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***Universal Jurisdiction and the International Criminal Court:
A Complementary Relationship?***

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The Rome Statute of the International Criminal Court (ICC) affirms in its Preamble that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by international cooperation’. It also recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, and emphasises that the ICC shall be complementary to national criminal jurisdictions.

According to this ‘principle of complementarity’, the ICC will only intervene if a State which has jurisdiction over a case involving genocide, crimes against humanity or war crimes is unwilling or unable genuinely to carry out the investigation or prosecution. Thus, priority is given to prosecution by national courts.

National courts may, under certain conditions, also exercise universal jurisdiction. This refers to the competence of a State in prosecuting and trying authors of certain international crimes, even when the perpetrators and victims of the crimes are not nationals of that State, and when the offence is committed outside its territory. Despite the absence of a general practice of States in exercising such jurisdiction, many States have adopted legislation enabling their courts to do so, and several international conventions include universal jurisdiction among the judicial remedies which States may (or must) apply in cases of international offences. Many scholars argue that customary international law also allows, or even obliges States to exercise such jurisdiction over authors of certain international offences.

The question arises how the exercise of universal jurisdiction by national courts relates to the complementarity principle of the Rome Statute. In other words, do national courts also have priority over the ICC when they exercise universal jurisdiction? Since the Rome Statute does not provide an explicit answer, the exact division of labour between national courts and the ICC in these situations still needs to be defined. Both the Prosecutor of the ICC and the Assembly of States Parties will play a part in shaping a future policy on this point.

In the special session of the Working Group on International Criminal Law held on June 6th, 2005, Mr. Morten Bergsmo, Senior Legal Advisor and Chief of the Legal Advisory Section of the ICC Office of the Prosecutor, introduced a discussion on these issues, presenting both the current policy of the Prosecutor and his personal views.

The introduction and underlying theme of the presentation deal with the tensions between criminal and international lawyers concerning the debate over statutory interpretation and choice of charges tuned towards such procedure, and the comparatively lesser use of sources of international law, such as customary international law. The divide between common law and civil law, which has been thus drawn out, is used by states as the main conflict line to approach power struggles in international criminal justice. Other proposed areas of discussion centred on the

choice of charges by OTP, cumulated or broadened to include a maximum number of offences, and presenting a tool that can be used as a safeguard against judicial discretion.

There is no officially elaborated OTP position, but there are some sources for discussion: the OTP policy paper (which states that it will pursue as few cases and individuals as possible, and of as higher authority as possible, following a principle of selectivity; there is no case portfolio in a responsive way but in a planned and structured way; it will not plan cases according to the availability of witnesses). Judges have prepared reflection papers in anticipation of the Court's functioning, one such document is an internal paper on complementarity (discussed in plenary session and adjusted after the discussion) proposing guidelines for dealing with claims of universal jurisdiction, for example.

Professor Bergsmo referred to excerpts from this document, including paragraphs concerning the 'possible impact of ICC on universal jurisdiction exercised by states'. The system envisaged hopefully encourages prosecution and avid exercise of jurisdiction by ICC. The Court should be engaged in a limited number of cases- (the OTP policy paper is a normative/operational document, influencing all prosecutorial decisions). The underlying reason for complementarity is that national courts are better equipped to deal with international crimes. However, what if there is an increase in universal jurisdiction? Growth in reach of domestic court even without a territorial link, or with the crimes, and jurisdiction is based on the basis of the crime. Such increase appears in line with objectives of Rome Statute, but it is problematic to assume that states exercising universal jurisdiction would be in a better position to prosecute than ICC. The principle of deference to national states should be increased, i.e. while Rome Statute applies complementarity regime, it could be argued that standards referred to should be evaluated in an especially rigorous manner in cases of universal jurisdiction. This seems to be the approach called for by the judges in the guidelines paper.

