Transcending Verticality: Stark need & small hope

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Introduction

Legal & factual context

Comprehensive trials have recently been proven to decrease the likelihood of strife resurgence in post-conflict societies by 64 %.[1] Transitional justice (TJ) aims at providing different avenues to "bolster rule of law reform." Different judicial and non-judicial mechanisms can be put in place to foster accountability, right to truth, reparations and guarantees of non-reoccurrence (TJ's four pillars). I here focus on the formal judicial mechanisms established to promote accountability.

Initially, when the Nuremberg Trials took place, the international community viewed its role in post-conflict transition as being limited to establishing formal accountability mechanisms. These institutions were the materialisation of the international community's will to deter the commission of the most egregious crimes. However, formal accountability mechanisms now also play an important role for TJ as they respond to post-conflict societies' imperatives. The demand for such mechanisms as measures to address past abuses has only increased through the years.[2] Indeed, trials have an undeniable "expressive value" that satisfies the post-conflict societies' desire to hold perpetrators accountable and its restorative needs.

Additionally, fighting impunity has become an important goal of the United Nations (UN), and the international community more broadly.[3] A legal tool that has contributed to this goal is the obligation to prosecute and extradite. Initially arising from the codification of States' obligation to ensure that acts of torture and crimes against humanity did not remain unpunished under the Convention against Torture, the *aut dedere aut judicare* obligation has now acquired customary status.[4]

Argument

Formal accountability mechanisms are significant for both the international community and TJ processes. This thus calls for a careful scrutiny of the normative considerations contemplated when they are established. Indeed, "where the international community assumes a role in the process, it [...] must be clear about the objectives of such prosecutions." Moreover, an analysis is important as the UN Secretary General himself has recognised that "transitional justice processes and institutional capacity-building are mutually reinforcing."

I argue a normative shift, one that aims at embodying capacity-building considerations when establishing formal accountability mechanisms, is necessary to close the impunity gap and promote sustainable peace. Examining the type of jurisdiction granted to these institutions is a good starting point to unpack what these mechanisms aim to achieve. The analysis does not focus on which model of concurrent jurisdiction, here complementarity and primacy, is better. Rather, I scrutinize the considerations that are contemplated by the international community when creating formal accountability mechanisms and the problems arising when capacity-building is not integrated. Accordingly, I conclude the rationale of verticality is unsustainable and has failed the international community.

I – Analysis

Normative justification of jurisdiction: fostering the international community's interest

With regard to concurrent jurisdiction, both the Intentional Criminal Tribunal for former Yugoslavia (ICTY) and

the International Criminal Tribunal for Rwanda (ICTR) had primacy over national courts (art 9(2) *ICTY Statute* & art 8(2) *ICTR Statute*): the *ad hoc* Tribunals' jurisdiction *de jure* superseded that of their national counterparts. Primacy was put in place as a response to international peace being threatened. National courts' deference was justified because "compelling international humanitarian interests were involved" which required uniformity, impartiality and minimum standards of justice. This ultimately favoured the accomplishment of the international community's greater goal: to further develop and strengthen international legal instruments that emanated from the Nuremberg Trials, and deter egregious crimes in the long-term.

In contrast, the ICC's complementarity model was meant to provide primacy to national courts unless them being "unable or unwilling" to "genuinely" investigate and/or prosecute (art 17(1)(a) *Rome Statute*). Therefore, a State can challenge the ICC's adjudicative initiatives if it deems it has jurisdiction over a case.

Yet, similarly to primacy, complementarity was a means to "promote universal and uniform individual criminal responsibility for the crimes concerned." Moreover, complementarity was rapidly limited to adjudication, despite judicial assistance to national prosecution being part and parcel of the *Rome Statute* (part XI). Accordingly, one of the primary concerns fuelling the establishment of both the *ad hoc* Tribunals and the ICC was the international community's interests.

Verticality, an unsustainable rationale

The operationalisation of both primacy and complementarity, which I argue below is plagued by verticality, has proven unsustainable in the long-term. First, it has negatively impacted the ICTY's and ICTR's effectiveness. Local ownership is essential for these institutions to have a lasting impact on impunity both at the local and international level.[5] Moreover, an institution fostering ownership usually also contributes to the training and transfer of knowledge and encourages the local judicial culture's development. However, concurrent jurisdiction based on primacy disregards the context in which it operates thus preventing local ownership to develop.

