

Battle of ideas, delivery of justice

How Justice Rapid Response contributes to the “project of International Criminal Justice”

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Justice Rapid Response (JRR) is an intergovernmental mechanism that is designed to support and complement the international community’s efforts to ensure accountability for the most serious international crimes. It has grown out of the recognition, some ten years ago, that for all the talk of ending impunity for mass atrocities, the tools to come anywhere near this worthy goal were largely insufficient, and this in spite of the many political successes of the “project of international criminal justice.”

JRR was conceived to fill a gap in the delivery of international criminal justice, in particular with regard to effective investigation of mass crimes. After becoming operational in 2009, JRR has seen a constant growth of the demand for its services. However, as the mechanism works in the background and deals with confidential information, it is less well-known than some of the more vocal advocates for the fight against impunity.

This brief article wishes to shed light on two aspects of why and how JRR operates: first, how it seeks to contribute to the realization of the “project of international criminal justice,” and second, why it is interesting as an innovative form of intergovernmental cooperation.

The project of international criminal justice

The project of international criminal justice was launched in the early 1990s, as a direct response to the devastating secession wars of the former Yugoslavia and the Rwandan genocide, which led first to the establishment by the UN Security Council of two ad hoc International Criminal Tribunals (International Criminal Tribunal for the former Yugoslavia, 1993;



International Criminal Tribunal for Rwanda, 1994) and then to a more general quest for a permanent international criminal court. Like many of the new ideas that abounded at the UN after the end of the Cold War, the project of international criminal law was bold, ambitious, and slightly utopian, inspired by the new opportunities for international cooperation that had just been opened. The establishment of the International Criminal Court (ICC), in particular, was part of the developments to which the UN Secretary-General Kofi Annan famously referred in his declaration to the Millennium Summit in 2000 in terms of a conflict between humanity and state sovereignty.¹ The claims that no one, not even sitting heads of state, should be above the law and that the jurisdiction of the future court should be extended to citizens of non-state parties were controversial from the outset. As the negotiations began, they were loaded with hesitations and reservations. The momentum for the fight against impunity was nevertheless growing unexpectedly fast, supported by a strong anti-impunity movement of non-governmental organizations (NGOs) and activists. After less than three years of negotiations, a comprehensive statute for the ICC, containing a number of ground-breaking provisions on the definitions of crimes, irrelevance of official position, only partially restricted jurisdiction and an independent prosecutor, was adopted (Rome Statute of the International Criminal Court, 1998).

The fact that this happened at the price of some big countries, including the United States, deciding to refrain from joining, was criticized at the time by those who thought that with additional time and more spirit of compromise, a widely acceptable text could have been within reach. In hindsight, however, it seems that postponing the negotiations would have considerably diminished the prospects for the project to succeed, given that the tone of world politics soon turned sour with the divisive “war against terror.” The *tour de force* that was required for the adoption of the Rome Statute in 1998 and for reaching the high number of 60 ratifications necessary for its entry into force already in 2002 ensured the viability of the international criminal law project. That the project had survived, however, did not mean that it was well off. Instead of an initial period focused on institution-building and gradual consolidation, the new Court was in for an unprecedented storm. Support to the ICC became a major bone of contention in international relations. The battle of ideas—sovereignty or humanity—continued to dominate the fight against impunity.

In 2002, the new administration of President George W. Bush of the United States carried out a policy review, which resulted in a decidedly antagonistic position to the ICC. The withdrawal of the U.S. signature to the Rome Statute deposited at the end of his predecessor’s term of office was followed by the enactment of legislation hostile to the ICC

that was immediately dubbed “the Hague invasion act” (www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law) because of a provision that allowed for the use of armed force to prevent U.S. nationals from being judged by the Court. (The American Service-Members Protection Act, 2002) Furthermore, a worldwide campaign for bilateral agreements to ensure non-surrender of U.S. citizens to the Court was initiated, bolstered by direct pressure on governments that refused to sign. All this provoked a response from the supporters of the ICC. The European Union, for instance, adopted a common position and a plan of action in support of the ICC and initiated a worldwide campaign promoting further ratifications of the Rome Statute. The environment that the new Court faced in its early years was increasingly politicized and polarized (see Garský, 2014).

