in which the institutional design of specific

⁶ However, this broad approach is taken for the purpose of mapping existing initiatives. Our future research will be concerned, specifically, with whether the existence of these international and internationalized tribunals makes a difference to domestic capacity and, if so, to what extent.

international or internationalized tribunals can promote or undermine their potential to develop local capacity. Section 6 will examine other indirect factors that arguably have a significant impact on capacity development initiatives, such as political or economic pressure, basic security concerns, etc. Section 7 situates this paper in the broader literature on capacity development and presents some of the theoretical tools that we shall use in our future research. An Annex to this paper contains basic information about direct capacity development initiatives that have taken place in various jurisdictions.

2. CAPACITY DEVELOPMENT

Our first task is to define as accurately as possible the object of enquiry, i.e., to explain what we understand by capacity development. Capacity will be understood as simply the “ability of people, organisations and society as a whole to manage their affairs successfully.”⁷ In this paper we shall use the notion of capacity *development* rather than capacity *building* to deal with judicial processes for international crimes. The reason for this is that the “building” metaphor misleadingly suggests a plain surface on which the capacity is erected, and “a step-by-step erection of a new structure, based on a preconceived design.”⁸ By contrast, by referring to development we clarify the link of this enquiry with the development literature, that is, with a significant body of work, both academic and practical, that can provide us with important insights. We shall use a fairly broad notion of capacity development. For our purposes, the “promotion of capacity development” shall refer to the efforts and activities of outside partners, and in particular international criminal tribunals, which can potentially support, facilitate or catalyse the capacity of domestic judicial systems to prosecute individuals for international crimes.

Three caveats are in order here. First, capacity development in this context needs to be distinguished from outreach activities. Indeed, due to the initial failure of the *ad hoc* international criminal tribunals to engage with the local populations of the countries in which the mass atrocities had been perpetrated, outreach became a significant, if not crucial aspect of the tribunals’ work. To that effect, outreach offices were created in almost every international or hybrid tribunal. The mandate of these offices has generally been broad, including not only outreach but also what has been termed legacy activities.

⁷ OECD, 'The Challenge of Capacity Development', at 14.

⁸ *ibid.*

Capacity development has been usually understood, at least in the context of international criminal tribunals, within the broader notion of outreach activities. Yet, our research will not deal with activities directed to the population at large. It will only be concerned with activities directed to professional legal actors (this includes the police, penitentiary officials, etc.).

Secondly, after mass atrocity situations states often lack stable, well-organized institutions, let alone a working judicial system. In fact, the aftermath of mass atrocities is often characterized by regime change or the direct involvement of the international community by way of international administration (e.g., Kosovo, East Timor) or at least by general judicial reform (e.g., Serbia, Sierra Leone, etc.). This creates a significant difficulty in terms of identifying which of the developments that have taken place in any given jurisdiction must be taken into consideration for the purposes of our analysis. Admittedly, the underlying rationale behind most capacity development activities is the (re)establishment of the rule of law in the relevant jurisdiction. Yet, this cannot be the appropriate criterion to select those initiatives which should be examined in the context of this enquiry. Indeed, many of these developments are aimed at the judicial system as a whole, and most are far removed from the specific task of prosecuting individuals for international crimes. Thus, even though the overarching aim of every capacity development activity in this context is arguably to build the rule of law in conflict-torn societies, this mapping paper will examine only those capacity development efforts which are *conducive* to triggering, supporting or enhancing criminal proceedings for mass atrocities.

Finally, we should not conflate the development of domestic capacities with mere transfer of knowledge or skills. Capacity development is “a much broader concept than the training and technical assistance approaches that are often put forward as answers to the capacity problem”.⁹ Indeed, one of the concerns that will become apparent from our analysis in the subsequent sections is that the focus has generally been on providing visible skills, such as specialized forms of training. Less attention has been paid to the administrative and material conditions in which these new capacities should be used. This has allegedly meant, for instance, that in many contexts these skills were learned,

⁹ OECD, 'OECD DAC Handbook on Security System Reform: Supporting Security and Justice', (2007) at 86.

but hardly used.¹⁰ Thus, it “is important to develop a culture change programme that addresses the behaviour and attitudes of personnel”¹¹ and the institutional culture more broadly, rather than concentrate only on the acquisition of skills or certain knowledge. “Failure to grasp that the capacity, or power, to act effectively is conditioned by administrative and material conditions as well as by personal knowledge and ability has probably been at the root of many difficulties with capacity-[development] programmes.”¹²

Accordingly, this paper seeks to adopt a comprehensive approach to capacity development. It will concentrate on five different areas which we divide, for simplicity, into ‘direct’ and ‘indirect’ capacity development. Among the *direct* forms of capacity development, we will examine the transfer of knowledge and contributions made in terms of infrastructure and supplies. Among the forms of *indirect* capacity development, we will discuss the way in which the institutionalization of domestic and hybrid criminal tribunals might contribute to developing the capacity of domestic legal systems, and we shall examine other factors such as political or economical pressure.

3. TRANSFER OF KNOWLEDGE

Transfer of knowledge is a core area of capacity-development whose impact is mainly at the level of individuals. This mapping paper will concentrate on training activities on the one hand, and other more indirect forms of transfer of knowledge that include, e.g., mentoring programmes and employment of nationals more generally in international or hybrid courts, internships, etc.¹³ It will briefly identify the groups of legal professionals and other relevant personnel that have received training and the general content of training sessions and programmes. This will allow us to devise a preliminary understanding of the general focus that these programmes have had, and identify upon what areas or relevant group of professionals the emphasis was put.

¹⁰ *ibid* at 94.

¹¹ *ibid*.

¹² Barakat and Chard, 'Theories, Rhetoric and Practice: Recovering the Capacities of War-Torn Societies', at 820.

¹³ See 5.2.3 below on this.

3.1 TRAINING

In the vast majority of the jurisdictions that we reviewed, training has usually been provided in short two or three days to one-week courses. We have found little by way of long-term regular training programmes.¹⁴ In the Balkans region or Rwanda, the two areas where we have found the greatest number of capacity development initiatives, it is difficult to see a clear long-term or coherent approach to training. Sessions tend to be relatively short, on a large and disparate variety of substantive, procedural and technical topics, and there is no clear indication of follow-up sessions. There is a small but growing trend against this approach. On the one hand, training is being imparted or at least largely coordinated by newly-established judicial or professional academies in some jurisdictions.¹⁵ On the other hand, there are increasingly broader programmes that aim at tackling the issue of capacity development through training in a more comprehensive way. Examples of these are the Judicial Reform Project and the Justice Sector Development Project in Bosnia and Herzegovina or the REJUSCO project in DRC.¹⁶

Moreover, training initiatives seem to have prioritized reaching the largest number of people rather than concentrating on a small number.¹⁷ Again, there are a few exceptions to this general trend, such as the training of 22 Timorese police investigators who received continuous and in-depth training so as to be able to continue their work once the Special Crimes Unit ceased to exist.¹⁸ The most relevant of these exceptions, however, have obtained in countries in which a developed legal profession already existed and the international community could work in partnership with judicial or professional training centres. This seems to be the case particularly in the former Yugoslav republics. The Kosovo Law Centre was created in June 2000, the Judicial Training Centre in Serbia in 2001, and in Bosnia and Herzegovina, several entity training centres were created in May 2003.¹⁹

¹⁴ See 3.3 below on this.

¹⁵ See, e.g., the Judicial Training Section in Kosovo, the Judicial Academy Training Centres in Croatia, Judicial and Prosecutorial Training Centres in Bosnia and Herzegovina, and the Judicial Training Centre in Serbia (see Annex, section A).

¹⁶ See Annex, sections A and F (DRC) respectively.

¹⁷ One of our interviewees, e.g., suggested that “We would not say, OK we can have a training for 30 or 50 judges. We find out how many judges are there in Rwanda, and we do it for all of them. To be aware of the same rules, the same standards, etc. If it’s for lawyers, all lawyers should be trained.” (DOMAC interview, 27th October 2008).

¹⁸ Caitlin Reiger and Marieke Wierda, ‘The Serious Crimes Process in Timor-Leste: In Retrospect’, (International Center for Transitional Justice, March 2006) at 35

¹⁹ See Annex, section A.

With regards to the areas covered, it is perhaps unsurprising that a significant part of the training conducted has been on substantive aspects of international criminal law and international humanitarian law. As illustrated in the Annex to this paper, training was conducted on issues such as the elements of war crimes, crimes against humanity and genocide, command responsibility, joint criminal enterprise, mitigating or aggravating circumstances, etc.²⁰ More recently, some jurisdictions such as DRC or Sudan received training on the laws on sexual crimes.²¹ There has also been significant training in almost every jurisdiction with regards to the basic rights of the accused and safeguards related to the issue of due process of law. Some training can be linked to specific legal reforms performed in some jurisdictions, such as the transplantation of a more adversarial system, or plea-bargaining; in the former Yugoslavia some training has been connected to the transfer of cases from the ICTY (see below).

By contrast, less attention has been generally paid to practical matters such as case management, legal advocacy, investigation techniques, cross-examination of witnesses, opening and closing statements, etc., although some seminars and workshops have been conducted on these topics. A clear exception in this context is the Criminal Defence Section in the State Court of Bosnia and Herzegovina (known as OKO) which, on top of training on other substantive and procedural issues, has performed training sessions on case analysis and expert witness examinations, direct and cross-examination of witnesses, opening and closing arguments, on advocacy and on the role of defence counsel in upholding fair trial standards.²² There has been *some* training on case management and court administration. See, in particular, the Justice Sector Development Project in Bosnia and Herzegovina, or the training imparted in Rwanda on court information management and online legal research, among other things. In most contexts there has been some training on the treatment of victims and witnesses, but this has been quite a marginal area.²³ Other projects include Penitentiary Management Reform in Bosnia and Herzegovina, training on the Operation of a Serious Crimes Tribunal in DRC, and investigative techniques such as DNA analysis, narcotics analysis,

²⁰ For a clear example, see the training sessions organized by the ICTY in the Balkans in Annex, section A.

²¹ See Annex, section F.

²² See Annex, section A.

²³ See, e.g., training on use of digital equipment designed to protect witnesses in Croatia and the early stages of the Witness Protection Program in Sierra Leone (Annex, section C).

crime scene investigation and interrogation techniques in Serbia.²⁴ The ICTY has covered issues such as targeting, investigation, and charging decisions, working with witnesses, including witness protection, data management, E-court management and trial support tools, etc. in the context of meetings and working visits, but has hardly conducted workshops on these issues.²⁵ It has, however, issued a manual of best practices for judges, prosecutors and defence counsel in terms of prosecuting, trying and defending war crimes cases.²⁶

There is a significant imbalance in terms of the groups that have been targeted by these initiatives. This, again, depends significantly on the various contexts. However, it seems clear so far that the judges and prosecutors have been the most frequently targeted groups. Investigators, including police officers, and prisons' personnel, by contrast, seem to be the groups that have received less training. An interesting initiative with regards to police officers and investigators, however, is the programme carried out in Sierra Leone by which groups of them have been seconded to the Special Court for 90-day periods, exposing them to complex criminal investigations and evidence handling.²⁷ Defence counsel, on its part, has often been neglected. For instance, until March 2004 defence counsel before the Special Court of Sierra Leone had received only one training session and investigators appointed to defence teams had received none.²⁸ The acknowledgement of the importance of adequate defence counsel for the carrying out of fair trials for international crimes has increased recently.²⁹ Another important aspect of these training initiatives is that the majority of the individuals who have been targeted by them are either high up in the professional hierarchy (established judges or prosecutors, etc.) or law students. Those individuals who form the mid-level of the hierarchy in most legal systems seem to have been largely neglected.

We have been able to identify very few capacity development activities in those states which are currently the subject of prosecutions before the ICC, namely, DRC,

²⁴ See Annex, sections A and F.