The ICTY's and ICTR's work was rejected by local judiciaries because post-conflict societies' pre-existing normative systems were ignored when establishing the *ad hoc* Tribunals. This in turn negatively impacted the Tribunals' legitimacy in the eyes of the local population and did not provide the deterrent effect desired. Hence, verticality, which in the case of the ICTY and the ICTR was partly expressed through primacy, did not yield the long-term benefits the international community aspired it to, while also not tapping into the capacity-building opportunities it could have.

Second, the ICC's application of complementarity *in concreto* has also proven problematic because it being infused by verticality. Some argue that for the ICC, "the principle of 'complementarity' implies a conflict of jurisdictions rather than a residual function for national courts."[6] This notion of conflict is strikingly opposed to the *Rome Statute* drafters' intent to give national jurisdictions primacy.[7] Indeed, although States were conscious that the protection of the international community's interest would come at the cost of occasionally compromising their sovereignty, they drafted the *Rome Statute* to regain control over the criminal jurisdiction they had previously conceded to the *ad hoc* Tribunals.

This *in concreto* competition between the two jurisdiction levels has been exemplified by the Libya case before the ICC. Indeed, some have argued that the *Gaddafi* and the *Al-Senussi* cases have been a *course contre la montre* whereby Libya's national judiciary had to adopt the ICC's pace in order to win its admissibility challenges. The Appeal Chamber ruled the challenging State was required to bring an admissibility challenge only when it can substantiate it,[8] while also at the earliest opportunity and only once (art 19(4) *Rome Statute*).

Strong criticism has emerged from this application of complementarity. First, it "underscores the need for expeditious post-conflict national proceedings that can reach the ICC's finishing line in time,"[9] which overly burdens post-conflict transitioning institutions that are already struggling with maintaining fragile peace on the ground.[10] Second, the ICC does not lead by example through such operationalization of complementarity and thus misses on opportunities to "guide […] local judiciar[ies] on the road to recovery" by not allowing them to focus on rebuilding their judicial culture. Indeed, the threat of ICC action pressures States to investigate/prosecute in order to avoid international intrusion into their affairs which is not in line with their post-conflict realities. This verticality not only hinders the sovereignty States aspired to protect when signing

the *Rome Statute*, but is also detrimental to the ICC since it cultivates distrust towards the institution.

Reflection

It is striking that both primacy and complementarity, although seemingly different, tend to foster a similar relationship of verticality[11] between the international institution and the local judiciary, whereby the international community's needs take quasi-coercive precedence over local needs. In fact, the normative framework for establishing formal accountability mechanisms as it is today blatantly disregards post-conflict societies' imperatives. Yet, normative considerations should include, if not to give central place to, the "goal of supporting the reconstruction of a domestic legal culture."[12]

II – Solution

Normative solution

Verticality is detrimental to achieving long-term deterrence of the most egregious crimes, the international community's ultimate goal, because it jeopardizes the institutions' success. Pushing for establishing the rule of law is meaningless without local ownership. Indeed, a system that takes into account local needs and that prides in helping institutions rebuild resonates with the post-conflict population, while deterring the vast majority of individuals that have been implicated and helped operationalizing the conflicts or problematic regimes. A normative shift is thus required whereby capacity-building becomes a central "guiding consideration" for the establishment by the international community of formal accountability mechanisms.

Capacity-building is important to foster the rule of law and the prosecution initiatives' efficiency in post-conflict societies for two additional reasons. First, lack of experience and expertise directly contributes to impunity. Second, "national prosecutions are a valuable opportunity both to force the local justice system to perform better and to build public confidence in that system." A good example of such elements at work are hybrid tribunals, although I do not explore them. Indeed, they have the potential to build confidence in the post-conflict State's institutions while also providing capacity-building opportunities for the national judiciary. However, the UN Security Council's lack of endorsement of such institutions has hindered their efficiency and international standing.

What does this mean concretely?