As these tensions began to be alleviated, essentially during President Barack Obama’s first term, new political complications were already in sight. This time they were related to the opposition of African states to the decision of the ICC’s Chief Prosecutor to issue an arrest warrant against President Omar al Bashir of Sudan in 2008, and later to the charges that had been raised against the Kenyan leader Uhuru Kenyatta for his involvement, before being elected President of the country, in the domestic unrest which resulted in large-scale killing.² Accusations of the Court’s political anti-African bias have also been presented forcefully, as all eight situations that so far have been brought before the Court are in Africa. It must be mentioned, however, that all but one of them have been referred to the ICC either by the African states themselves or by the UN Security Council. The African Union has moreover raised the question of amending the Rome Statute to the effect that no charges would be brought against heads of state or government during their term of office. (African Union, 2013)

The prevailing feeling, twenty years after the launch of the project of international criminal justice, seems to be one of “a certain *malaise*” even among the staunch supporters of the ICC. Recently, the renowned *Journal of International Criminal Justice* dedicated a whole issue to this subject pointing out that the project of international criminal law seemed to be “under pressure” (Jessberger and Geneuss, 2013, pp. 501 and 503) “the initial enthusiasm has waned and has been replaced by disenchantment,” (Delmas-Marty, 2013, p. 553) “the momentum for international criminal law has disappeared, (Jessberger and Geneuss, 2013, p. 501) “the honeymoon is over” (Luban, 2013, p. 505 as “unrealistic expectations” (Schabas, 2013, p. 547) have given way to more down-to-earth considerations. (Jessberger and Geneuss, 2013, p. 502) For some of the commentators, this was a normal and inevitable state of affairs with regard to a political project that had been able to sustain enthusiasm for such a long time. Others cited more specific reasons such as ambiguities and lacunae of the Rome Stat-

ute, which represents a compromise between humanitarian values and state sovereignty, the excessive caution of the ICC and the slow pace in which the Court has delivered justice, but also financial considerations: the cost and length of the proceedings. Not surprisingly, many of the commentators proposed to pay more attention to positive developments at the national level, with the reminder that the ICC, as an institution of last resort which should step in only when national jurisdictions clearly fail their task, was never meant to bear the sole responsibility for addressing mass crimes. The balance seemed to be shifting in favor of national prosecution of the most serious international crimes, exactly as foreseen in the complementarity principle of the Rome Statute. (Roht-Arriaza, 2013) For many, the devolution of the norms of international criminal justice to the national level, (Luban, 2013, p. 511) or reconciling global and local justice, (Akhavan, 2013, p. 532) would constitute the real measure of success of the “project.” (Orentlicher, 2013, p. 522)

The Rome Statute’s provision of complementarity sets a fairly high threshold for ICC’s international judicial intervention, requiring that the state with jurisdiction is either “unwilling or unable to carry out genuine investigations or prosecutions” and defining inability in terms of “a total or substantial collapse or unavailability of the state’s national judicial system.”³ This formulation would seem to exclude trivial cases of inefficiency—inability in the sense of capacity gaps and deficits in investigative and prosecutorial skill sets—but much depends on how it is interpreted.⁴ In 2010, the ICC adopted an explicit policy on “positive complementarity” seeking to encourage states to exercise their primary responsibility to investigate and prosecute crimes under international law over which they have jurisdiction.⁵ Domestic capacities have also been enhanced in recent years as more than 120 states have ratified the Rome Statute of the ICC, many of them revising the domestic criminal laws to include appropriate criminalization for genocide, war crimes, and crimes against humanity. National proceedings have been conducted both on the basis of universal (extra-territorial) jurisdiction and in countries where such crimes have been committed.