²⁵ See Annex, section A.

²⁶ See ICTY Manual on Developed Practices, launched on 28 May 2009 (available at <http://www.icty.org/sid/10145>, last accessed 23 August 2009).

²⁷ See Sierra Leone's Civil War: Interaction between the International and National Responses to the Atrocities, DOMAC paper (draft), January 2009, at 18.

²⁸ 'Bringing Justice: The Special Court for Sierra Leone. Accomplishments, Shortcomings and Needed Support', (16: Human Rights Watch) at 28.

²⁹ OKO is perhaps a good illustration of this.

Uganda, Sudan and the Central African Republic. Among these states, the DRC stands out as having been the only state subject to a considerable number of initiatives under the auspices of the UN Mission (MONUC). This raises several important questions, some of which will be explored in the next phase of our research. It would be interesting to know, for instance, whether this lack of capacity development initiatives is related to the fact that in many circumstances the conflicts are ongoing and whether this ultimately suggests that the ICC is in fact perceived as some sort of surrogate for the local courts.³⁰

Notwithstanding the limited scope of our research at this stage, we were not able to find evidence of training imparted to international personnel, whether staff or judges of the international or hybrid courts themselves, or specialists conducting training sessions, on issues such as cultural sensitivity, or the local legal system, its traditions and provisions, etc. Interestingly, the Justice Rapid Response approach,³¹ which is possibly an alternative arrangement to capacity development, seems to place great emphasis on the capacities of the international force deployed in the aftermath of mass atrocities. Their teams would ideally receive “international deployment training” which shall include personal safety and security, cross-cultural awareness, team-work and leadership, etc.³²

3.2 MEETINGS, MENTORING AND OTHER INFORMAL MEANS

Formal training sessions are hardly the sole mechanism of transfer of knowledge and skills to local legal communities. Work visits, mentoring programmes, internships and fellowships, and other more informal contacts between local and international personnel seem to have a significant role to play in this area. Visits and meetings have been a crucial aspect of the initial contacts between the ICTY and ICTR and the legal communities of the republics of the former Yugoslavia and Rwanda, and to some extent in the context of internationalized or hybrid tribunals. They have had a lesser role notably in the case of the ICC. Visits both by local officials to the *ad hoc* tribunals, and by international officials to the local communities have been instrumental not only in strengthening cooperation and sorting out technical matters; but they have also been a

³⁰ See section 5.1.2 below on institutional design and the principle of active complementarity.

³¹ The Justice Rapid Response is a new inter governmental initiative aimed at filling “some of the serious practical gaps that have emerged in the evolution of International Justice” by, e.g., identifying, collecting and preserving information that would be essential for criminal prosecutions in situations where local authorities are not equipped to do so, by sending in a group of international experts (see, generally, Chatham House Meeting Summary, ‘Filling One of the Gaps in International Justice: Justice Rapid Response’, 23 October 2007).

³² *ibid.*

forum in which concrete issues of substantive and procedural law have been discussed.³³ Some visits were related to the deferral and transfer of cases, addressing issues such as sharing information, handing over cases and documents to domestic courts, etc.³⁴ Others addressed issues such as case flow management, methods and techniques of collection and use of evidence, witness protection and handling; e-court management and trial support tools.³⁵ In fact, it is reported that the War Crimes Chamber in Serbia decided to establish a victim and witness support unit after a conference in Sarajevo organized by the Victims and Witness Support Unit of the ICTY.³⁶ Symposia have also been an important meeting place for local and international personnel of different international or internationalized criminal tribunals to discuss these issues.³⁷

One clear way of fostering capacity development is the participation of nationals of the local state in the work and activity of the international or hybrid courts. This has been a particularly problematic issue with international courts. Indeed, few nationals of the republics of the former Yugoslavia have been employed in the ICTY in important legal positions. The ICTR, for its part, has largely failed to hire Rwandans in important positions. The main concern behind this policy has arguably been security. And yet the hiring of, e.g., Rwandans has been motivated primarily by the need for Kinyarwanda speakers to work as interpreters and translators, accompanying investigators on their field missions, etc.³⁸ In the ICC, the policy has also been not to hire nationals of the relevant states in order to carry out investigatory or legal research tasks.³⁹ Yet, this is also an issue in many hybrid or internationalized courts.⁴⁰ For instance, few Timorese were integrated into top positions in the serious crimes prosecutorial office; and defence of accused individuals was largely handled by international counsel, with little or no

³³ See charts in Annex. See also, ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', (2008) at 26.

³⁴ See activities conducted by the ICTY in Annex, section A.

³⁵ *ibid.*

³⁶ Bodgan Ivanisevic, 'Against the Current - War Crimes Prosecutions in Serbia', (ICTJ, 2007)

³⁷ See, e.g., the Fourth Colloquium of International Prosecutors which gathered prosecutors of all international and hybrid tribunals (Annex, section E).

³⁸ Victor Peskin, 'Courting Rwanda. The Promises and Pitfalls of the ICTR Outreach Programme', *Journal of International Criminal Justice*, 3 (2005), 950-61 and 959.

³⁹ See DOMAC interviews, The Hague, July 14th and 15th 2008.

⁴⁰ See on this, Section 5.2.4 below.

participation of Timorese public defenders.⁴¹ In Sierra Leone, it has been argued that several of the posts that were meant to go to Sierra Leonean nationals have been filled by non-nationals.⁴² Sierra Leone nominated only two Sierra Leoneans to senior positions, when it was allocated four such posts (three judges and deputy prosecutor).⁴³ The rest of the positions were filled by internationals. This may be changing, as the recent nomination of a Sierra Leonean to the position of Deputy Prosecutor of the Special Court indicates. There may be several explanations for this, from lack of capacity in Sierra Leone to a political decision from the Sierra Leonean authorities to distance themselves from the Court. In any event it indicates that the potential of the Special Court for developing local capacities has remained underused.

Of particular relevance in this context are mentoring programmes and similar initiatives carried out mainly in different hybrid or internationalized courts. In Bosnia and Herzegovina, for example, two joint prosecutors (one local, one international) acted in cases related to the genocide in Srebrenica and involving multiple defendants.⁴⁴ In Cambodia, international and national prosecutors, judges and defence counsel act jointly. In the Special Court for Sierra Leone, each defence team must include persons with experience in international criminal law, criminal procedure law, including Sierra Leonean law, which forces them to be mixed. This entails cooperative work between local and international personnel. Moreover, most international and hybrid tribunals provide different forms of internship programmes for law graduates and young legal professionals.

A final potential catalyst to capacity development that needs to be mentioned derives from the fact of having locals and internationals working together allows them to interact also informally. Indeed, some people suggest that fostering such

⁴¹ Jane E. Stromseth, 'Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?' *Georgetown Journal of International Law*, 38 (2007), 251 at 290-1 See also Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', *Harvard Human Rights Journal*, 16 (2003), 245-78 at 262-3.

⁴² See DOMAC interview, The Hague, July 14th 2008.

⁴³ See Report on Sierra Leone, within work package 5 of DOMAC, citing Tom Perriello and Marieke Wierda, 'The Special Court for Sierra Leone under Scrutiny', (International Center for Transitional Justice, March 2006) at 21: "Whereas the Special Court Agreement allows the government to fill judicial positions with people of any nationality, the Deputy Prosecutor position was explicitly designated as national. The government amended the agreement through an exchange of letters and quietly had the Parliament amend the language of the implementing legislation in order to allow for their selection. The Sierra Leonean Bar Association objected to the implicit suggestion that its government deemed none of their members as qualified. In retrospect, the decision to exclude Sierra Leoneans from this post and as judges has been deleterious to the hybrid nature of the Court and resulted in the alienation of many Sierra Leonean legal professionals."

⁴⁴ ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 12.

communications could have a significant impact on the national legal culture, an important aspect of strengthening the rule of law. Yet on the whole little interaction appears to have taken place between local and international staff.⁴⁵ One reason for this in many contexts has to do with great significance of language barriers. But this is not the only problem. In East Timor, for instance, interaction between international judges and their three Timorese colleagues reportedly functioned relatively well. However, there was some frustration among the Timorese judges, who felt they were not treated as equals, highlighted by the vast differential in salaries, as well as the fact that international judges were UN employees with administrative support and leave entitlements.⁴⁶ Beyond these three judges there was virtually no social contact with local judges. Rather, the Timorese judges were resented by their other national colleagues and are said to have often felt like “second-class citizens”.⁴⁷ This approach to considering these interactions beneficial in terms of capacity development has not been without criticism, though. Some observers have criticized the belief in that transfer of knowledge and skills can obtain as a result of mere social or other informal contacts, as if they could occur by “osmosis”.⁴⁸

⁴⁵ Etelle R. Higonet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform', *Arizona Journal of International and Comparative Law*, 23 (2006), 347 at 388.

⁴⁶ See Reiger and Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', at 15. Furthermore, they report that international judges have often had patronizing attitudes.

⁴⁷ Stromseth, 'Pursuing Accountability for Atrocities after Conflict', at 290.

⁴⁸ DOMAC Interview, London, 5th February 2009.

4. PROVISION OF SUPPLIES AND INFRASTRUCTURE

This aspect of the capacity development of the local legal system is extremely important in the aftermath of mass atrocities, and particularly in certain contexts such as several countries in Africa. Providing supplies and infrastructure has the potential to enhance significantly the organizational capacity to carry out prosecutions for international crimes. The research conducted so far, however, seems to indicate that only limited parts of capacity development initiatives have taken the form of providing supplies, equipment and infrastructure (mainly in the form of buildings or offices) to the national jurisdictions. Even where initiatives have been concerned with this aspect of capacity development, it is not necessarily the case that a needs assessment was carried out, or a consultation process had taken place with regard to the types of supplies, equipment and infrastructure provided.

The research conducted so far, however, seems to indicate that only limited parts of capacity development initiatives have taken the form of providing supplies, equipment and infrastructure (mainly in the form of buildings or offices) to the national jurisdictions.

In the majority of cases, IT equipment has been provided to courts, especially in the Balkans (generally it has been in the Balkans that supplies and equipment have been provided).⁴⁹ In Africa and Cambodia a number of initiatives have included the rehabilitation of court buildings. For some of the jurisdictions that we are concerned with, we have found no mention of capacity development initiatives providing supplies, equipment and infrastructure. And yet, post-conflict societies are usually in most need of this type of initiative. As Higonnet puts it, “the inability of many post-atrocity local courts to cope with war crimes trials is often due, at the most basic level, to crippling damage sustained by physical infrastructure by bombing, shelling, arson, looting, or neglect.”⁵⁰ In East Timor, for instance, “[a]ll physical infrastructure, such as court and prison buildings, books, and records, was completely destroyed during the “scorched-earth” campaign during the withdrawal of the TNI and militias.”⁵¹

⁴⁹ See Annex, section A.

⁵⁰ Higonnet, 'Restructuring Hybrid Courts', at 357.

⁵¹ Reiger and Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', at 11.

Developing the capacity of local judiciaries to prosecute individuals for international crimes in mass atrocity cases seems to require, at a minimum, the reconstruction of court buildings and the provisions of basic supplies. It is important to examine, though, to what extent the existing provision of supplies and infrastructure has the potential to really help develop the capacity of *local* judiciaries in contexts of severe deprivation. Perhaps the most eloquent example of this is the building that hosts the Special Court for Sierra Leone. So far there is no clear idea of what to do with the modern facilities, as it would simply be too costly for the state of Sierra Leone to use as the site of, for instance, its Supreme Court.⁵² Put differently, the provision of supplies and infrastructure not only creates an opportunity for the people in post-conflict societies, but it also seems to entail a great challenge for agencies and bodies working in this specific area.

