

Complementarity After Kampala: Capacity Building and the ICC's Legal Tools

Morten Bergsmo^{*}, Olympia Bekou^{**} & Annika Jones^{***}

Table of Contents

Abstract	809
A. Background to the Principle of Complementarity	794
B. Developments Relating to Complementarity During the Stocktaking Exercise	797
I. The Background to the Review Conference	797
II. Stocktaking in Kampala	799
III. The Outcome of the Stocktaking Exercise	803
C. The ICC's Legal Tools	804
D. The Legal Tools and Positive Complementarity	806
I. Access to legal Information Relating to Serious International Crimes	806

* Morten Bergsmo is Senior Researcher at the University of Oslo, Faculty of Law, Visiting Fellow at Stanford University, Visiting Professor, Georgetown University and Coordinator of the ICC Legal Tools Project; he formerly served as Senior Legal Adviser and Chief of the Legal Advisory Section of the ICC Office of the Prosecutor.

** Olympia Bekou is Associate Professor in Law and Head of the International Criminal Justice Unit, Human Rights Law Centre ('HRLC'), University of Nottingham.

*** Annika Jones is a Ph. D. Candidate at the University of Nottingham and Senior Research Fellow of the Legal Tools Outsourcing Partners' Network.

II. Facilitating Transfer of Legal Knowledge and Expertise	808
III. Provision of Legal Skills in the Field of Criminal Justice for Atrocities.....	809
E. Conclusion	811

Abstract

Twelve years after the creation of the first permanent International Criminal Court and eight years since the entry into force of its Statute, the first ever Review Conference took place in Kampala, Uganda. Besides successfully introducing aggression as one of the crimes under the Court's jurisdiction and expanding the coverage for war crimes, the Review Conference provided a timely opportunity to reflect on some of the key aspects of the Court's regime. An integral part of the Review Conference was the "stocktaking exercise". The exercise provided a platform for the participants at the Review Conference to reflect on the successes and the failings of the ICC following the first few years of its operation and to consider measures that could be taken to enhance and strengthen the Court's functions in the years to come. The stocktaking exercise focused on four themes: complementarity, cooperation, victims and affected communities and peace and justice. These themes represent major aspects of the ICC's operation which will continue to warrant consideration as the Court matures as an institution. The theme of complementarity is of particular importance because of its uniqueness to the ICC. The ICC's complementarity regime places a primary obligation on States to investigate and prosecute international crimes. It does so by limiting the jurisdiction of the ICC to situations where States are shown to be unwilling or unable genuinely to investigate and prosecute, in respect of cases of sufficient gravity to justify action by the Court. The principle of complementarity was an innovation, specifically tailored for the ICC. The Review Conference therefore provided an important opportunity to reflect on the effectiveness of the principle and steps that could be taken to strengthen it. This piece will consider the tenor of the debate concerning complementarity during the Review Conference and the emphasis that was placed on strengthening national capacity for the investigation and prosecution of core international crimes. In particular, it will highlight a significant shift in the use of the term "positive complementarity". The term, which had originally been used to refer to the ICC's role in the construction of national capacity, was used throughout the Review Conference to refer to the involvement of States, international organisations and civil society in strengthening justice at the national level. It will also draw attention to the efforts that were made during the Conference to identify means to put positive complementarity into practice with the hope of overcoming some of the problems that States had faced in the investigation and prosecution of serious international crimes within their national systems. The article will go on to discuss the relevance of the ICC

Legal Tools Project, a unique collection of legal databases, digests and applications designed to facilitate the application of international criminal law, to the discussions that took place in Kampala. It will be concluded that the ICC's Legal Tools provide an important means of supporting the principle of complementarity, positive or otherwise.

