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Hello, my name is Olympia Bekou and I am Professor of Public International Law at the University of Nottingham in the UK.

I have chosen to focus on one of the shorter provisions in the Rome Statute, which, despite its potential for influencing the effective functioning of the ICC regime, has not been the subject of much academic scrutiny to date. This provision is Article 88.

The Rome Statute contains a limited number of positive obligations directed at States Parties. Most of such obligations can be found in Part 9 of the Statute, which covers issues pertaining to co-operation with the Court. Article 88 on 'Availability of procedures under national law' reads: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

Therefore, by virtue of Article 88, States undertake to make sure that procedures are available in their national laws enabling them to comply with the Court's co-operation regime. Article 88 encapsulates the obligation a State has to legislate in order to enable its national legal system to respond to ICC requests for effective co-operation. There is no equivalent provision on the implementation of substantive law provisions found in the Statute, which, in my view, leaves a considerable gap.

Let us now consider what Article 88 covers. The drafting history of this provision is not particularly remarkable. As with many other provisions in the Statute, during the negotiations at Rome, a compromise was reached between those who felt that ICC-State co-operation should be governed by procedures found in the Statute, and those who opposed this on the grounds of State sovereignty. The Rome Statute does not dictate a common international procedure to be followed by States, when executing an ICC co-operation request. The manner of execution rests with the State, which, under the general obligation to co-operate with the Court, found in Article 86 of the Statute, undertakes to do so in accordance with procedures found in its national law. In fact, a number of provisions in the co-operation part of the ICC Statute make reference to national law. See for instance, Articles 89(1), 91(4), 93(1), 96(3) and Article 99(1) of the Statute.

However, the existence of Article 88 means that a State cannot use the absence of national procedures as an excuse for non-cooperation. This provision therefore aims to rectify a particular problem that had arisen in the early practice of the ICTY in particular, where States

used the absence of relevant national legislation to avoid co-operation. This is what the drafters wanted to avoid through the inclusion of Article 88.

Furthermore, Article 88 provides the authority a State needs to incorporate the Statute nationally; or at least the co-operation part of the Statute. There are certain provisions in the Rome Statute that we cannot expect to find in national legislation. These sorts of provisions need to be introduced for the purposes of complying with the Statute. What I am thinking of here is for instance the provision on competing requests (in Article 90 of the Statute). In that, priority is given to requests coming from the Court when certain conditions are met; or, the rules applicable to the contents of an ICC request (articles 91 and 96 of the Statute) which would not be found at the national level prior to implementing the ICC Statute.

Article 88 therefore serves as a gateway to all those provisions that need to be incorporated. Other such examples that may be alien to a number of States, would include the obligation to surrender a State's own nationals for instance. This is not common in some legal systems, which preclude the extradition of own nationals. Equally, the limited grounds on which a State can refuse to execute an ICC co-operation request (I am referring to here to the protection of national security and a conflict with a pre-existing fundamental legal principle of general application both of which are found in the Rome Statute). Article 88 therefore provides the basis on which a State may proceed with the necessary amendments of existing laws or with enacting new provisions, where necessary.

Is there an obligation to legislate elsewhere in international law or in the Rome Statute? Having examined the scope of Article 88, the next step will be to investigate whether an obligation to adopt legislation exists elsewhere in the Statute. While the Statute in its Preamble (in the 4th and 6th preambular paragraphs) acknowledges the "duty of every State" to investigate and prosecute international crimes, the body of the Statute does not contain a binding obligation in that respect. In general treaty law, the preamble may be used for the purposes of interpretation of a treaty, but no legal obligation arises therefrom. An examination of the existence or not of such an obligation in international treaty or customary law is therefore necessary.

A number of provisions in international treaty law oblige State parties to enact legislation for those who commit or order war crimes. Article 49 of the I Geneva Convention, Article 50 of the II Geneva Convention, Article 129 of the III Geneva Convention and Article 146 of the IV Geneva Convention, require the adoption of penal legislation to cover the crimes of committing or ordering wilful killing, torture or inhumane treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property against one of the protected groups (civilians, wounded, sick, shipwrecked members of the armed forces and prisoners of war). Additional Protocol I to the Four Geneva Conventions also provides for such an obligation in its Article 86. In addition, Article 5 of the Genocide Convention stipulates that States parties "undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts" of genocide. That the violation of the obligation to prosecute and punish may entail State responsibility, has also been established, whereas the obligation to legislate has been characterised as being part of customary law.