5. INSTITUTIONAL DESIGN

Capacity development can hardly be constrained to the transfer of knowledge and skills and the provision of supplies and infrastructure. It needs to look also at the structural conditions that shape the normative and institutional environment in which these skills, knowledge and goods are meant to be used. This section shows that the way in which

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different international or internationalized tribunals have been designed, and the way and mechanisms through which they interact with their domestic counterparts, exercises a significant influence on their ability to develop the capacity of the domestic criminal justice system.⁵³ Our purpose is to identify the key elements in their institutional design that have had a significant impact on this ability to develop local capacity. Arguably this impact will have more to do with the enabling context and changes in the institutional and legal framework, than with the transfer of knowledge or skills to individual legal

⁵² See, e.g., Report on the Special Court for Sierra Leone, Submitted by the Independent Expert Antonio Cassese, 12 December 2006.

⁵³ On this see William W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina', *University of Pennsylvania Law School Working Papers Series*, paper 185 (2007).

professionals, or the provision of supplies or infrastructure in the local jurisdictions. However, as we hope to make clear in the following pages, this impact is by no means less significant than the forms of direct capacity development examined so far. Accordingly, this mapping exercise requires us to briefly identify the relevant aspects of the normative and institutional context that have had an impact on the local capacity to prosecute individuals for international crimes.

5.1 THE INTERNATIONAL TRIBUNALS

The main issue we consider in this section is the influence that the jurisdictional relationship between international courts and their local counterparts has exercised on the ability of the former to contribute to local capacity development. In short, while the jurisdiction of the ICTY and ICTR was originally based on the principle of primacy over national courts, the ICC is organized around the principle of complementarity. In this section we will show how both these principles, and the specific ways in which they have been implemented have had important implications in terms of their impact on local capacity. Our focus will be to identify concrete ways in which these Courts have been able to contribute to capacity development in the relevant jurisdictions, or can improve their prospects of doing so.

5.1.1 THE ICTY: BETWEEN THE RULES OF THE ROAD AND THE COMPLETION STRATEGY

The first institutional arrangement that needs to be considered for our purposes is the Rules of the Road Agreement (RoR), signed in 1996. The RoR accorded the ICTY the power to review case files before the domestic courts of Croatia, BiH, and Serbia, before they could issue an indictment.⁵⁴ This procedure was allegedly introduced to ensure that national courts met international legal standards in the light of growing concerns over the possibility of arbitrary arrests and unfair trials.⁵⁵ Yet, instead of improving the quality of the local trials, this procedure created a backlog at the ICTY and a chilling effect both

⁵⁴ Although the RoR technically applied to BiH, Croatia and Serbia, the driving force behind them was arguably the situation in BiH. On this see, DOMAC interview, The Hague, 28th February 2009.

⁵⁵ For instance, the OSCE reports that between 1993 and 1995 in the military court of the Municipality of Orašje in FBiH, 47 suspects were convicted *in absentia*, with several receiving the death sentence (OSCE, "Background Report on National War Crime Prosecutions, Transfer of ICTY Proceedings and Missing Persons" 2005). See, also, Lilian A. Barria and Steven D. Roper, 'Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY', *Human Rights Rev*, 9 (2008), 317-30 at 323, and OSCE, 'War Crimes Trials before National Courts of Bosnia and Herzegovina: Progress and Obstacles', (2005) at 5.

upon prosecutions by willing domestic authorities and upon judicial reform more generally.⁵⁶ This was partly because of the lack of resources allocated to the review process which, in many instances, entailed significant delays in the review process and often enough no answer at all. Between 1996 and 2004 the ICTY's RoR unit reviewed files for 5,789 cases. Only 3,489 were referred back to the entity authorities. Of these, in 2,346 the evidence was insufficient for an indictment.⁵⁷ Moreover, a further problem was that when cases were referred back, they did not stipulate which court was supposed to try them.⁵⁸

Thus, the RoR arrangement constituted a significant source of disempowerment for local judiciaries. It shaped not only the formal relationship between domestic courts and the ICTY, but also the relationship between legal professionals. For instance, a 2000 Survey in Bosnia indicated that local legal professionals perceived "disrespect" in their sporadic contact with the ICTY. They suggested that the ICTY officials "failed to keep them informed of the status of the investigations even in response to direct enquires" and, in fact, that "the international community saw them as intellectual inferiors who did not understand the relevant law" and "contributed to [their] marginalization".⁵⁹ Overall, this study concluded that "these professionals viewed the ICTY as unresponsive and detrimental to the ability of Bosnian courts to conduct national war crimes trials".⁶⁰ Relationships between the ICTY and the local judiciaries have not been any better in Serbia or Croatia. As a result of all this, it has been argued that, at least until 2002, "... principally due to a failure in design and, to a lesser extent, in implementation, the tribunal's long-term impact on the systems of justice in the area of conflict ha[d] been minimal".⁶¹

The Completion Strategy, adopted in 2003, changed the relationship between the ICTY and the local judiciaries. In essence, it incorporated the new Rule 11*bis* which provided that the Prosecutor or the chambers of the ICTY could transfer certain cases to

⁵⁶ William W. Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina', at 1.

⁵⁷ OSCE, 'War Crimes Trials before National Courts of Bosnia and Herzegovina'. As part of the Completion Strategy, the ICTY transferred this review to national authorities.

⁵⁸ Barria and Roper, 'Judicial Capacity Building in Bosnia and Herzegovina', at 322.

⁵⁹ Human Rights Center, International Human Rights Law Clinic (University of California Berkeley), and Sarajevo), 'Justice, Accountability and Social Reconstruction', at 36 and 41.

⁶⁰ *ibid* at 36.

⁶¹ David Tolbert, 'The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings', *Fletcher F. World Aff.*, 26 (2002), 7 at 8.

the domestic judiciaries of the former Yugoslav republics. Yet, this transfer of cases was subject to certain conditions: the referral bench in the ICTY needed to be “satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.”⁶² These requirements were later specified and included several procedural safeguards and a requirement that the trial process complies with international human rights standards, including the impartiality and independence of the tribunal, sufficient judicial experience including training in war crimes trials, adequate pre-trial detention, etc.⁶³ Interestingly, the Tribunal maintained the authority to recall a transferred case if any of these conditions was not met.⁶⁴ To effectively implement this revision power, the OSCE would monitor all trials conducted under rule 11*bis* and report to the ICTY.⁶⁵ Arguably, this new jurisdictional relationship between the ICTY and the domestic courts “moved the ICTY toward catalyzing the enhancement of national judicial institutions and the exercise of domestic criminal jurisdiction.”⁶⁶

It has been suggested that a positive feature of the ICTY Completion Strategy was that it arguably “created momentum for reforming the BiH judicial system at the state level.”⁶⁷ The creation of war crimes section at the Court of BiH was the result of an agreement reached by the OHR and the ICTY in January 2003.⁶⁸ In March 2003 a new Criminal Code and a new Criminal Procedure Code were introduced in BiH.⁶⁹ This process was accompanied by important measures at the entity level too. Roughly at the same time the OHR required the reappointment of all judges and prosecutors, a task which was performed by the High Judicial and Prosecutorial Council. In short, all these changes meant restructuring the courts and entity-level OTPs, which were the other institutions in charge of conducting trials for war crimes.⁷⁰ Incidentally, until 2002 Bosnia

⁶² ICTY Rules of Procedure and Evidence, Rule 11*bis* (B).

⁶³ UN Doc. S/2002/678. See also Jens Dieckmann and Christina Kerll, 'Un Ad Hoc Tribunals under Time Pressure - Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence', *International Criminal Law Review*, 8 (2008), 87-108 at 100-01.

⁶⁴ ICTY Rules of Procedure and Evidence, Rule 11*bis* (F).

⁶⁵ As a matter of fact, the OSCE has also monitored and informed the ICTY about non-rule 11*bis* trials which nonetheless use ICTY evidence (see below). On this, e.g., Ivanisevic, 'Against the Current', at 28.

⁶⁶ Burke-White, 'The Domestic Influence of International Criminal Tribunals', at 30.

⁶⁷ Barria and Roper, 'Judicial Capacity Building in Bosnia and Herzegovina', at 323.

⁶⁸ ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 6.

⁶⁹ Barria and Roper, 'Judicial Capacity Building in Bosnia and Herzegovina', at 325. Among the most notable changes were the change from an inquisitorial system to a more adversarial system; detailed provisions on war crimes and crimes against humanity; and the introduction of plea-bargaining.

⁷⁰ On this, see below.

had “invested relatively few resources in judicial reform efforts.”⁷¹ The same can be argued with regards to Serbia and, to a lesser extent perhaps, Croatia.⁷²

The transfer of cases has not been free from concrete difficulties and limitations.⁷³ Thus, the next phase of our research will assess the contribution of the normative and institutional changes that obtained since the adoption of the completion strategy, to the development of local capacity in concrete jurisdictions.⁷⁴ Among the issues that need further analysis, some of them have to do with the planning aspect, such as legal transplants of common-law institutions into civil-law countries. Others have to do with the issue of local ownership, such as the lack of sufficient involvement of local public officials in devising the new normative and institutional framework in which the prosecutions for international crimes would take place. Finally, still others have to do with the issue of sustainability: by closing down the ICTY and devising an exit strategy, sending the cases back to national judiciaries in order to meet its own goals, a significant problem was created for the local judiciaries in terms of the huge backlog of cases and lack of adequate financial support.⁷⁵

5.1.2 THE INTERNATIONAL CRIMINAL COURT

The impact of the International Criminal Court (ICC) on domestic capacity development is hard to discern at this stage of its institutional history. It has been argued that the most important contribution of the ICC will not be the number of cases it handles, but rather its role in monitoring and supporting states’ domestic criminal proceedings.⁷⁶ Unlike the ICTY and ICTR, which were originally organized under the principle of primacy over domestic courts (see above), the ICC regime is based on the principle of complementarity. Complementarity means that, provided it has jurisdiction over the

⁷¹ Burke-White, 'The Domestic Influence of International Criminal Tribunals', at 7.

⁷² See Diane F. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia', (The Open Society, May 2008) at 60 and Thierry Cruveiller and Marta Valiñas, 'Croatia: Selected Developments in Transitional Justice', (ICTJ, December 2006) at 14.

⁷³ On this, see section 7 below and Cruveiller and Valiñas, 'Croatia: Selected Developments in Transitional Justice', at 13.

⁷⁴ For these purposes, we shall draw upon other DOMAC research, specifically that concerned with the normative impact of international criminal tribunals and the relevant in depth case studies respectively.

⁷⁵ Daryl a Mundis, 'The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals', *American Journal of International Law*, 99 (2005), 142 at 146.

⁷⁶ Mark S Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building', *Florida Journal of International Law*, 15 (2002-2003), 215-42 at 230 and Tal Becker, 'Universal Criminal Jurisdiction: Address to the American International Law Association', *ILSA JICL*, 10 (2004), 477 at 481.

offence, the ICC will prosecute and try a particular offender, only if the country in which the offence was committed or that of the nationality of the offender are unwilling or unable to do so themselves.⁷⁷ Although complementarity was

In terms of capacity development the principle of complementarity of the ICC can create a freezing effect of domestic prosecutions, rather than the intended incentive to prosecute this type of offences locally.

arguably the result of a compromise pushed by the U.S. delegation in Rome, it has often been seen as an attempt to rectify the shortcomings of the *ad hoc* tribunals.⁷⁸ It was expected that complementarity would “likely push states to retain control over prosecuting nationals charged with violating international humanitarian law.”⁷⁹ It is perhaps premature to examine the actual implications of this principle vis-à-vis the development of local capacity through creating a context that enables domestic prosecutions or institutional or normative change. Yet, there are some initial trends that are worth identifying at this stage in order to examine them in the second phase of our research in greater depth.