A. Background to the Principle of Complementarity

Before turning to the discussions that took place in Kampala with respect to complementarity, it is worth considering the original understanding of the principle incorporated into the Rome Statute. During its inception and the early years of the Court's operation, the principle of complementarity has been subjected to much academic scrutiny, both in terms of its constituting elements and the potential ramifications of its use.¹

Complementarity strikes a delicate balance between the competing interests of State sovereignty and judicial independence.² The balance

¹ See, *inter alia*, J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (2002), 41, 45; M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity', (2003) 7 *Max Planck United Nations Yearbook* 591, 599; J. K. Kleffner & G. Kor (eds), *Complementary Views on Complementarity* (2006); M. M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law* (2002), 869; I. Tallgren, 'Completing the International Criminal Order: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court', 67 *Nordic Journal of International Law* (1998) 2, 107; B. Perrin, 'Making Sense of Complementarity: The Relationship Between The International Criminal Court and National Jurisdictions', 18 *Sri Lanka Journal of International Law* (2006) 2, 301.

² See M. Bachrach, 'The Rome Statute Explained', 12 *International Law Practicum* (1999) 1, 37, 40; see also J. Pejic, 'Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness', 29 *Columbia Human Rights Law Review* (1998) 2, 291, 309-311. Arguably, the protection the ICC provides will compensate for the relinquishment of whatever sovereign rights. On this particular issue see R. Bhattacharyya, 'Establishing a Rule-of Law International Criminal Justice System', 31 *Texas International Law Journal* (1996), 57, 75; see also R. A. Brand, 'External Sovereignty and International Law', 18 *Fordham International Law Journal* (1995) 4, 1685, 1696-1697.

between these two interests was crucial to the materialisation of the Court.³ In order to secure the agreement of States it was necessary to offer national institutions the primary responsibility over the investigation and prosecution of international crimes. At its inception, therefore, complementarity was envisaged primarily as a means of determining the forum that would assume jurisdiction over a particular case. The Statute recognises that whereas some States have well-functioning judiciaries, others do not.⁴ Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where States are unable or unwilling genuinely to investigate and prosecute without replacing judicial systems that function properly.⁵

When complementarity was first introduced into the Rome Statute, State Parties could not have foreseen its full practical implications or its potential to assist the Court in reaching its goal of ending impunity for core international crimes.⁶ Since the principle of complementarity allows the Court jurisdiction only where national institutions are unable or unwilling to exercise jurisdiction, States may feel 'forced' to investigate or prosecute cases involving core international crimes so as to avoid any intrusion by the ICC into situations involving their nationals or their territory. The real or perceived threat of ICC action, encapsulated in the application of complementarity, serves a useful purpose in practice and came to be recognised as complementarity's "catalytic effect".⁷

Effective national prosecutions have been an issue since the early function of the ICC. In 2003, the Court's Prosecutor, upon taking his position, suggested that the lack of cases prosecuted by his Office would be

³ B. B. Ferencz, 'International Criminal Courts: The Legacy of Nuremberg', 10 *Pace International Law Review* (1998) 1, 203, 227.

⁴ J. L. Dunoff, & J. P. Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict', 93 *American Journal of International Law* (1999) 2, 394, 405.

⁵ J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *American Journal of International Law* (1995) 2, 404, 413; see also 'Establishing an International Criminal Court; Major Unresolved Issues in the Draft Statute', 1 *International Criminal Court Briefing Series* (1998) 1, available at <http://www.iccnw.org/documents/LCHRUnresolvedIssues.pdf> (last visited 27 August 2010); Bassiouni puts it, "complementarity requires deferral to capable national systems", M. C. Bassiouni *et al.*, 'Conference Convocation', 13 *American University International Law Review* (1998) 6, 1383, 1396.

⁶ The goal of contributing to the fight against impunity for international crimes is recognized in the Preamble to the Rome Statute, para. 5.

⁷ See generally, J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 309-339.

its major success, if this is to be a consequence of effective national prosecutions.⁸ In its 2006 Policy Paper,⁹ the Office of the Prosecutor (OTP) further elaborated on this issue, by introducing what has since become known as ‘a positive approach to complementarity’¹⁰:

With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.¹¹

For positive complementarity to work, it is not enough to rely on the OTP to steer national processes towards more investigations and prosecutions. Although such encouragement is influential,¹² it runs the risk of becoming a paper exercise if there is no strong national framework in place enabling States to exercise criminal jurisdiction. It was clear, even prior to shaping the agenda for the Review Conference, that if positive complementarity was to succeed, a more systematic approach towards empowering national legal orders was needed.