A similar change has taken place within the UN system with transitional justice initiatives⁶ becoming an essential part of different post-conflict peace-building efforts. The policy of using blanket amnesties as a standard feature of peace settlements was renounced soon after the adoption of the Rome Statute, and replaced by new guidelines advising that amnesties should never be endorsed for genocide, war crimes, crimes against humanity, or gross violations of human rights. (*The rule of law and transitional justice in conflict and post-conflict societies*, 2011, para. 12, p. 5). Hybrid Courts with both local and international judges have been estab-

lished with the twin objective of ensuring accountability and promoting national reconciliation. National authorities are encouraged to take action to ensure prosecution and Commissions of Inquiry are used to draw out facts necessary for later accountability mechanisms. The UN Security Council, as well, has included rule of law and transitional justice initiatives in numerous resolutions, thus recognizing that accountability must be established for atrocity crimes in order to prevent countries emerging from conflict from slipping into a new circle of violence. All this can be said to amount to a coordinated effort within the UN system to assist national authorities to implement the ICC's complementarity principle. (*The rule of law and transitional justice in conflict and post-conflict societies*, 2011, para. 32, 10).

At the same time, conflict-affected countries often do not have the capacity to take quick action to ensure accountability for crimes that have been reported. In the words of the UN Secretary-General:

assisting societies devastated by conflict or emerging from repressive rule to re-establish the rule of law and come to terms with large-scale human rights violations, especially within a context marked by broken institutions, exhausted resources, diminished security, and a distressed and divided population, presents a daunting challenge. (Guidance Note of the Secretary General, 2010, p. 3)

Even if the country where atrocities have taken place is willing to exercise its jurisdiction, the combination of a large number of victims, weak state institutions, no experience in dealing with mass atrocities, and no tradition of accountability can be simply overwhelming. "Justice delayed is justice denied," also in the sense that, if evidence is not properly collected before it gets lost or is intentionally destroyed, there is little chance of bringing perpetrators to justice. The fight against impunity has begun to spread out to the national level but a lot of work remains to be done. The picture that the project of international criminal justice presents is still one of a great puzzle with many missing pieces. The aim of this article is to show that JRR provides one such piece.

Justice Rapid Response: The facility

The point of departure for launching the initiative of JRR was the realization that collection of evidence and early investigation are critical moments in establishing accountability for mass atrocity crimes. As the JRR Feasibility Study of 2005 pointed out, there is often only a short political and security window in the aftermath of a violent conflict to gather evi-

dence of the crimes that have been committed. (*Justice Rapid Response Feasibility Study*, 2005) An example of this, a situation where the government and civil society were fully willing to pursue justice and international support was available for the establishment of a hybrid court for that purpose, but efforts to secure essential evidence faced unexpected difficulties, was presented in Sierra Leone after Foday Sankoh's capture in 2000. The relevant problems included lack of technical capacity to process information that was collected as well as lack of knowledge of international crimes and of the type of information that would be useful in establishing whether such crimes had been committed. As the word spread about the imminent establishment of the Special Court, potentially available information was put at risk. (As told by Alison Smith at Chatham House (2007), *Filling One of the Gaps in International Justice: Justice Rapid Response*) The Yugoslavia Tribunal, as well, was at times left with huge amounts of information it had received from NGOs but which it could not use as evidence. (*Filling One of the Gaps in International Justice: Justice Rapid Response*, 2007) Similarly, the Rwanda Tribunal struggled with "the huge numbers of victims, witnesses, incidents, and evidentiary documents involved, as well as the legal complexities of the crimes in question." (Jallow, 2004)

The basic idea of JRR is simple and effective: provide high-quality investigative assistance at short notice and for a limited time when the need for it arises. Unlike traditional mechanisms such as rule of law assistance or capacity-building intended to strengthen the national legal system, no complex and time-consuming procedures are needed. Rapid response is made possible by the creation of a stand-by roster of active-duty criminal justice experts on which JRR can draw. Nor is there need for long-term deployment of these experts as JRR's task is limited to identification, collection, preservation, and standardization of evidence of genocide, war crimes, crimes against humanity, or serious violations of human rights, and does not extend to developing criminal cases. The experts are trained to ensure that all information collected fulfils high standards of criminal investigation and can be used as evidence in court. As the objective was set in the Feasibility Study, with JRR in place, "a wide range of international, hybrid, and national courts, as well as truth commissions, could benefit from higher quality evidence gathered more efficiently and at lower cost, and in forms that permit its use under both domestic as well as international rules of evidence." (*JRR Feasibility Study*, p. 1)