It has been noted that by allowing states to free-ride on the ICC, the principle of complementarity can allegedly undermine rather than enhance the capacity of domestic legal systems, particularly of those states in which mass atrocities have been perpetrated, to prosecute and punish those responsible for these international crimes. Uganda and its self-referral of the crimes perpetrated by the Lord’s Resistance Army to the ICC is an example of this. This referral allowed the government to “garner international commendation and to respond to domestic critics without having to face the costs of domestic prosecution.”⁸⁰ Admittedly, this situation can obtain also due to lack of political ability to prosecute certain high level individuals. Yet, the point is that calling for the ICC to intervene in a situation can constitute an “easy” way out of that kind of political conundrum. Put differently, in terms of capacity development the principle of

⁷⁷ See articles 17 and 53 of the ICC Statute.

⁷⁸ Rosanna Lipscomb, 'Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan', *Columbia Law Review*, 106 (2006a), 182-212 at 202, and its quotes in note 128.

⁷⁹ Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building', at 222 and Jonathan I Charney, 'International Criminal Law and the Role of Domestic Courts', *American Journal of International Law*, 95 (2001), 120 at 122.

⁸⁰ William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', *Harvard International Law Journal*, 49 (2008), 53-108 at 62-63.

complementarity can create a freezing effect of domestic prosecutions, rather than the intended incentive to prosecute this type of offences locally.⁸¹

Admittedly, encouraging national jurisdictions to undertake domestic prosecutions for international crimes is not a goal mentioned in the Rome Statute. Yet, this aspect of the ICC's framework seems of great relevance to DOMAC. Some of the relevant research in this area has focused on identifying alternative institutional or normative policies which, although compatible with the ICC's framework, would enhance rather than undermine the capacity of domestic jurisdictions to prosecute international crimes. Burke-White, for instance, proposes that the ICC should endorse what he calls a principle of "proactive complementarity". By this he simply means that the ICC should "encourage, and perhaps even assist, national governments to prosecute international crimes."⁸² This, he contends, can create an incentive to make states more willing to prosecute international crimes themselves. Burke-White illustrates this by reference to the situation in Sudan. In effect, just after the ICC Prosecutor announced he would begin an investigation in June 2005, the Sudanese government announced the establishment of special domestic tribunals to investigate international crimes perpetrated in Darfur.⁸³ Accordingly, Sudan created the Darfur Special Court, and a Judicial Investigations Committee and a Special Prosecutions Committee in June and November 2005 respectively.⁸⁴ But at the same time this creates the difficulty of distinguishing between initiatives aiming at holding individual perpetrators to account, and those intended to shield them from international prosecutions.

Other commentators argue that a court like the ICC, staffed entirely by foreigners and situated at the other side of the world cannot "encourage a restructuring of the legal system so that it conforms with international norms."⁸⁵ Accordingly, they suggest that a hybrid tribunal should be used to complement the work of the ICC.⁸⁶ Moreover, there has been a suggestion that the ICC will be examining the possibility of conducting joint

⁸¹ Except for Sudan, all the investigations currently ongoing before the ICC have been referred to the ICC by an interested state.

⁸² *ibid* at 56.

⁸³ IRINnews.org, April 4 2005, at <http://www.irinnews.org/report.aspx?reportid=53710> last accessed 23/12/2008).

⁸⁴ Burke-White, 'Proactive Complementarity', at 71. See, more recently, the debate in Kenya about the creation of a hybrid tribunal. See, <http://news.bbc.co.uk/1/hi/world/africa/7880921.stm> (last accessed, 1 March 2009).

⁸⁵ Lipscomb, 'Restructuring the ICC Framework', at 195, citing Laura a Dickinson, 'The Promise of Hybrid Courts', *American Journal of International Law*, 97 (2003), 295 at 304.

⁸⁶ See, e.g., Jenia Iontcheva Turner, 'Nationalizing International Criminal Law', *Stanford Journal of International Law*, 41 (2005), 1 at 4 and Lipscomb, 'Restructuring the ICC Framework to Advance Transitional Justice', at 205.

international-national investigations, followed by a determination as to which cases will be taken by the ICC, and which will be prosecuted domestically.⁸⁷ A careful examination of these issues is beyond the scope of this mapping paper.⁸⁸

5.2 INTERNATIONALIZED OR HYBRID COURTS

This section examines the way in which certain aspects of the institutional design of internationalized or hybrid courts can have an impact on the development of local capacity. It covers the Special Court for Sierra Leone (SCSL), the war crimes section at the Court of BiH, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels in East Timor and Kosovo, the Lebanon Special Tribunal (STL), and the Iraqi High Tribunal. It is possible to identify at this stage four main aspects regarding the way in which these hybrid courts have been institutionalized that have had some impact on their ability to develop (or undermine) the capacity of local judiciaries. For the purposes of this mapping paper we will examine: the participation of local authorities in the setting up and functioning of the relevant court; the position of the hybrid court with regards to the local judiciary and its jurisdictional regime; the composition of the court; and the type of exit or termination strategy.

5.2.1 PARTICIPATION OF THE LOCAL AUTHORITIES IN THE SETTING UP AND FUNCTIONING OF THE HYBRID COURT

Unlike the ad hoc Tribunals and the ICC, it is to be expected that local authorities and legal professionals participate in the creation and design of internationalized or hybrid courts. Often, local authorities have an impact upon the functioning of these courts, crucially perhaps, by appointing or participating in the appointment of judges and prosecutors. These features are in principle considered a crucial advantage of this type of tribunal in terms of enhancing the sense of ownership of the judicial process by the local community and increasing the fit to the specific circumstances of each jurisdiction.⁸⁹

The first thing we must note is, however, that not all of these tribunals were created with direct participation from local government officials or legal professionals.

⁸⁷ DOMAC Interview, The Hague, July 15th 2008.

⁸⁸ For the impact of proactive complementarity in the provision of training and other modes of transfer of knowledge see section 5.3 below. Against complementarity see Jr Brian Concannon, 'Beyond Complementarity: The International Criminal Court and National Prosecutions. A View from Haiti', *Columbia Human Rights Law Review*, 32 (2000), 201.

⁸⁹ See section 7 below on this.

The Special Panels in East Timor were created by UNTAET with no participation or consultation to local legal professionals.⁹⁰ Similarly, in Kosovo the Panels were created by UNMIK with the total exclusion of locals from the design and the key decisions made in the implementation of the Regulation 64 Panels.⁹¹ In fact, because of the lack of a legal framework, the initial decision adopted by UNMIK was to revive the Serbian laws imposed by Milosevic in 1989 (unless they contained an element of ethnic discrimination or violated standards of international law), a decision which had to be rapidly repealed.⁹² The statute of the Iraqi High Court was drafted entirely by foreign experts, with almost no involvement of local jurists. Those who were ultimately involved were usually émigrés who had returned to Iraq after the invasion.⁹³ Finally, the Court of BiH was the result of an agreement between the OHR and the ICTY. Victims' groups and civil society in general were not consulted. Yet, this lack of participation impacted differently on the local perception of different tribunals and, as a result, on their potential to make a lasting impact in the legal framework and culture of the relevant jurisdiction. Whereas this arguably did have a negative impact in East Timor, Iraq and Kosovo, it is claimed that this has not had significant negative impact on the image or the legitimacy of the process in BiH.⁹⁴

By contrast, local authorities and arguably local legal professionals did play a role in the creation of the SCSL, the ECCC and the STL. This allegedly fosters the sense of ownership of the local communities of the justice process. Yet, participation does not necessarily result in ownership. The Government of Lebanon participated actively in the negotiation of the STL Statute. However, because of the stalemate in Lebanon's own ratification process, due mainly to the opposition's reluctance, the STL came into force as a result of Security Council Resolution 1757, passed under Chapter VII of the U.N. Charter. Moreover, it is unclear to what extent participation has had a significant impact on the way these tribunals are viewed by local jurists. It has been plausibly argued, for instance, that states in which these international crimes have been perpetrated negotiate the creation of internationalized or hybrid criminal law enforcement mechanisms when

⁹⁰ Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', at 256.

⁹¹ Perriello and Wierda, 'Lessons from the Deployment of International Judges and Prosecutors in Kosovo', at 2.

⁹² UNMIK Resolutions 1999/24 and 1999/25.

⁹³ See e.g. DOMAC interview, London, 22nd December 2008.

⁹⁴ ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 6.

this furthers the political goals of the governing elite.⁹⁵ The most straightforward example is, of course, that of the ECCC. Burke-White argues that the tortuous negotiating history, with its many starts and stops, played a role in enhancing Prime Minister Hun Sen's power domestically. International involvement was used politically by Hun Sen by claiming that the UN forced him not to recognize the previous amnesties and used this process to threaten political rivals and allies.⁹⁶ East Timor illustrates the exact opposite scenario. The rationale for internationalized tribunals under UNTAET was to "externalize the political and diplomatic costs of prosecution" vis-à-vis Indonesia from the weak East Timorese authorities onto international actors.⁹⁷ The international component was there seen as crucial not only for the creation of the hybrid or internationalized panels, but also to creating an enabling environment for these prosecutions to take place at all.⁹⁸

5.2.2 INSTITUTIONAL POSITION WITH REGARDS TO THE LOCAL JUDICIARY AND JURISDICTIONAL REGIME

A second aspect of these hybrid or internationalized courts that arguably has incidence on their impact on capacity development of the local judiciaries is their institutional position vis-à-vis the domestic courts. In short, a court which is part of the local legal system will have greater potential for capacity development than if it is outside it. The SCSL, for instance, remains outside the national legal system, and this has somewhat complicated the relations with the local legal system. This is in part because the domestic legal community has felt removed from the workings of the Special Court and it is resentful of the funds donated to it.⁹⁹ Another difficulty of courts situated outside the domestic judiciary has to do with the impact of the hybrid or internationalized court's decisions. In Kosovo, for instance, the OSCE has argued that the decisions of international judges "are not useful tools for providing guidance to the local legal community" because they are generally not published or made available beyond the

⁹⁵ William W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', *Michigan Journal of International Law*, 24 (2003), 1 at 40.

⁹⁶ *ibid* at 38-9.

⁹⁷ *ibid* at 47.

⁹⁸ *ibid* at 53. See also Burke-White, 'Proactive Complementarity', at 93-94.

⁹⁹ Perriello and Wierda, 'The Special Court for Sierra Leone under Scrutiny', at 39. See also DOMAC research paper "Sierra Leone: Interaction between International and National Responses to the Mass Atrocities".

parties.¹⁰⁰ The STL, for its part, will not even be located in Lebanon. Rather, its premises will be in a suburb of The Hague, in the Netherlands, and it will only have an office in Lebanon.¹⁰¹

Several of the newly created hybrid courts are situated, by contrast, within the domestic judicial system. The Court of BiH, for instance, is situated at the state level in the local judiciary. Moreover, although the Registry was originally established as a separate project under international leadership, it is being absorbed into the regular Court. The purpose was to ensure greater local ownership of the process.¹⁰² Yet, as it will be discussed in the following section, this has not always provided it with a greater impact on domestic courts. The ECCC illustrate some of the most pressing dangers of being too close to the local judiciary. The ECCC were situated within Cambodia's judiciary after a long and complicated negotiating process. Yet, it has been argued that this was meant to allow the government to exercise a greater degree of influence over the tribunal.¹⁰³ Thus, the position of a hybrid court has important implications for its potential in developing the capacity of domestic legal systems.

A related consideration that needs to be factored in our analysis is the relationship of the hybrid or internationalized court with the local judiciary and legal community. This relationship depends, most notably, on whether they have concurrent subject-matter jurisdiction, or the hybrid court is the only one entitled to try offences under international law committed in the relevant jurisdiction. It also depends on whether this relationship is hierarchically or horizontally structured, and whether any of the courts can claim primacy over the jurisdiction of the others (see the discussion on the relevance of primacy for capacity development in 5.2.1 above). It is to be expected that the more a formal relationship exists between the hybrid court and the local judiciary, the greater its impact will be. This would be the case, arguably, when the relationship is hierarchical in character. Reality, though, seems to indicate the need for a more nuanced analysis.