⁸ *Statement made by the Luis Moreno-Ocampo, Chief Prosecutor, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, The Hague.*

⁹ ICC-Office of the Prosecutor, *Report on Prosecutorial Strategy* (2006).

¹⁰ For the general discussion on positive complementarity approach see: W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008), 53; W. W. Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’, 19 *Criminal Law Forum* (2008) 1, 59.

¹¹ *Supra* note 9, 5.

¹² W. W. Burke-White, *supra* note 11, 71.

B. Developments Relating to Complementarity During the Stocktaking Exercise

Throughout the lead up to the Review Conference and the stocktaking exercise, the importance of the principle of complementarity was re-affirmed. However, the main emphasis was on the construction of national capacity. The difficulties that States had faced in fulfilling their role under the ICC's complementarity regime gave new impetus to the pursuit of positive complementarity. The next sections will highlight how the term "positive complementarity" which began as a prosecutorial policy came to be recognized by State Parties as a vital means of strengthening the ICC's regime.

I. The Background to the Review Conference

The foundations for the Review Conference discussion on complementarity can be found in the 8th Session of the Assembly of States Parties to the Rome Statute (ASP) in November 2009.¹³ The States Parties to the Rome Statute approved complementarity as one of the four themes for consideration as part of the stocktaking exercise.¹⁴ In the following months, the Bureau of the ASP became actively involved in shaping the format and content of the negotiations that were due to take place in Kampala. A Resumed 8th Session of the ASP was held in New York in March 2010, during which the Bureau presented a report entitled "*Taking stock of the principle of complementarity: bridging the impunity gap*", which was appended to the Resolution on the Review Conference.¹⁵ The paper emphasized the integral nature of the principle of complementarity to the functioning of the ICC's system of justice and the long term efficacy of the

¹³ See, *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC-ASP/8/Res.3, adopted at the 8th plenary meeting, on 26 November 2009, by consensus. Paragraph 6 of the resolution reads: "Encourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by States Parties introduced as 'positive complementarity'", available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf (last visited 27 August 2010). See also a discussion paper submitted by Denmark and South Africa at the 8th ASP, entitled: 'Bridging the Impunity Gap through Positive Complementarity', 6 November 2009.

¹⁴ *Id.*, *supra* note 3, Annex IV, "Topics for stocktaking".

¹⁵ *Review Conference*, Resolution ICC-ASP/8/Res.9, adopted at the 10th plenary meeting, on 25 March 2010, by consensus, Appendix.

Court.¹⁶ However, the clear emphasis of the paper was positive complementarity.

In the paper, “positive complementarity” was defined as

“all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis”.¹⁷

The paper discussed various issues relating to the notion. Firstly, it identified three categories of support; namely, legislative assistance, technical assistance and capacity building.¹⁸ Secondly, it discussed different “scenarios” in which assistance could be provided; before, during and after situations arise, where the Court is investigating and prosecuting and where it is not.¹⁹ Thirdly, and most significantly, the paper considered the actors involved in positive complementarity.²⁰ It highlighted the limited role that the ICC should play in positive complementarity, as a result of its judicial mandate and limited budget which should remain directed at the Court’s primary function in investigating and prosecuting the crimes under its jurisdiction.²¹ The paper clearly stated that the “Court is not a development agency”.²² Instead, the focus was shifted to States and civil society and the ways in which they could encourage and assist national institutions to fulfil their role under the Rome Statute. The report included as an aim for the stocktaking exercise the identification of ways in which State Parties, assisted by civil society, and in dialogue with the Court, may “even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions”.²³

¹⁶ *Id.*, para. 4.

¹⁷ *Id.*, para. 16.

¹⁸ *Id.*, para. 17.

¹⁹ *Id.*, paras 19-26.

²⁰ *Id.*, paras 27-45.

²¹ *Id.*, para. 4.

²² *Id.*, para. 4.

²³ *Id.*, para. 51.

Denmark and South Africa, the two States which had been identified as focal points for the stocktaking on complementarity, also compiled a paper ahead of the Review Conference.²⁴ The paper, entitled “*Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*”, outlined a number of examples of projects which had already been established and developed to enhance the capacity and willingness of States to fulfil their role in the ICC’s complementarity regime.