Whilst certain provisions of the Geneva Conventions as well as the Genocide Convention may well have achieved the status of customary law, one may cast some doubt as to whether the obligation to legislate is indeed customary. Even if this were the case, the examples I have just mentioned would not cover all of the crimes found in the ICC Statute; for crimes against humanity in particular, a legislative gap would remain.

Several other arguments have been put forward in support of the view that the implementation of the substantive law part of the Statute constitutes an obligation for States parties.

Some argue that that the "overwhelming practice of States parties to the Rome Statute to implement the substantive law clearly establishes [...] an agreement, understood as a common understanding about the meaning of the treaty as requiring them to do so" in accordance with the rules of interpretation of international treaties found in Article 31(3)(b) of the Vienna Convention. This position, albeit certainly appealing, is in my view, flawed. In order to accept that subsequent State practice constitutes a good indication of the States Parties' understanding of the meaning of the treaty, the practice needs to be consistent and adopted by all such Parties to the treaty. Although this does not mean that all States Parties need to be engaged in such practice, it is hard to see what would qualify as tacit acceptance of the additional positive obligation of the State to legislate in the field of substantive criminal law; except to, in fact, enact relevant legislation.

In addition, in order for the subsequent practice to be classed as reliable source of treaty interpretation, there should not exist a clear difference of opinion between States Parties. Whilst it cannot be said that the States which have included the provisions on substantive law in their implementing legislations have done so because they perceive this to be an obligation, some States Parties clearly stipulated that they do not consider this to be a legally binding duty, whereas others have only adopted legislation covering solely the cooperation regime. This highlights the difference in opinion and militates against a finding that the subsequent practice of States parties would be a good reference point regarding an obligation to legislate.

Another argument in support of the position that the Rome Statute ought to be interpreted as if containing a positive obligation to implement the substantive part of the Statute is an interpretation in light of its object and purpose.

Whilst it is true that the ultimate purpose of the ICC Statute is the "ending of the practice of impunity", the text of the Statute is not concerned with how this overarching goal will be achieved nationally, and deals solely with the international dimension of the prosecution of international crimes. With the exception of complementarity, all other references to national procedures in the Statute are aimed at facilitating co-operation with the ICC at the international level. States Parties therefore have absolute discretion as to how they deal with national prosecutions, if indeed they decide to prosecute. An argument based on the object and purpose of the Statute to support national implementation of the crimes would therefore not be very helpful.

In addition, academic opinion is sufficiently uniform behind the fact that there is no clear obligation in the Statute as it stands to introduce the substantive provisions of the Statute into the national legal systems. One academic rightly observes "that one cannot impose any duty upon States unless it has been explicitly laid down and agreed upon by them. A mere reference in the Preamble would not suffice to derive any legally binding duty". Moreover, others point out that "State Parties are not strictly obliged to change their domestic laws to ensure parity with the statute in all aspects of domestic criminal law and procedure in order to avail themselves of the complementarity regime". Whereas yet another notes that "the Statute contains no specific obligation on States to implement the Statute's provisions per se". States will, nevertheless, still have to check whether their own legal systems are sufficiently well equipped to meet the standards set by the Statute, and indeed whether they will need to adapt their existing laws or adopt new ones. Even those who consider implementation to be driven by the threat of the ICC exercising its jurisdiction, do not recognise an obligation to enact legislation in the Statute.

The question therefore remains: To legislate or not to legislate? Despite the absence of an explicit legal obligation, a number of States have incorporated the crimes into their domestic legal systems. A quick look through the National Implementing Legislation Database, which I have curated for over a decade and which forms part of the ICC's Legal Tools Project, reveals

that of those States that have specifically enacted legislation, most have incorporated the crimes. This may be attributed to a number of reasons, including convenience, good international citizenship or the very catalytic effect of complementarity.

Convenience lies in the use of a single legislative process to incorporate all relevant Statute provisions. As States are required, under the Statute, to provide for national procedures with regard to the cooperation regime, a single legislative process to review or adopt all ICC-related legislation is both cost and time efficient. Moreover, States wishing to demonstrate that they take an active part in the fight against impunity were quick to adopt crimes legislation as part of their wider international role, coupled with the realisation that the ICC due to limited finances can only prosecute a handful of cases. As a result, the bulk of the work remains at the national level.

But none of the above reasons is as strong an incentive as complementarity. Complementarity is the result of a delicate balance between the quest for ICC supremacy and State sovereignty. Much has been written on the principle and its ramifications. Complementarity was adopted with the view to safeguarding State sovereignty, but it can be seen as an equitable tool of allocating jurisdiction between the Court and States.

Against this backdrop, complementarity represents an opportunity for States to enact legislation on the crimes and associated provisions, even if this is purely to avoid the ICC's jurisdiction.