¹⁰⁰ Perriello and Wierda, 'Lessons from the Deployment of International Judges and Prosecutors in Kosovo', at 22-23, citing OSCE Report Sept. 2002, 'Kosovo's War Crimes Trials: A Review'. Interestingly, though, it is reported that International Judges also fail to refer to any international or foreign legal source, and rather refer only to FRY criminal and criminal procedure statutes and UNMIK Regulations.

¹⁰¹ Art. 8 of the Agreement and headquarters Agreement between the UN legal counsel and the Netherlands, December 21, 2007.

¹⁰² ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 5.

¹⁰³ Burke-White, 'A Community of Courts', at 32.

Several hybrid courts lack any sort of formal relationship with domestic judiciaries. They have exclusive jurisdiction over international crimes, or enjoy some form of primacy over them. This usually alienates their work from the local judiciaries, who have little information of what goes on in the hybrid court and almost no incentive to find out.¹⁰⁴ An important exception to this framework is the Court of BiH. War crimes committed in BiH may be tried before the Court at the state level and at the entity level before the cantonal courts of the Federation, the district courts of the Republika Srpska, and the Basic Court of the Brčko District.¹⁰⁵ Moreover, since 2004 the review process that under the RoR was conducted by the ICTY is the responsibility of state-level authorities in BiH. However, two important considerations have limited the impact of the Court of BiH on the local judiciaries. First, it is not a superior court within the BiH judicial structure and its decisions are not binding on the cantonal and district courts.¹⁰⁶ And secondly, while the review process could have bolstered cooperation or greater influence, its actual consequence has allegedly been that “either entity-level courts have stopped all criminal proceedings waiting for a decision from the [s]tate Court’s OTP or they have used the review process as an excuse not to begin or continue their investigations.”¹⁰⁷ Accordingly, this specific institutional feature has hardly contributed to solving this issue. In fact, a member of the OTP has described the cooperation with the ICTY prosecutor and the prosecutors in neighbouring countries as “better developed than the cooperation with the cantonal and district prosecutors.”¹⁰⁸

Another way in which it has been claimed that “hybrid courts address local needs is [when] its subject matter jurisdiction incorporates both domestic and international” crimes.¹⁰⁹ Although this proposition can be endorsed in certain scenarios, it should be treated with some care. In Sierra Leone, for instance, although its statute gives the Special Court jurisdiction over domestic crimes, the Court never tried anyone for a crime under the domestic criminal law of Sierra Leone.¹¹⁰ Together with the fact that the local

¹⁰⁴ Perriello and Wierda, 'The Special Court for Sierra Leone under Scrutiny', at 39.

¹⁰⁵ ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 5. Of course, they can also be tried before the ICTY.

¹⁰⁶ ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 30.

¹⁰⁷ Barria and Roper, 'Judicial Capacity Building in Bosnia and Herzegovina', at 323.

¹⁰⁸ Quoted in ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 31.

¹⁰⁹ Turner, 'Nationalizing International Criminal Law', at 37, citing SCSL Statute, as amended in Jan 2002, arts. 1-5. Also SCU and ECCC.

¹¹⁰ DOMAC interview, London, 5th February 2009.

judiciary is unable to conduct trials for international crimes due to the lack of domestic legislation and arguably because of the existing amnesty, this has not helped to overcome the gap between the hybrid and the local courts.¹¹¹ A Rule 11*bis* procedure was recently added to the Rules of Procedure and Evidence, allowing for the transfer of cases to other courts, including Sierra Leonean domestic courts.¹¹² However, the potential of this rule in this case is arguably different from the situation of the ICTY as discussed above. In the case of the SCSL there is only one accused still at large and at this stage it is unlikely that new indictments will follow. Furthermore, it remains to be seen whether, when captured, this case would be transferred to the Sierra Leonean judicial authorities given the legal impediments and practical difficulties that exist before them.

5.2.3 COMPOSITION OF THE COURT

The composition of each court's personnel need also be factored in our analysis of their impact on local capacity development. This is arguably one of the key aspects of hybrid courts, and one of the main reasons why they have the potential to contribute much more than international courts to local capacity development in the criminal justice sector. Our analysis of this issue must include the proportion of international judges, prosecutors, etc. and local ones, but also the level of participation and the importance of the roles and positions occupied by locals both in terms of legal duties and of their management positions. The standard claim would be that the greater the involvement and level of responsibility of local professionals, the greater the contribution of the court to local capacity development.

This claim, however, does not generally include judges and prosecutors. Most hybrid tribunals have a majority of international judges in each panel. In Sierra Leone and East Timor, two-thirds of the judges are UN-appointed, and the remaining third is local, or at least appointed by the national authorities. In Kosovo, the relevant provisions

¹¹¹ *ibid.*

¹¹² See Rules of Procedure and Evidence of the Special Court as amended on May 27th 2008.

included a majority of local judges sitting together with UN-appointed judges.¹¹³ Yet, they required that both Kosovar Albanian and Kosovar Serb judges sit on war crimes trials alongside the international appointees. This, however, did not work as expected. Many Serb judges resigned under pressure from Belgrade or simply refused to serve under UNMIK.¹¹⁴ Moreover, international jurists initially ended up being invariably outvoted by Kosovar Albanian judges. UNMIK then had to issue new regulations in December 2000 “providing for the introduction of majority international judicial panels and empowering international prosecutors to reactivate cases abandoned by their Kosovar counterparts.”¹¹⁵

A majority of local judges need not be required in order to develop the capacity of local personnel and local courts. Although the trial panels and the appellate panel in BiH initially included two international judges and one national judge, the balance of their composition has now been reversed.¹¹⁶ Moreover, for a long time international prosecutors have constituted a minority and OKO has employed mainly Bosnian staff with the exception of the director and deputy.¹¹⁷ This is considered a cause of pride, and it is claimed that it has bolstered the sense of ownership, without seriously undermining the authority of the process. Admittedly, though, the situation in Bosnia is rather unique. The creation of the Court of BiH “took place 10 years after the end of the war, in a country with a functioning infrastructure and administration, skilled human resources, a strong and powerful international presence under the political authority of the OHR, and the military presence of the EUFOR multinational force.”¹¹⁸ And even so the three main ethnic groups are represented among judges and prosecutors.¹¹⁹

But the relevance of involving local staff is certainly not limited to judges or prosecutors. Involvement of local staff in important professional and administrative positions is considered crucial for capacity development. For the time being it can be

¹¹³ Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', *Criminal Law Forum*, 12 (2001), 185-246 at 204-5 and 234.

¹¹⁴ Dickinson, 'The Promise of Hybrid Courts', at 302 and Perriello and Wierda, 'Lessons from the Deployment of International Judges and Prosecutors in Kosovo', at 9.

¹¹⁵ Stromseth, 'Pursuing Accountability for Atrocities after Conflict', at 282.

¹¹⁶ ICTJ, 'The War Crimes Chamber in BiH: From Hybrid to Domestic Court', at 11. Notably, even when the majority was of international judges, the presiding judges were from BiH.

¹¹⁷ *ibid* at 16. There are, however, foreign fellows that have worked in OKO, and they have received three international lawyers with significant experience in the ICTY to share their knowledge with the staff.

¹¹⁸ *ibid* at 39.

¹¹⁹ *ibid* at 7.

argued that the level of involvement has been disparate. An important aspect of our future research will involve an examination of how this has evolved over time in different tribunals. In the SCSL, for instance, Sierra Leoneans work in every organ of the Court, in both professional and administrative positions. They comprise forty percent of staffing holding professional, non-administrative positions, such as trial attorneys, and fifty percent of all staff. Sierra Leonean lawyers serve as judges in both the Trial and Appeals Chamber, work as trial attorneys in the Office of the Prosecutor, and serve as duty counsel in the Defence Office.¹²⁰ However, other commentators suggest that it was not enough; that “provisions should have been made to employ and train more Sierra Leoneans at every level of the court, with intensive capacity-building programs”.¹²¹

Moreover, it would be important to examine the relevant figures taking into consideration the position that locals occupy in different jurisdictions. In East Timor, for instance, few Timorese were integrated into top positions in the serious crimes prosecutorial office. Initially, nine inexperienced Timorese public defenders were given the sole responsibility for defending individuals accused of serious crimes, facing international prosecutors. This created a huge imbalance and arguably affected the principle of equality of arms. Yet, as of August-September 2002, i.e., since the Defense Lawyers Unit was created, defence was handled by international lawyers. And then no East Timorese defenders were helping to defend any serious crimes cases.¹²²

5.2.4 COMPLETION OR EXIT STRATEGY

The final aspect of the institutional design of hybrid or internationalized courts that arguably has an impact on its potential to develop the capacity of the local judiciary to prosecute international crimes has to do with its completion or exit strategy. Although the traditional model was for the court to disappear, and entrust some of its residual functions on international or domestic bodies, there seems to be a new trend of phasing out the international component of hybrid courts. The latter option is arguably chosen because of its greater potential to contribute to domestic capacity development and the

¹²⁰ 'Bringing Justice: The Special Court for Sierra Leone', at 28.

¹²¹ Higonnet, 'Restructuring Hybrid Courts', at 388.

¹²² Stromseth, 'Pursuing Accountability for Atrocities after Conflict', at 257 and 91, citing interviews to Caitlin Reiger and Siphosami Malunga.

rule of law in the relevant jurisdiction.¹²³ However, it has been argued that the phasing out of international participation in the Court of BiH is driven mainly by funding realities and that, as a result, it may be far more rapid than ideal for the purposes of effective capacity development.¹²⁴ By contrast, the need to wind up the work of the Special Court in Sierra Leone has triggered renovated efforts to transfer relevant skills and resources to the national system.¹²⁵

This issue is connected to a somewhat different one, namely, the risk of all the trained legal professionals migrating after the completion of the work (on this see section 3.2 above). In effect, a phasing out policy seems to be much more consistent with the realities of not losing the local professionals that have acquired the relevant skills as a result of their work in, or their involvement with the court. This issue is closely linked to other aspects of the design of the court, such as its position vis-à-vis the local judiciary. Arguably, a phasing out policy, which is facilitated by the hybrid tribunal being part of the local courts, seems to enhance the capacity development potential of the hybrid court in this specific sense. Yet, this is not necessarily so. Interestingly, the Agreement by which the STL was created (a court which does not provide for a phasing out exit strategy) states that Lebanese Judges are to be given full credit for their period of service with the STL when they return to Lebanon, and they shall be reintegrated at a comparable level to that of their former position.¹²⁶ Admittedly, though, there are already doubts as to whether this would be feasible, considering the sensitivity of the issue they will be addressing.¹²⁷

5.3 EXTRADITION PROCEEDINGS IN DOMESTIC COURTS

Finally, it should also be noted that foreign domestic courts can also have an impact on local capacity development, particularly when it comes to extradition requests. This is because the issue of the quality and overall capacity of the domestic legal system can plausibly condition the willingness of the state to extradite a suspect. It is beyond the scope of this mapping paper to examine the various proceedings that have taken place

¹²³ Registry, 'Project Implementation Plan: Progress Report' (2005), 7.

¹²⁴ Stromseth, 'Pursuing Accountability for Atrocities after Conflict', at 273.

¹²⁵ According to officials interviewed by DOMAC in Freetown, on 29-30th October 2008.

¹²⁶ Article 2(8) of the Agreement.