A key element in JRR's innovative concept is that the facility does not have an independent mandate to intervene in any conflict or post-conflict situation. It is a professional service-provider that works together with and at the request of either a state that has appropriate jurisdiction or an international institution that has the proper mandate to initiate inves-

tigation and collection or preservation of evidence in a given situation. This means as well that JRR cannot be engaged in investigating crimes that reportedly have taken place in a country without the consent of that country's government. Such a scenario could only be possible as part of a mission authorized by the UN Security Council under Chapter VII of the UN Charter. Consent is thus a necessary starting point but not a sufficient condition for JRR's engagement. Four additional criteria have been established for reviewing any request for assistance: (a) the investigation is in conformity with international law; (b) the request is free from political motivation that may undermine the investigation; (c) the deployment can be carried out paying particular attention to the safety of the experts as well as to the safety of the victims and witnesses; and (d) the request requires a rapid response. (*JRR Annual Report 2014*, p. 5) In practice, a further condition is that funding for successful completion of the mission must be secured in advance.

Thanks to the fact that JRR's mandate is so clear-cut, the facility has been able to focus on perfecting the services it provides. During the past five years, it has created a stand-by roster of 500 criminal justice experts, all of them deployable at short notice. The professional categories in JRR's expert roster include criminal and human rights investigators, legal advisers and prosecutors, forensic specialists, interpreters, military analysts, witness protection specialists, and related professionals. A further noteworthy characteristic of the JRR roster is its great diversity in terms of cultural, geographical, and language background of the experts. Currently there are experts from 95 countries speaking 75 different languages. More than half of these experts are women, and some 40% come from developing countries. The diverse composition of the roster is a great advantage that no national roster can offer, and strengthens the perception of JRR as a neutral actor. In most situations, experts from the region speaking the language or languages and familiar with the cultural sensitivities of the country can be deployed.

All JRR experts are specifically trained in the conduct of international investigations before they can be certified to the roster. In order to ensure quality, professionals have to be nominated by their government or institution to JRR's training courses and undergo a rigorous selection process. Since 2009, JRR has organized 30 training courses in different parts of the world, both general courses in international investigations and courses on more specific subjects such as forensics or sexual and gender-based violence (SGBV). New training modules are being developed on financial investigations and asset recovery as well as on crimes involving children. (*JRR Annual Report 2014*) The training courses are organized in close cooperation with the Institute for International Criminal Investigation (IICI).

The importance of proper training can hardly be over-emphasized. Apart from the risk that information might be inadequately recorded or lost, lack of knowledge of proper methods and standards of international investigations can lead to causing additional harm to the victims and witnesses. The risk of re-victimization is particularly high with regard to sexual and gender-based violence, which often is underreported due to a social stigma attached to the victims and their families. The immediate and primary objective of training is to feed and to maintain the roster of criminal justice experts. At the same time, specialized training courses organized in different parts of the world do also, if indirectly, contribute to legal sector capacity building in a number of countries as well as, in general, to the establishment of a high standard of professionalism for international investigations.