The ICTY's and ICTR's Completion Strategy can serve as an insightful example of what transcending normative verticality means *in concreto*, despite the transfer of cases to national courts being, in this context, motivated by efficiency and budgetary rather than capacity-building concerns. In 2003, the UN Security Council started pushing the Tribunals to wind down their activities, suggesting trials should be completed by 2008.[13] Both Tribunals' presidents however highlighted the Completion Strategy's goals were unrealistic. The UN Security Council thus suggested that cases involving intermediate and lower-rank accused could be transferred to competent national courts in order to facilitate the Strategy's completion.[14] During a Plenary, the Tribunals' judges adopted Rule 11*bis* of the Rules of Procedure and Evidence to give them the power to transfer cases to "willing and adequately prepared" courts. This judge-made rule recognizing the alternative jurisdiction of national courts was later confirmed by ICTY jurisprudence and the UN Security Council.[15]

At first, the Completion Strategy yielded mitigated results. While the War Crimes Chamber of Bosnia and Herzegovina was put in place quite successfully, Rwanda struggled in reaching the ICTR's Referral Chamber's expectations. The transfer process, built to close *ad hoc* Tribunals faster rather than for capacity-building purposes, was initially humiliating for Rwandese courts which were honestly trying to modernize and reach international standards of procedural fairness.

However, the Completion Strategy has proven extremely salutary and critical to "local judicial culture development" in the long-run as it has provided a stimulus for positive change. I here focus on Rwanda.[16] From the outset, the Organic Law was passed in order to codify the changes necessary in order for Rwandese courts to qualify for ICTR referral. This showed Rwanda's willingness to strengthen its judicial culture. With time, fair trial guarantees were heightened,[17] impartiality was given central importance, and the death penalty was even

abolished.

The transformation of Rwanda's judicial culture reached its zenith in 2011, when the Referral Chamber granted the *Uwinkindi* case to Rwandese courts.[18] In retrospect, the Completion Strategy was a formidable capacity-building process despite it being kick-started for the UN Security Council's budgetary and efficiency imperatives. Indeed, changes undergone from 2009 until today constituted invaluable training opportunities providing judicial personnel with confidence, knowledge and experience.

Hope: A 'new face for primacy'?

The example of Rwanda demonstrates the pertinence of capacity-building considerations. Yet, these need to be accounted for from the outset, when formal accountability mechanisms are established, rather than post-facto, like through the Completion Strategy. Furthermore, increased international recognition of and involvement towards local institutional capacity-building is crucial. Accountability-related TJ concerns are currently put forth at the UN level by just one person, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, though sometimes also advocated for by the UN Commissioner for Human Rights. However, the international community's commitment towards capacity-building needs to be more systematic, especially considering the aforementioned detrimental effect the UN Security Council's lack of endorsement had on hybrid tribunals' success.

Still, there is hope. The *International Residual Mechanism for Criminal Tribunals (IRMCT) Statute* is one step on the path towards transcending verticality in the establishment of international formal accountability mechanisms. Indeed, the *Statute* presents procedural innovations to its predecessors' framework that have the effect of fostering capacity-building. This is not to say that it is enough, but it shows that maybe, the international community could, in the future, be open to undergo the normative shift I suggest.

First, the *Statute* grants the IRMCT the power to transfer cases of "the persons indicted by the ICTY or the ICTR who are not among the most senior leaders" to national courts (art 6(1) and art 1(3)). Article 6(1) leaves no ambiguity: the IRMCT "shall undertake every effort" to refer cases to national jurisdictions. This is thus an enshrinement of Rule 11*bis* of the ICTY and ICTR Rules of Procedure and Evidence within the *IRMCT Statute* itself and signals the UN Security Council's endorsement of the initially judge-made rule. Second, the *Statute* grants robust monitoring capacities to the IRMCT (art 6(5)), reinforcing the international community's commitment to referral.[19] Hence, by integrating the referral of cases to national jurisdictions in its functioning, the *IRMCT Statute* exemplifies partially transcended verticality.

Conclusion

As presented above, institutions which States have put in place to fulfil their *aut dedere aut judicare* obligation have been based on normative considerations that favor the international community's interests, while neglecting the post-conflict societies'. This, however, has ultimately hindered the ICTY and ICTR's successes regarding the long-term deterrence of the most egregious crimes, while creating distrust towards the ICC's *in concreto* application of complementarity. More importantly, these institutions have disregarded the importance capacity-building plays in closing the impunity gap.