¹²⁷ ICTJ, 'Handbook on the Special Tribunal for Lebanon', at 21.

in different jurisdictions. Suffice it to say that this particular issue has been addressed by at least some local courts.¹²⁸ In the next phase of our research we shall examine the outcome of these proceedings, and more importantly whether they have ultimately made a contribution to the overall efforts to enhance local capacity in the relevant jurisdiction.¹²⁹

6. OTHER MEANS

The development of capacity to carry out domestic prosecutions for international crimes in the aftermath of mass atrocity situations is heavily dependant on the political, institutional and normative context in which they are to take place. Thus, there are certain indirect means which, though arguably not directed towards developing the local capacity to carry out domestic prosecutions, are nonetheless very influential in terms of creating the enabling context in which these prosecutions can take place. Among them, we shall concentrate for the purposes of this mapping exercise, on political or economic incentives by international actors, pressure by internationally led or influenced local civil society, and physical security.¹³⁰

For example, the institutional and normative changes that correlated with the coming into force of Rule 11*bis* within the ICTY legal framework must also be assessed in the light of pressure or incentives provided by certain key players, most notably the EU and the U.S.¹³¹ The literature on Serbia is particularly eloquent on this. Cooperation with the ICTY was allegedly “spurred by annual deadlines linking U.S. aid ... to Serbia’s satisfaction of criteria that included cooperation

Economic and political pressure were instrumental not only in securing the surrender and transfer of indicted individuals to The Hague, but also in reforming domestic criminal law institutions in a way that satisfied international human rights standards and satisfy the requirements of Rule 11bis.

¹²⁸ Of particular relevance with regards to this issue are the cases of Damir Travica (UK) and Dragan Vasiljkovic aka Daniel Snedden (Australia), both involving extraditions to Croatia.

¹²⁹ Extradition, however, is not always a matter of the capacity of the requesting state to try fairly and efficiently the defendant. Many states have legal or constitutional prohibitions to extradite their nationals.

¹³⁰ Admittedly, the kind of issues that will be examined in this section will be the subject of enquiry in other areas of DOMAC. Thus we shall only refer to them here in a schematic way in order to clarify their link to the issue of capacity development and the way in which they will be incorporated in the second phase of our research.

¹³¹ On this, see generally, Orentlicher, 'Shrinking the Space for Denial', at 21 on Serbia and Cruveiller and Valiñas, 'Croatia: Selected Developments in Transitional Justice', at 5 on Croatia.

with the ICTY.”¹³² Orenlichter plausibly suggests that important factors behind the late 2004-early 2005 surge in cooperation with the ICTY “may have been Serbian authorities’ desire to secure a resumption of U.S. aid and potential benefits associated with the accession process promised by the European Union.”¹³³ Indeed, in 2005 the EU opened Stabilization and Association Agreement talks with Serbia and in May 2006 it suspended the talks over Serbia’s failure to cooperate fully with the ICTY.¹³⁴ The same can be argued of other jurisdictions, such as BiH. In that case, for instance, the Establishment of a single High Judicial and Prosecutorial Council is often mentioned as a condition for the commencement of negotiations for the conclusion of a Stabilisation and Association Agreement between the EU and BiH.¹³⁵ This type of economic and political pressure was instrumental not only in securing the surrender and transfer of indicted individuals to The Hague, but also in reforming domestic criminal law institutions in a way that satisfied international human rights standards and satisfy the requirements of Rule 11*bis*. It could be argued, by the same token, that progression from the stabilization phase on to the accession phase could eventually be linked to Serbia carrying out domestic prosecutions for international crimes that meet international standards.¹³⁶ Croatia is a particularly good example for this linkage.

The international community can also influence domestic prosecutions from within the relevant jurisdiction. This would be the case in situations like Kosovo, East Timor and, to a lesser extent perhaps Bosnia and Herzegovina where international institutional presence was almost determinant in terms of the institutional reconstruction of the state. But this influence can also take different, more subtle paths. In Serbia, for instance, it is argued that civil society is very strong and that it has been pushing for further prosecutions with regards to the crimes perpetrated during the 1990s. But in particular, the claim is that the capacity development efforts and initiatives by the international community over certain key actors of the civil society have contributed to provide them with the conceptual and technical skills to influence the local accountability process.¹³⁷ In

¹³² Orenlichter, 'Shrinking the Space for Denial', at 39.

¹³³ *ibid* at 45.

¹³⁴ *ibid* at 47.

¹³⁵ See Commission of the European Communities at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:3075:FIN:EN:DOC.

¹³⁶ DOMAC interview, London, 30th January 2009.

¹³⁷ *ibid*.

some cases by lobbying and pushing for domestic prosecutions, and in others by directly identifying witnesses and collaborating ways with the initiation and development of criminal prosecutions.¹³⁸ By contrast, in contexts such as Sierra Leone, the development of local civil society is weak and the international influence over them roughly negligible.¹³⁹ This arguably resulted in less pressure on domestic authorities to initiate prosecutions for mass atrocity cases in the local courts.

Finally, it is worth mentioning the issue of physical security as an important background consideration that has a significant impact on the capacity of domestic institutions to effectively carry out prosecutions for international crimes in the aftermath of mass atrocities. Basic security conditions are arguably of momentous importance if prosecutions for international crimes are to take place and to be conducted fairly.¹⁴⁰ Thus, although security sector reform initiatives are not part of our research, they can potentially be very influential in terms of its impact on the enabling context. A clear example of this is DfID's holistic efforts to develop the capacity of the local police and the justice sector as part of the same overall process.¹⁴¹

The important question is how the interplay between the different levels of contextual, individual and institutional capacity development has worked in concrete jurisdictions.

To sum up, there are other important considerations to bear in mind when examining the ways in which the international community has contributed or can potentially contribute to the development of local capacity to carry out criminal prosecutions in mass atrocity cases. These other considerations, which impact mainly on the enabling context in which these prosecutions are to take place, are arguably as important as the more direct ones discussed in previous sections, and in some circumstances they have proven to be even more decisive.¹⁴² The important question for the next part of our research is how the interplay between these different levels of contextual, individual and institutional capacity development has worked in certain

¹³⁸ See, e.g., the documentation work being carried out by the Research and Documentation Center in Sarajevo. Its main task is to investigate and gather facts, documents and data on genocide, war crimes and human rights violations, regardless of the ethnic, political, religious, social, or racial affiliation of the victims at <http://www.idc.org.ba/aboutus.html>).

¹³⁹ DOMAC interview, London, 5th February 2008.

¹⁴⁰ DOMAC interview, London, 22nd December 2008.

¹⁴¹ See Annex, section C on Sierra Leone and, e.g., Ball et al., 'Security and Justice Sector Reform Programming in Africa', and Stone et al., 'Supporting, Security, Justice and Development: Lessons for a New Era'.

¹⁴² Yet, a detailed research on them is beyond the scope of our enquiry and fits more comfortably within other areas of research in DOMAC.

concrete jurisdictions. This analysis will provide us a good understanding of the synergies in play and of the ways in which they have ultimately enhanced or undermined local prosecutions and the development of local capacity.

7. PROBLEMATIZING CAPACITY DEVELOPMENT: QUESTIONS FOR FUTURE RESEARCH

So far this paper has been concerned with existing efforts to develop the capacity of local actors to conduct prosecutions for international crimes. The issue of capacity development in criminal justice systems following mass atrocities is not an entirely discrete theoretical and practical issue. Rather, it has important connections in terms of the relevant difficulties or challenges that capacity development programs face generally. Accordingly, we need to identify at this stage some of the critical issues highlighted in the literature which seem to apply specifically to our area of enquiry. These issues shall inform not only our analysis for the purposes of this mapping paper; they will constitute important analytical tools to devise our research plan for the subsequent phase of our research. In the following paragraphs, we refer to five specific issues, namely, the existence of needs assessments, the issue of ownership and equity, the issue of legal and institutional transplants, the so-called “silo effect”, and the problem of sustainability. We shall also examine in some detail how these issues arguably impact capacity development initiatives in the area of transfer of knowledge. Admittedly, this is a provisional survey based on a preliminary review of the existing literature. We should refine the relative incidence of these aspects and perhaps identify new ones in the course of our more detailed enquiry on specific jurisdictions at a later stage of our research.

Often capacity development activities failed at this early stage because their subject-matter was of no relevance to the local actors, or because they were insensitive to their experience or lack thereof.

The first of these aspects is planning. In this context, the existence of needs assessments before the implementation of any capacity development programme becomes of great significance. On the one hand, the success of any capacity development programme arguably depends on there being “a fit between capacity

development approaches and country realities.”¹⁴³ As it will be suggested above, often capacity development activities failed at this early stage because their subject-matter was of no relevance to the local actors, or because they were insensitive to their experience or lack thereof, etc. On the other hand, these exercises provide benchmarks for monitoring change over time, they help identify areas of concern and target specific needs, and they can generate local support for a given capacity-development initiative.¹⁴⁴ Finally, mapping existing resources will also help agencies identify potential gaps in service or a spatial mismatch between needs and resources. Ideally, these exercises should be performed periodically. Existing practice seems to be extremely weak in terms of conducting needs assessments.¹⁴⁵ Yet, needs assessments are crucial if a capacity development effort is to be sensitive to the context. Sensitivity to context is considered a fundamental aspect of successful capacity development in terms of judicial or legal capacity.¹⁴⁶ Different countries present very different situations and very different needs, as the entirely different situations in Serbia, Sierra Leone, and East Timor illustrate. Yet, as the general literature on capacity development suggests, often “the cart is put before the horse: organizational structures are imposed and skills training is delivered in measurable packages of ‘person hours’ long before the real institutional and capacity building needs can be understood.”¹⁴⁷

Admittedly, though, our analysis needs to be sensitive to the realities of existing constraints in terms of the timing of actual responses to mass atrocities in concrete situations. In the aftermath of mass atrocities states are almost invariably not in a position to conduct criminal investigations for international crimes. This has important implications for the way in which the international response, and in particular one aimed at developing local capacities, should be planned. Certain aspects of the criminal response to mass atrocities might need a quick response. The Justice Rapid Response approach seems to be one of the most interesting developments in this particular area, though it has been hardly conceived with a focus on developing local capacities.¹⁴⁸ The

¹⁴³ *ibid* at 20.

¹⁴⁴ Carol J. De Vita, Cory Fleming, and Eric C. Twombly, 'Building Nonprofit Capacity: A Framework for Addressing the Problem', in Carol J. De Vita and Cory Fleming (eds.), *Building Capacity in Nonprofit Organizations* (The Urban Institute, 2001) at 24.

¹⁴⁵ See Annex.

¹⁴⁶ See, e.g., DOMAC interview, London December 22nd 2008.

¹⁴⁷ Barakat and Chard, 'Theories, Rhetoric and Practice: Recovering the Capacities of War-Torn Societies', at 826-7.

¹⁴⁸ See section 3.1 above.

use of extraterritorial tribunals, such as the ICC, might also need to be examined under this light.¹⁴⁹ Others, by contrast, may allow for a timeframe more akin to the overall (re)building or improvement of the local judicial system. Thus, the issues of the existing time constraints, particularly in the light of the outcomes expected of given initiatives, need to be carefully factored into our analysis.

The importance of adequate planning is connected to the second relevant issue identified above, i.e., that of fostering ownership by local communities of the criminal proceedings conducted in response to mass atrocities and of distributing existing resources in an equitable manner. Country ownership is currently seen as the cornerstone of effective development.¹⁵⁰ The literature on capacity development suggests that “people and their social institutions must be included in the community planning process to increase the probability of achieving a successful outcome.”¹⁵¹ Moreover, “the more these assessments involve broad-based consultation, the more likely the outcome will reflect national needs and priorities and be locally owned.”¹⁵² Participation can also be conducive to equity. “If community members have a sense of ownership in the decision-making process and feel that scarce resources have been distributed in an equitable and fair manner, the likelihood of success is vastly improved.”¹⁵³ Accordingly, the level of involvement of local authorities and members of the relevant stakeholders (legal professionals, civil society organizations, etc.) seems to constitute an important indicator of the potential for success of different capacity development initiatives. This, of course, should not mean obscuring the complexity of this issue. “Achieving an assessment that is nationally led and that meets donor standards may not always be possible. This is especially the case where national capacity to conduct a review at either the pace or level of complexity pushed by international actors is lacking.”¹⁵⁴ But it also can be the result of corruption, lack of transparency, political weakness and other difficulties faced by war-torn societies and new regimes. Accordingly, one of the tough questions in this context is how the

Country ownership is currently seen as the cornerstone of effective development.

