

Roundtable Discussion

**Approaching the Review Conference in Kampala:
The International Criminal Court – Achievements and
challenges**

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Informal summary

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Principle of complementarity

What was envisaged in Rome, the ideals we talked about in Rome, are now becoming reality and are proving to be much more difficult than we envisaged. The Rome Statute should be looked at as a compromise of many different interests which were represented in Rome.

One of the issues of concern in Rome was the issue of sovereignty. Some States were still reluctant in Rome to allow any outside body to have jurisdiction over their nationals. These States wanted to retain the right to have jurisdiction and to be able to investigate and try their nationals without the interference of anybody else.

On the other hand there were many States who were concerned that history had shown that States failed to exercise authority over their citizens, as a result of which serious crimes went unpunished: What should happen if those States don't exercise that right adequately and as a result impunity continues to reign?

The question was: How to balance these two concerns, the right of States to try their own nationals, but at the same time to make sure that you have got a mechanism on hand that would take on the responsibility if the States themselves failed to do investigate and prosecute. That is how the principle of complementarity came about: States themselves are seen as the first bulwark in the fight against impunity. The first and foremost responsibility to investigate and prosecute lies with States. It is only if those States are

unwilling or unable to prosecute that the ICC can come in. But as long as the States do their duty, the ICC will fold its hands and not do anything else. The Prosecutor said once: “The success of the ICC will not only be measured in the number of its prosecutions, but also in the number of prosecutions carried out nationally.”

The principle of gravity that the crimes before the ICC have to fulfil means that the ICC can only prosecute very few people. The prosecution of a few should not result in impunity for the many. So even if the ICC, which potentially has got jurisdiction in 110 countries that have ratified the Statute, wished to prosecute everyone, it would not have the capacity to do so. Therefore, the ICC will only focus on a few selected individuals and the rest of the individuals will still have to be prosecuted at the national level. This raises a number of questions about the capacity of the national judicial systems to handle these cases, an issue nobody thought about in Rome. How do you build up the capacity of national judicial systems so that they will be able to carry out their own investigations and prosecutions?

(Followed by the presentations of Elizabeth Evenson and Thomas Schneider about positive complementarity)

Cooperation

This is also an evolving issue which started with some lack of clarity as we are now with positive complementarity, but which is increasingly becoming clearer between the Court and the States.

Cooperation is essential for the operations of the Court. Without cooperation of States the Court cannot perform its mandate under the Statute. What does it actually mean and entail when a State gets a request for cooperation? Essentially the Court needs cooperation of States in its investigations: If the Office of the Prosecutor goes out into a State, it requires the cooperation of that State not only to enter the territory of that State, but also in terms of carrying out the investigations. Cooperation is also required when it comes to the arrest and surrender of suspects to the Court. The Court does not have its police force, it does not have its army and it relies on the police forces of States for them to carry out the arrests. Another complication comes with the fact that the Court is carrying out investigations in ongoing conflict situations. Cases cannot be brought before the Court unless you have got testimony and that testimony has got to be given by witnesses. Witnesses will not cooperate or assist the Court unless their protection can be assured. This is where again the Court needs

the cooperation of States. The Court can do so much also to protect these witnesses, but a large part of that work has to be done by States in having witness protection measures.

The Court also requires cooperation of States on the issue of enforcement of sentences. The Court has a prison facility for detained persons before they are sentenced. After they have been sentenced they have to serve their prison sentence in States.

Above all the Court requires cooperation in the form of political support, not only when it is under attack but also to ensure that at all times the role of the Court is explained correctly and to as many people as possible.