At the time of the Feasibility Study, it was expected that, apart from states, the ICC would be one of the main recipients of JRR's assistance. The proliferation of transitional justice initiatives in the past ten years has nevertheless changed the picture as the need for investigative expertise is widely spread throughout the UN system. Becoming operational in 2009, JRR has adapted its offer to the new situation. Since then it has participated in 50 different missions, most of which have been UN-led: UN Commissions of Inquiry, UN fact-finding missions, and UN peace-building missions. JRR has also assisted the European Union, the Extraordinary African Chambers in Dakar, and it has cooperated with the ICC and the two International Criminal Tribunals, as well as assisted in national accountability processes. In fact, every UN Commission of Inquiry since 2009 has made use of JRR. The country situations in which JRR experts have been deployed include: Colombia, Guatemala, and Haiti in Latin America; Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Eritrea, Guinea, Mali, Senegal, and South Sudan in Africa; Gaza, Iraq, and Syria in the Middle East; and Cambodia, the Democratic Republic of North Korea, and Kyrgyzstan in Asia.

In 2011, the UN Secretary-General requested UN Women (UNW) to ensure that each Commission of Inquiry be provided with expertise on investigations of sexual and gender-based violence (SGBV). In order to fulfill this call, UN Women concluded a Memorandum of Understanding with JRR on the creation of a special SGBV Justice Experts Roster within the broader JRR roster. The purpose of the UNW-JRR special roster is to provide expertise on the investigation of sexual and gender-based violence as international crimes in a timely manner. To date, some 120 experts have been certified to the special SGBV roster. Training courses specialized in SGBV according to the training module developed in cooperation with the IICI have been held in The Hague, in Pretoria, Doha, and in Bogota.

Further courses are scheduled for this year to meet the growing demand of experts, in particular to help respond to and investigate sexual crimes in ISIL-affected areas in Iraq and Syria.⁷

In the past few years, JRR has grown into a trusted partner for a number of UN bodies and agencies and other international institutions. As a result of this, the numbers of requests for JRR's assistance, missions it has assisted, and experts it has deployed have grown exponentially. In 2014, for instance, JRR had a 75% annual increase in the number of investigations which it assisted. At the same time, there were more than four times as many investigations in 2014 as in 2012. (*JRR Annual Report 2014*) So far, JRR's success has depended on effective cooperation and creation of partnerships with different UN bodies and organs as well as other international actors in the area of international criminal justice and human rights. With the launch of the new Complementarity Programme, JRR has nevertheless opened a new avenue adding its expertise to the efforts to implement the Rome Statute's complementarity principle, offering direct assistance, mentoring and modeling to national authorities in states willing to investigate conflict-related crimes. (*JRR Complementarity Programme*)

Justice Rapid Response: The forum

JRR is an inter-governmental initiative, not a NGO. It is nevertheless useful to distinguish the facility—the activities of training, roster management and deployment—that are taken care of by the Geneva-based secretariat, with representations in New York and in the Hague, from the broader inter-governmental forum that comprises by now almost 80 states and 20 institutions and organizations. The choice of the word “forum” indicates that the broader JRR is not an international organization but a loose association that allows for differential participation. States may participate in JRR's activities by nominating experts for training and deployment, receiving JRR's expert assistance, providing funds or in-kind contributions or otherwise promoting JRR's objectives. (*JRR, Organizational Structure and Principles for Participation, 2014*) States that accept JRR's mandate and share its objectives are part of the Intergovernmental Forum for JRR provided that they appoint a focal point of contact. (*JRR, Organizational Structure and Principles for Participation, 2014*) The forum shall meet at least once a year for the presentation of the annual report, open also to interested states. Special meetings can be organized from time to time. The work of the facility, for its part, is carried out by the Secretariat which has a legal identity as a non-profit international association under Swiss law, JRR Association. Another entity, JRR USA, has been established as a corporation under US

law to enable JRR to have a legal presence in the United States. Both entities work under the oversight of the JRR Executive Board.

The fact that JRR is not a treaty-based organization imposing binding obligations on its members has brought clear advantages. First, there was no need to set in stone the traits of the initiative before knowing whether it would take off. Second, the founding states were able to launch the initiative without having to wait for necessary ratifications. Later on, the lack of ratification requirements has served the objective of securing widest possible participation in JRR. Furthermore, the light-weight structure and the absence of time-consuming decision-making procedures provide flexibility and enable agility in face of changing situations. The Executive Board of JRR is composed of representatives of states. The current EB members are Argentina, Canada, Colombia, Finland (the Chair), the Netherlands, the Republic of Korea, Sierra Leone, Sweden, Switzerland (the Vice-Chair), and Uganda. The Executive Board exercises oversight and gives general guidance and strategic direction to the secretariat but is not involved in the day-to-day business of the facility. Quite importantly, this means that eventual political interests or agendas of the Board members cannot affect decisions to deploy experts to a particular situation. Likewise, all detailed information related to deployments is confidential and not available even to the members of the Board.