¹⁴⁹ On this, see section 5.1 below.

¹⁵⁰ OECD, 'The Challenge of Capacity Development', at 15.

¹⁵¹ Vita, Fleming, and Twombly, 'Building Nonprofit Capacity', at 7.

¹⁵² OECD, 'OECD DAC Handbook on Security System Reform', at 91.

¹⁵³ Vita, Fleming, and Twombly, 'Building Nonprofit Capacity', at 7.

¹⁵⁴ OECD, 'OECD DAC Handbook on Security System Reform', at 91.

international community, and international or internationalized courts, should balance local ownership with effective capacity-development.

A further issue that needs careful consideration in order to provide a sound assessment of capacity development activities concerns the transplant of institutions or legal norms into domestic systems. Korten distinguishes what he calls the “Learning Process Approach” from the “Blueprint Approach”.¹⁵⁵ While in the “learning approach” the international and local actors are expected to share their “knowledge and resources to create a program which achieved a fit between needs and capacities of the beneficiaries and those of the outsiders who were providing the assistance”;¹⁵⁶ in the “blueprint approach” capacities are seen as coming from the outside, served up by professionals, and applied as a set ‘fix’ to certain problems. Capacity-development initiatives are usually modelled on the latter. The justice sector in the aftermath of mass atrocities has not been an exception to this general trend, as some of the relevant institutional or legal changes examined above illustrate. The subsequent phase of our research will have to examine to what extent capacity development activities have followed the blueprint approach, and to what extent this has been detrimental to their capacity to produce valuable effects in the targeted societies. Korten, by contrast, advocates practice being guided by already established local practices to the extent possible. A further question for future research will be identifying specific programmes built on existing legal practices and comparing them to those which follow the blueprint approach.

Overall, there seems to be very limited progress towards centralization and central planning in capacity development efforts for the criminal justice sector, at least with regards to prosecutions for international crimes.

Another relevant aspect of capacity development activities that can be perceived also in the context of our enquiry is coherence, sometimes also called the “silo effect”. This is when individual projects compete for resources. The OECD, for instance, has explicitly recommended that “[w]hat should be avoided is an SSR [Security Systems Reform] process made up of, and implemented as, stand-alone projects with little or no co-ordination or consideration of larger national frameworks.”¹⁵⁷ By contrast, it strongly

¹⁵⁵ In David Korten, 'Community Organization and Rural Development: A Learning Process Approach', *Public Administration Review*, 40 (1980), 480-511 at 480.

¹⁵⁶ *ibid* at 497.

¹⁵⁷ OECD, 'OECD DAC Handbook on Security System Reform', at 88.

recommends the establishment of a central coordinating body that should lead the reform process.¹⁵⁸ From the information gathered for this mapping paper, there seems to be very limited progress towards centralization and central planning in capacity development efforts for the criminal justice sector, at least with regards to prosecutions for international crimes. Although this phenomenon is still relatively marginal, the next phase of our research will have to look into the reasons behind the silo effect, and the obstacles towards centralization and coordination.

A final important issue is that of sustainability. “Like the changing ecosystem, capacity [development] is neither a one-time fix nor a permanent solution.”¹⁵⁹ Sustainability has to do with different aspects of capacity development, from the sequencing of programmes, to aiming at institutional changes in key organizations and providing follow-up support rather than focusing exclusively on improving the capacity of individuals. It also highlights the importance of changing work attitudes, improving the critical thinking and working on other “non-technical” skills or attributes, such as self-confidence, things which may be less easily instilled by mere transfer of skills.¹⁶⁰ Put differently, the sustainability of capacity development is related to less visible elements which are usually connected to the enabling context and the institutional environment, than with more visible forms of training. And “[t]he enabling environment influences the behaviour of organizations and individuals in large part by means of the incentives it creates.”¹⁶¹ Sustainability is also connected with monitoring and evaluative activities. Perhaps unsurprisingly, few of the relevant activities and efforts analyzed above and identified in the relevant charts contained in the Annex to this paper have been planned around this notion. Again, there seems to be a slow movement towards providing for more sustainable mechanisms of capacity development in some jurisdictions, but they are still a small minority. This raises the question as to the reasons for this alleged lack of focus on sustainability by international organizations and donors. But, more importantly perhaps, it forces us to focus on identifying best practices in this area and ways of overcoming this particular challenge.

¹⁵⁸ *ibid* at 86.

¹⁵⁹ Vita, Fleming, and Twombly, 'Building Nonprofit Capacity', at 26.

¹⁶⁰ OECD, 'The Challenge of Capacity Development', at 30.

¹⁶¹ *ibid* at 13.

Before concluding, let us illustrate how this framework works and how it can help us determine certain specific questions that need elucidation during the next phase of our research. We shall take, for these purposes, existing programmes for the transfer of knowledge (see section 3 above). There seems to be considerable agreement in the literature that a significant majority of the programmes or projects aimed at transferring specific knowledge and skills to local professionals have, overall, achieved very little in practice.¹⁶² Among the main reasons given are: insufficient resources,¹⁶³ lack of mandate from the relevant tribunal,¹⁶⁴ political obstruction, etc. However, not all the impediments are external to the activities themselves. In our preliminary research, we were able to identify several key issues that should direct our future research on this topic. These issues are directly connected to the potential of training and other mechanisms for the transfer of knowledge to contribute meaningfully to capacity development of local legal communities. Some of these issues have been touched upon in the relevant literature¹⁶⁵ but most of them remain underexplored in the context of developing the capacity to process judicially mass atrocity cases. The next phase of our research will be concerned with validating the findings in this paper, examining in more detail the overall impact of certain of these initiatives in concrete jurisdictions, and making suggestions for possible improvements.

The sustainability of capacity development is related to less visible elements which are usually connected to the enabling context and the institutional environment, than with more visible forms of training.

¹⁶² See Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals', at 578. On the SCSL, the Report of the Independent Expert argues: "At this stage, I do not think that it is realistic to expect that the Court's legacy will directly: (a) ensure greater respect for the rule of law in Sierra Leone; (b) promote or inspire substantive law reforms; (c) improve the conditions of service and remuneration of judges in Sierra Leone; or (d) alleviate corruption allegedly existing in the judiciary. The Court may contribute to these goals, but they will only materialise as an indirect effect, in the long run, and thanks to other concomitant factors." (Report on the Special Court for Sierra Leone, Submitted by the Independent Expert Antonio Cassese, 12 December 2006, 61, para. 279).

¹⁶³ The SCSL had contemplated an ambitious capacity-building program called the Legacy Project which was allegedly abandoned for lack of funding. *ibid* at 580.

¹⁶⁴ "Despite the willingness of many individuals within the Court to train or otherwise be involved with the domestic system, there have been few successful initiatives, partly because there is no explicit mandate for the Court to do so." (Perriello and Wierda, 'The Special Court for Sierra Leone under Scrutiny', at 40).

¹⁶⁵ See section 2 above.

On the one hand, it is worth paying a closer look at specific impediments that the transfer of knowledge has faced in concrete situations to provide a more nuanced and elaborate picture of this area of capacity development. For instance, it is claimed that part of the reason why the ICTR has lacked momentum to materialize training sessions in conjunction with visiting international legal experts or members of international NGOs is the division of internal competence between the different sections of the Tribunal. The Outreach section, which is in charge of the legacy aspect of the completion strategy, is part of the Registry. However, most of the relevant personnel who can perform formal and informal transfer of knowledge, both for their particular knowledge and for their presence in Rwanda, belong to the Office of the Prosecutor (OTP) and the Chambers. Similarly, the Outreach Programme is based in Tanzania, while most of the staff deployed in Rwanda works for the OTP. This means that the Registry would have to give some control over this area to these bodies. They were reportedly unwilling to do this.¹⁶⁶ By contrast, the problem with the Legal Profession Program created by No Peace Without Justice in Sierra Leone was arguably that lawyers in the Special Court largely did not see it as *their* task to work with the national judiciary, not only because of time constraints but also because their perception of their roles did not encompass a “training” element.¹⁶⁷ Regardless of whether these lawyers are right not to consider this issue as their responsibility, this indicates that a far more nuanced explanation is necessary as to what the actual impediments or limitations to the implementation of training and other forms of informal transfer of knowledge have been on the ground.

The research conducted so far seems to indicate poor planning and a lack of detailed assessment of the needs and objectives of local legal communities.

On the other hand, it is important to look in some detail into the specific issues highlighted in this section. Thus, the research conducted so far seems to indicate poor planning and a lack of detailed assessment of the needs and objectives of local legal communities. This has the potential of severely undermining the actual success of many of these initiatives. Thus, a further key aspect of our research in the next phase of the project will be to determine how these projects and programmes are planned and implemented, and the rationale behind several of these decisions.

¹⁶⁶ Peskin, 'Courting Rwanda', at 958-9.

¹⁶⁷ Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals', at 580, citing Alison Smith, Country Director for Sierra Leone, NPWJ.

Four elements are relevant in this context. First, it is important to know to what extent these projects have been grounded on needs assessments and whether consultation processes with the relevant stakeholders have been performed. We will also look at the way in which the subject of the training sessions for the transfer of knowledge were chosen and the way in which the trainers and trainees were selected. Indeed, it is claimed that in East Timor, instead of receiving basic skills such as legal reasoning and decision-writing, judges were trained in “family law in Portugal or contract law in Macau.”¹⁶⁸

In certain contexts, such as East Timor, Kosovo or some parts of Africa, it would be unrealistic to expect huge advances in terms of skills and knowledge in less time than it takes to obtain a full legal qualification in most countries.

Secondly, during the next phase of our research we shall also examine the expected outcomes of these training programmes and their impact on the actual policies and strategic decision-making of donors and implementing bodies in this area. Indeed, an important aspect of planning training and transfer of knowledge initiatives has to do with the specific aims pursued by them. However, in certain contexts, such as East Timor, Kosovo or some parts of Africa, it would be unrealistic to expect huge advances in terms of skills and knowledge in less time than it takes to obtain a full legal qualification in most countries. In others, by contrast, there are relatively sophisticated existing legal capacities. The risks are quite apparent. As it has been put, “Western experts need to acknowledge the expertise and strengths of Bosnian legal professionals. ... [T]he influx of international lawyers and others who are perceived as promulgating a foreign system of law disempowers Bosnian professionals, heightens their ambivalence and potentially mitigates the positive effects that could result from the international presence”.¹⁶⁹ Thus, a crucial aspect of our research in this context will be to examine how these different contexts are approached, what are the specific aims of training and other initiatives in each of them, and the outcomes expected.

Third, we need to consider the selection of trainers, international judges, and mentors. Language and cultural barriers, particularly with regards to legal culture, can

¹⁶⁸ Reiger and Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', at 17.