As the ICC may take over from national jurisdiction only if it is established that a State with jurisdiction over the crimes is unwilling or unable genuinely to investigate and prosecute those crimes (see Article 17 of the Statute), it is necessary to examine whether the absence of a satisfactory national legal framework would *prima facie* indicate the unavailability of the State to deal with the crimes under the Statute.

The key to effective national exercise of jurisdiction is found in the genuineness of the proceedings. Given that the Statute does not prescribe a particular approach to be adopted nationally, the form the legislation may take is left to the State in question. It is a common practice, for instance, to prosecute core crimes as ordinary crimes at the national level (for example, as murder, rape etc.). Many States have endorsed this approach. The famous trial of Lt. Calley for the My Lai massacre in Vietnam, was classed as a premeditated murder and assault with intent to murder, whereas the Abu Ghraib cases included charges of indecent acts, dereliction of duties, maltreatment and assault. Prosecuting the case as an ordinary crime does not render the State unwilling or unable automatically. It is the quality of the process that matters. The ICC itself has dealt with these issues in its jurisprudence arising out of the situation in Libya for example.

This does not mean, however, that common criminal law provisions will always be suitable for the prosecution of certain conducts criminalised by the Rome Statute. For example, it is questionable whether all forms of persecution as a crime against humanity would be covered by ordinary criminal law provisions. The same holds true with some of the war crimes, such as the crime of improper use of the flag of truce, transfer of the own civilian population on the occupied territory, denial of quarter etc. In addition, not all of the modes of individual criminal responsibility, such as command responsibility or joint criminal enterprise can be found in national legal orders. Defences should also be reviewed as part of this process. In the above cases, it may be impossible for a State to prosecute and the admissibility criteria found in the Statute could be satisfied, leading to a trial before the ICC.

Treating core crimes as ordinary crimes will not always be appropriate. The acknowledgement of the gravity of the crimes is an important part of the judicial process involving core crimes with this element having been incorporated also into the Statute. At the national level,

this element is equally important. International crimes carry an additional stigma which distinguishes them from ordinary crimes. Ordinary crimes usually ignore the seriousness of the violations of international law. As such, the gravity of the crimes should be observed, through the enactment of national legislation.

An added reason in favour of enacting legislation to include substantive law is a shift in the policy on complementarity. With the emphasis on positive complementarity, implementing legislation takes centre stage.

For positive complementarity to work, it is not enough to rely on the OTP to steer national processes towards more investigations and prosecutions. Although the Prosecutor's power of leverage and persuasion will undoubtedly influence national activity, such encouragement runs the risk of becoming a paper exercise if there is no clear national legislative framework in place which will enable States to exercise criminal jurisdiction.

If the emphasis on positive complementarity were to succeed, a more systematic approach towards empowering national legal orders is needed. Introducing an obligation to enact legislation for instance, would considerably reduce State claims that prosecutions are impossible due to the absence of national legislation. Such an approach would encourage not only closer but also more meaningful interaction between the national and international levels. The result of this would be allocation of ICC resources to those cases only that bear the greatest gravity together with greater involvement of national courts. The enactment of legislation as a means of materialising positive complementarity is therefore more pressing than ever.

With a number of the situations currently before the ICC originating from self-referrals, that is, States referring the situation in their own countries, poses more questions on complementarity. The possibility of a State refraining from prosecutions altogether, allowing the ICC to take over, had not been envisaged when the Statute was drafted. An obligation to provide for legislation for core crimes would not alleviate this position. Although it is hard to say that the absence of such an obligation encourages the so-called "inaction scenario", it is hoped that some States in certain circumstances may be less inclined to abstain from any activity, if legislation were to be in place.

I guess my discussion above confirms that the Rome system of justice, which has the ICC at its centre, would be strengthened if there were an obligation in the Statute to incorporate substantive law to complement the existing obligation to enact legislation for co-operation, currently found in Article 88 of the Statute.

To conclude: *De lege ferenda* – it might be worth considering in a future amendment of the Statute, to include an obligation for a State to enact legislation also for the substantive law provisions. Whether expanding Article 88 is the right home for such an amendment or introducing a new provision to that respect, will need to be discussed further.

However, the issue that remains be more pressing is that of the content of legislation. Having legislation that not only fully serves a State's co-operation obligations under the Rome Statute but also enables it to effectively investigate and prosecute, is key to the success of the international criminal justice system comprised of the Court and States operating alongside each other to fight impunity.

Of the current membership of the Court, just over half of the States Parties to the Statute have implemented it at the national level. Striving for universality of implementation is important, if the Court is to succeed in its functions. And Article 88 plays its part in it.

Thank you!