The case transfers that took place in the context of the Completion Strategy exemplify how salutary integrating local judiciaries within formal accountability mechanisms can be. Transitional justice considerations are quintessential to international peace and stability. The embodiment of changes created to make the Completion Strategy possible within the *IRMCT Statute* provide hope that the international community can evolve towards the right direction.

At least, this 'new face of primacy' is an insightful example of how to better accommodate the constraints transitional societies face. This seems more appropriate than the ICC's current application of complementarity, as it allows the local judiciary to know it plays a formal role within the accountability mechanism, while also giving it time to stabilize, rebuild and train.

This piece is meant to be a reflection and does not aim to offer 'the right solution.' Although the *IRMCT Statute* is a good start, a full-fledged normative shift fostering a localized rule of law is required, one that is

given full force through the systematic commitment of the international community. Making capacity-building a “guiding consideration” in formal accountability mechanisms’ establishment, is, I think, required to insure long-lasting peace. Additionally, this could finally allow formal accountability mechanisms to honestly stand as sustainable guarantees of non-reoccurrence, thus broadening the TJ potential of these institutions. This, however, is food for thought for another reflection piece.

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[1] Cyanne E Loyle & Benjamin J Appel, “Conflict Recurrence and Postconflict Justice: Addressing Motivations and Opportunities for Sustainable Peace” (2017) 61:3 *Int’l Studies Quarterly* 690 at 691, 697**.**

[2] Varda Hussain, “Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals” (2005) 45:2 Va J Int’l L 547 at 549.

[3] Enshrined in the Rome Statute preamble itself.

[4] See for example, *Questions concernant l’obligation de poursuivre ou d’extrader (Belgique c Sénégal)*, arrêt, CIJ Recueil 2012, p 422 (20 juillet 2012).

[5] Hussain, *supra* note 2 at 582.

[6] Payam Akhavan¸ “Complementarity Conundrums: The ICC Clock in Transitional Times” (2016) 14:5 J Int’l Crim Justice 1043 at 1048.

[7] Akhavan, *supra* note 6 at 1048.

[8] *Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I (Saif Al-Islam Gaddafi)*, ICC-01/11-01/11 OA 4, Appeals Chamber (21 May 2014) at para 164.

[9] Akhavan, *supra* note 6 at 1054.

[10] *Ibid.*

[11] See also Antonio Cassese et al, *Cassese's International Criminal Law*, 3rd ed (Oxford University Press: 2013) at 293.

[12] Hussain, *supra* note 2 at 551.

[13] Resolution 1503 on the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, UNSC, 4817th meeting, S/RES/1503 (2003) at para 7; Resolution 1512 on the

International Criminal tribunal for Rwanda, UNSC, 4849th meeting, S/RES/1512 (2003) at preamble.

[14] Resolution 1534 on the International Criminal Tribunal for the former Yugoslavia, UNSC, 4935th meeting, S/RES/1534 (2004).

[15] *Prosecutor v Stanković*, IT-96-23/2-AR11bis.1, Decision on Rule 11*bis* Referral (1 September 2005); Resolution 1966 on the establishment of the International Residual Mechanism for Criminal Tribunals with two branches, UNSC, 6463rd meeting, S/RES/1966 (2010) at para 11.

[16] Joanna Harrington, "Monitoring and the Referral of Criminal Cases between Jurisdictions: An ICTR Contribution to Best Practice in Jalloh" chapter 22 in Charles Chernor Jalloh and Alhagi B M Marong, eds, *Promoting Accountability Under International Law for Gross Human Rights Violations in Africa* (Brill: 2015) at 496.

[17] *Ibid* at 486.

[18] *Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Uwinkindi),* ICTR-2001-75-Rllbis, Referral Chamber Designated under Rule 11*bis* (28 June 2011), upheld by the Appeals Chamber: *Decision on Uwinkindi's Appeal against the referral of his case to Rwanda and related motions*, ICTR-2001-75-ARllbis, Appeals Chamber of the ICTR (16 December 2011) at para 87.

[19] See also Harrington, *supra* note 16 at 493.

Sujet:
prévention de l'impunité