¹⁶⁹ Human Rights Center, International Human Rights Law Clinic (University of California Berkeley), and Centre for Human Rights (University of Sarajevo), 'Justice, Accountability and Social Reconstruction. An Interview Study of Bosnian Judges and Prosecutors', (2000) at 40.

render initiatives largely ineffective.¹⁷⁰ To illustrate, in East Timor commentators suggest that the way in which international judges were appointed was problematic in several ways. Because they were appointed through the standard UN recruitment process for peacekeeping missions, which does not involve targeted advertising, there was a lack of qualified candidates.¹⁷¹ This was allegedly made worse by the fact that the local Ministry of Justice had to approve the candidates, and had a specific language policy in favour of Portuguese speaking judges. The international lawyers who were accepted as mentors in the public defence office were also strongly resisted by those who were supposed to profit from their expertise.¹⁷²

Similar complaints have been made in the context of the Regulation 64 Panels in Kosovo.¹⁷³ “Some of the international judges brought in proved to be culturally insensitive, inadequately skilled and/or versed in international law, or had deficient English skills”.¹⁷⁴ There was “no mechanism for the mentoring of local judges and, in Pristina, international and local judges even have offices in different buildings.”¹⁷⁵ In fact, it is claimed that “a number of international judges, especially early on, had little background or training in international humanitarian law.”¹⁷⁶ This is not just a matter of poor selection, but rather a more complex issue. As Cady and Booth recognize, finding experienced lawyers, able to work in English and willing to work under the hardships of the kind of work they need to perform is difficult.¹⁷⁷ Moreover, “older Sierra Leonean judges thought it an affront when younger human rights barristers were flown in from London to ‘train’ them on human rights law.”¹⁷⁸ And similarly, “East Timorese [were] sick of internationals coming in and conducting ‘workshops’.”¹⁷⁹ International personnel usually lacked the time, experience and the training to act effectively as mentors. Our

¹⁷⁰ Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals', at 580.

¹⁷¹ Reiger and Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', at 14.

¹⁷² Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', at 268-9.

¹⁷³ Tom Perriello and Marieke Wierda, 'Lessons from the Deployment of International Judges and Prosecutors in Kosovo', (International Center for Transitional Justice, March, 2006) at 2.

¹⁷⁴ Higonet, 'Restructuring Hybrid Courts', at 15.

¹⁷⁵ *ibid*, citing International Crisis Group, *Balkans Report Finding the Balance: The Scales of Justice in Kosovo* at 9.

¹⁷⁶ Stromseth, 'Pursuing Accountability for Atrocities after Conflict', at 284.

¹⁷⁷ See their 'Internationalized Courts in Kosovo: An UNMIK Perspective' in André Nollkaemper, Jann K. Kleffner, and Cesare Romano, *Internationalized Criminal Courts and Tribunals : Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford ; New York: Oxford University Press, 2004) at 63-4.

¹⁷⁸ Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals', at 573 citing Alison Smith, Country Director for Sierra Leone, NPWJ.

¹⁷⁹ Caitlin Reiger in Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', at 265.

research in the next phase will examine the ways in which judges, mentors and other trainers were selected, the impact that this selection has had on their actual performance, and the ways in which their contribution to capacity development could be enhanced.

A fourth aspect of our forthcoming research on training initiatives must also examine the existence of monitoring and evaluation mechanisms, or the lack thereof. The fact that many of these activities were performed as a one-off session seems to indicate that little attention was paid to this aspect. But even when some monitoring was taking place, it is unclear how helpful it has been. In East Timor, for instance, “[p]rograms were designed so that trainers and mentors from their first days reported on and evaluated the progress of defenders to the Ministry of Justice. Trainers also reported the attendance of the public defenders at these sessions, and the Ministry of Justice reduced monthly salaries as a penalty for missed sessions.”¹⁸⁰ Accordingly, mentors and trainers were ultimately perceived as an extension of the Ministry, and having supervisory and disciplining functions. This exacerbated the tension between trainers and officials undermining the potential of the training sessions to contribute to capacity development.

National ownership has varied significantly between different jurisdictions. Ownership is increasingly considered one of the crucial elements which are necessary for any capacity development initiative to achieve its goal. Yet, this is not free from difficulties. Involvement by local authorities in the functioning of a hybrid court can bring in issues such as corruption, interference of the executive or the government in the judiciary and, depending on the overall attitude towards the international or internationalized tribunal, it can result in a detrimental influence on the capacity of the international body to influence the local legal culture, in this case, by means of training and transfer of knowledge. In East Timor, for instance, while the country was in desperate need of large-scale capacity development, training of local staff only took place on a very small scale. One of the reasons for this was that the East Timorese government played a significant role in boycotting training programs. “Officials in the Ministry of Justice ... rejected numerous substantial offers for funding for the tribunal and capacity-building programs”¹⁸¹ because these programmes were incompatible with the

¹⁸⁰ *ibid.*

¹⁸¹ *ibid* at 268. It is reported that USAID, for example, donated 8,2 US\$ million to civil society organizations after the offer to the judiciary was declined. Offers from Australian NGOs were also declined.

aim of the executive to install Portuguese as the working language of the courts.¹⁸² In Iraq, by contrast, the problem was the tribunal's enforcement of the death penalty. This entailed that "few countries with reputable judiciaries aside from the U.S. were likely to be involved or send staff."¹⁸³ The UK, for instance, explicitly withdrew its trainers because of this fact.¹⁸⁴ Accordingly, the next phase of our research will need to assess how ownership has worked in different contexts in terms of enhancing or undermining training and transfer of knowledge initiatives, and to identify specific strategies that might have been used to counteract its potential detrimental effect and/or boost its beneficial ones.

Programmes have generally lacked coherence.¹⁸⁵ A large number of initiatives in this area have been stand-alone projects rather than part of broader programmes. Arguably, stand-alone projects are less likely to reflect all the attributes of a coherent approach or have the impact of programmes.¹⁸⁶ Moreover, there is little sign of coordination between different agencies or bodies providing this kind of training.¹⁸⁷ Neither the local government nor any international or multilateral body has assumed a position of leadership with regards to these processes. This accounts for not only many of the existing overlaps in terms of the training provided, but also for the many gaps. Besides, in most states training is very unevenly distributed from a geographic perspective insofar as it is mainly concentrated in the capital or the relevant big cities. An interesting exception to these general trends is arguably the current Justice Sector Development Programme in Sierra Leone, organized jointly by the Government with the British Council and DFID, which has taken a much more holistic approach to capacity development within the justice sector.¹⁸⁸ Our future research will have to determine the factors which have contributed to this kind of piecemeal approach to the implementation of training activities. That is, whether this has been the responsibility of local

In most states training is very unevenly distributed from a geographic perspective insofar as it is mainly concentrated in the capital or the relevant big cities.

¹⁸² *ibid* at 268-9.

¹⁸³ Higonet, 'Restructuring Hybrid Courts', at 401.

¹⁸⁴ DOMAC interview, London, 22nd December 2008.

¹⁸⁵ Nicole Ball et al., 'Security and Justice Sector Reform Programming in Africa', (DFID, Department for International Development, April 2007). See also our brief analysis of the silo effect in section 2 above.

¹⁸⁶ *ibid*.

¹⁸⁷ See, for instance, Reiger and Wierda, 'The Serious Crimes Process in Timor-Leste: In Retrospect', arguing that training to judges, although well-intentioned, was haphazard and poorly coordinated (at 16).

¹⁸⁸ See Annex, section C. See also Christopher Stone et al., 'Supporting, Security, Justice and Development: Lessons for a New Era', (New York: Vera Institute, June 2005).

governments, international agencies, or simply the result of the way in which the relevant actors interact.

Finally, most training programmes have been concerned with transferring knowledge or skills to the relevant actors directly. Only in a few cases have programmes been concerned with “rebuilding national training organisations ... and the institutional conditions for them to work well.”¹⁸⁹ Moreover, as suggested above, these programmes were largely targeted at high ranking officials and law students, rather than the middle-level legal officers and personnel. This puts into question precisely the sustainability of these transfers even if successful.¹⁹⁰ This is a particularly serious issue in legal and political communities in which mass atrocities have occurred where there are powerful incentives to leave the country to pursue a career elsewhere. It is reported that 70,000 African professionals leave the continent annually.¹⁹¹ Indeed, “several of the lawyers employed by the Court belong[ed] to the Sierra Leonean Diaspora and will continue to live and work abroad once the trials are over. Others are likely to build upon their experience at the Special Court and work at other international tribunals, rather than going back to local practice.”¹⁹² Put differently, the risk of losing trained professionals thereby minimizing the impact on the local legal system cannot be exaggerated. Thus, it is extremely important to see how these initiatives have approached the issue of sustainability in conditions in which this is a particular liability.

¹⁸⁹ OECD, 'The Challenge of Capacity Development', at 29.

¹⁹⁰ *ibid* at 94.

¹⁹¹ World Bank Operations Evaluation Department, 'Capacity Building in Africa: An OED Evaluation of World Bank Support', April 2005).

¹⁹² Michelle Staggs, 'Bringing Justice and Ensuring Lasting Peace' Some Reflections on the Trial Phase at the Special Court for Sierra Leone' (War Crimes Studies Center, University of California, Berkeley, 2006) at 25.

8. PRELIMINARY CONCLUSIONS

The purpose of this mapping paper has been threefold. First, it identifies the different capacity-development initiatives performed in post-mass atrocities contexts and situates them within a broader narrative of international criminal justice. Secondly, it situates our enquiry within the broader context of capacity development theory and specifies the main theoretical questions in that literature that have an impact on the development of local capacity to process war crimes cases. And finally, it constitutes the basis on which we shall design our research plan for the following phase of this project.

The structure of the paper is quite straightforward. Section 2 clarifies the meaning of capacity development for present purposes. Sections 3 and 4 analysed the different strategies employed by the international community directed to developing the capacity of domestic institutions, namely, the transfer of knowledge and skills through training and other means, and the provision of supplies and infrastructure. The next part of the paper is concerned with indirect forms of capacity development. Section 5 examined the way in which the institutional design of an international or a hybrid tribunal can impact on the domestic capacity. Section 6 dealt with other indirect means, such as economic and political incentives, the role of civil society, and basic security concerns as important aspects of the enabling context for such local prosecutions to take place. Section 7 provides a theoretical framework that problematizes capacity development in this context and provides tools for the next stage of our research. Overall, two central claims are advocated throughout the paper. First, we have argued that capacity development should be understood in broad terms as a multi-level problem, namely, involving individual, institutional and contextual aspects. Secondly, we have suggested that a sound approach to this issue needs to concentrate importantly on the synergies between initiatives in each of these levels in order to explain both successes and shortcomings of concrete programmes.

To conclude, this mapping paper constitutes the basis on which we will model the plan for the second phase of our research. On the one hand, it identifies most of the important questions that will be explored later on in the project with regards to existing approaches to capacity development in the aftermath of mass atrocity cases. That is, it highlights the difficulties involved in the planning of initiatives and shared obstacles to effective capacity development, but also their coherence, sustainability, and the relevance of local ownership of the accountability process.¹⁹³ On the other hand, this paper and its Annex have allowed us to identify several of the

Capacity development should be understood in broad terms as a multi-level problem, namely, involving individual, institutional and contextual aspects. Accordingly, a sound approach to this issue needs to concentrate importantly on the synergies between initiatives in each of these levels in order to explain both successes and shortcomings of concrete programmes.

relevant deficits or at least concerns in terms of developing local capacity. Of course situations vary considerably, but generally speaking needs have been identified in the following areas. First, there is an important deficit in local knowledge of substantive international criminal law, including issues such as the elements of the crimes, derivative liability doctrines, etc. Secondly, there are also deficits in procedural criminal law standards, including equality of arms, impartiality of the tribunals, fundamental rights of the accused, access to justice, etc. Thirdly, some initiatives have focused on technical aspects of investigating international crimes and effectively conducting trials, from performing complex investigations and investigating “cold” cases, to advocacy and cross-examination of witnesses techniques, etc. Finally, a major source of concern throughout has been the improvement or provision of infrastructure and basic supplies, in terms of offices and courtrooms, computers, but also access to communications and legal information, and even paper and other basic needs. Thus the next phase of our research will concentrate on examining how international criminal tribunals have affected local capacities in these areas, and will also consider other areas or deficits that may have been neglected by capacity development initiatives so far, and why this has been the case.

¹⁹³ Admittedly, we do not claim at this stage to have exhausted the possible means that international criminal tribunals, and the international community generally, can use to develop domestic capacity. Other possible paths that we shall explore in the next stage include, for instance, independent oversight mechanisms of judges, prosecutors, and defence counsel; continuing legal development initiatives; etc.

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