Another problem is that of so-called reverse complementarity - for example crimes which do not come under the jurisdiction of the ICC, also if cases are declared inadmissible. In the discussion, an emerging trend was mentioned of recent judicial

decisions (especially federal court decisions in Spain and in Germany) and certain government statements and specific legislation, indicating that a sort of ‘subsidiarity’ should be applied with respect to universal jurisdiction, in the sense that the ICC should have priority in trying a case before a State wishing to exercise universal jurisdiction. This has also been referred to as ‘reversed complementarity’, since it amounts to the opposite order of priority between national jurisdictions and the Court. If this trend were to be confirmed, it would add another element to the emerging criteria for the exercise of universal jurisdiction, which seem to require (i) the presence of the accused in the prosecuting State; (ii) that other ‘more interested’ States are not willing to prosecute the case; and now (iii) that the ICC is not taking up the case. According to the guidelines, while the criteria under Rome Statute of course apply, the standards of art 17 and 20 for genuineness of national proceedings should be viewed with an especially rigorous manner where there is no link between crime and state.

Professor Bergsmo also outlined the input of the OTP into the aforementioned paper. The OTP agreed that the deference to universal jurisdiction was warranted by considerations of sovereignty and by practical considerations. However, the OTP doubted whether the particular strictness in applying the criteria of Articles 17 and 20 was a positive sign towards NGO’s and States promoting universal jurisdiction, or to the ‘outside world’ in general. Behind this consideration lies the idea that no limits should be set for national jurisdictions, including for proceedings based on the exercise of universal jurisdiction.

Currently, the Court is faced with 5 situations (although no specific cases), covering 3 different scenarios of triggering mechanisms. Drawing on this, Professor Bergsmo referred to the visit by Ugandan officials to The Hague, and the difficulty of adopting a coherent position within the OTP. In this respect, constructed ambiguity as to the alleged amnesty afforded to those leaders might be viewed as a diplomatic exercise? But should the OTP be engaged in diplomatic terms when it is pursuing the agenda and determining complementarity? Such questions and issues can only be addressed by a judge in the end, as to what is *ultra vires* or not. This might arise from intervention by competent defence counsel, through jurisdictional challenges (for example concerning assurances, amnesty, informal agreements, etc.).

The need to safeguard the quality of decision-making has to be reflected in the procedures, which was the task of the expert group for the setup of the OTP office, concerning the regulations of OTP. The emphasis was placed on formalizing the decision-making process within the OTP, especially on the main discretionary themes. A public hearing was conducted on this theme, but only interim regulations have been adopted so far.

The OTP responded to the judges' reflection paper (it is mentioned in the paper that no judge or chamber is bound by it). On universal jurisdiction, it highlighted that deference to national jurisdiction was warranted for national sovereignty but also for more practical considerations: such an assumption is questioned in case of missing link (where the state has no other link to the crime, i.e. territorial or personal). It is suggested that a stricter approach should be adopted when assessing complementarity issues in such cases. One point made by OTP is that universal jurisdiction should be viewed with particular restraint and care when assessing admissibility- while acknowledging soundness of advice but it might be difficult to convey to the outside world for example for NGOs, since complementarity and universal jurisdiction were supposed to aim at ensuring impunity- so the restraint is to be interpreted as not adversely affecting the exercise of complementarity. So OTP didn't disagree but chose to put it as a possible external concern on the emphasis of rigor when assessing genuineness in complementarity.

Professor Bergsmo said it would be impossible for the OTP to be oblivious of emerging State practice, but at the same time it is important to find out what is behind these decisions and public statements. He asked himself what would happen to the ICC if it would take over all such cases; how it would affect its budget and its functioning. He assumed that the OTP will not adopt a 'pro-active' attitude in this field; it is likely to approach a first upcoming case with prudence. He reiterated that the main actor in the overall system of prosecuting international crimes is the State. Whether it is a justification for convenience or not, the bottom line is that states are the main players, ICC serves as a reminder. As far as the impunity gap is concerned, the ICC will only take few cases, and will not likely be the most primary player in that respect.