The activities of JRR support and complement the work of bigger and more institutionalized actors in international criminal justice and human rights fields. As the organization of JRR is light and flexible, it is also cost-effective. JRR has therefore been able to rely on voluntary contributions from states and from institutions. So far, most of the funding has come from public sources but the aim is to diversify the funding base to include philanthropic and grant-making organizations.

Concluding remarks

The project of international criminal justice may have faced crises every now and then, but it is alive and has gained important strongholds. National and hybrid courts can rely on a clear legal framework for the prosecution of the most serious international crimes, thanks to the steady accumulation of international jurisprudence and the major codification effort in the form of the ICC Statute. In the second wave of the fight against impunity, the relevant norms are being incorporated into national legislation and implemented at the national level.

Much like another project that was born under the sign of a conflict between humanity and state sovereignty, the responsibility to pro-

tect, international criminal justice has found a new emphasis on national ownership, empowerment and capacity-building. The complementarity principle that was introduced to the ICC Statute as a necessary concession to accommodate concerns about state sovereignty has become “one of the most important achievements of the ICC.” (Luban, 2013, p. 511) From a groundbreaking idea, the fight against impunity has grown into a vast policy agenda.

The ICC is by definition a high-profile institution that will stay in the forefront of defending the achievements of the “project.” It would nevertheless be a mistake to relegate the battle of ideas to the ICC level alone, presuming that the prosecution of genocide, war crimes, or crimes against humanity at the national level or in hybrid courts would be free from controversies. The much-criticized trials of the Khmer Rouge at the UN-Extraordinary Chambers in the Courts of Cambodia, (see Klein, 2006) the contention of where to prosecute the son of the former Libyan dictator Muammar Gaddafi (see Megret and Giles Samson, 2013) as well as recent amnesties in a number of countries (See, Roht-Arriaza) are just a few examples of situations that have generated wide principled debate.

Breaking impunity is a long and tedious process, in which actual prosecutions play an important role. Ultimately, the objective must be that the prosecution of mass atrocity crimes ceases to be a single exception and becomes part of the normal course of events. As a practical tool to improve the delivery of international criminal justice, JRR gives one essential contribution toward this goal.

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NOTES

1. “We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.” *We the Peoples: the role of the United Nations in the twenty-first century*’ Report of the Secretary-General U.N.Doc A/54/2000, 27 March 2000, para. 218.
2. Charges against Kenyatta were dropped in December 2014, see <http://www.icc-cpi.int/situations> (accessed on 23 February 2015). The Prosecutor then indicated that she might see it necessary to discontinue the Darfur case as

- well in face of non-cooperation by the essential stakeholders including the UN Security Council. See <http://www.un.org/apps/news> (accessed 23 February 2015).
3. Rome Statute, Art. 17 para. 3: "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."
 4. Schabas (2012), p. 196 sees a danger that article 17 "will become a tool for overly harsh assessments of the judicial machinery in developing countries."
 5. The concept of positive complementarity was embraced in the ICC's Kampala Review Conference in 2010.
 6. Transitional justice is an approach to achieving justice in times of transition from conflict and/or state repression. It refers to a set of judicial and non-judicial methods: criminal prosecutions, truth commissions, reparation programs, and various kinds of institutional reforms. See <http://www.ictj.org/about/transitional-justice> (accessed 23 February 2015).
 7. ISIL ('Islamic State in Syria and the Levant') is held responsible for indiscriminate killings and human rights abuses including systematic sexual and gender-based violence in Iraq and Syria.

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