The report of the Bureau made positive complementarity a central aspect of the stocktaking exercise. Not only did the preparations for Kampala reflect a new emphasis on positive complementarity, they also seem to represent a change in the use of the term. Whereas the term “positive complementarity” had previously been used by the OTP to refer to the involvement of the Court in the construction of national capacity,²⁵ the focus of the report of the Bureau had shifted to the involvement of States and civil society in capacity building activities. Although the paper in itself had no legally binding effect, its structure and content influenced the debate that took place in Kampala and the resolution that was adopted with respect to complementarity at the end of the Review Conference.

II. Stocktaking in Kampala

The formal stocktaking exercise on complementarity took place on the fourth day of the Review Conference.²⁶ The exercise was organised by Denmark and South Africa, the focal points for complementarity, who had played an integral role in the preparations for the stocktaking exercise. In addition to the formal stocktaking exercise, several informal side events were organised throughout the Review Conference to allow States Parties, civil society and other delegates to engage in further discussion both prior to and following the time allocated on the official agenda.²⁷

²⁴ RC/ST/CM/INF.2 *Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*, 30 May 2010.

²⁵ *Supra* section 1.

²⁶ The plenary took place on Thursday 3 June 2010. Held in a panel format, with contributions from the floor; the plenary of the stocktaking on complementarity largely reflected the content of the discussion paper prepared by the Bureau.

²⁷ See for instance an informal event on complementarity, organized by the Coalition for the International Criminal Court (CICC) in advance of the plenary session, held on 1 June 2010. A further panel discussion on complementarity was hosted by South Africa and the Denmark, the focal points for complementarity on 2 June 2010. In addition, a

The template that had been outlined by the Bureau of the ASP provided a framework for the formal stocktaking event. It listed, as a tentative programme of work, the elaboration of the principle of complementarity, the practical application of complementarity and the Rome Statute system, positive complementarity, what it is and why it is necessary, and practical implementation of positive complementarity, or the enabling of national jurisdictions.²⁸ These themes were also discussed in the informal meetings that took place outside of the plenary.

At the plenary, States and panellists highlighted the centrality of the principle of complementarity to the ICC's regime and the importance of States fulfilling their role under the Rome Statute by investigating and prosecuting crimes committed on their territory or by their nationals.²⁹ Specific attention was drawn on the significance of the principle of complementarity in bringing justice closer to victims and affected communities. The visibility of justice has been thought to play a central role in increasing its legitimacy in the affected community and therefore the restorative impact of the trial process.³⁰ The investigation and prosecution of serious international crimes by national courts may allow more victims and members of the local community to attend hearings and facilitate communication of the occurrence and significance of the proceedings to local populations. The ability to participate in proceedings, which is more likely when justice takes place closer to the affected population, has also been thought to increase the cathartic effect of criminal trials amongst the victim population.³¹ Furthermore, the investigation and prosecution of international crimes in national institutions increases the likelihood that local personnel will play an integral role in the proceedings. The involvement of local personnel may result in more effective communication of the purpose and value of the trial process than that which could be achieved by staff who are unfamiliar with local languages and cultural practices.³² The practical advantages of national justice were also

side event was hosted by the Democratic Republic of the Congo, the United States and Norway on "*The DRC and Positive Complementarity*", also on 2 June 2010.

²⁸ *Review Conference*, Resolution ICC-ASP/8/Res.9, adopted at the 10th plenary meeting, on 25 March 2010 by consensus.

²⁹ In accordance with Article 12 of the Rome Statute.

³⁰ M. Drumbl, *Atrocity, Punishment and International Law* (2007), 148.

³¹ C. L. Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses' 19 *American University International Law Review* (2003) 2, 301, 383-384.

³² Justice mechanisms located within post-conflict societies have been considered 'better able to demonstrate the importance of accountability and fair justice to local populations', see J. E. Stromseth, 'Pursuing Accountability for Atrocities After

highlighted during the course of the discussions.³³ Like other international tribunals, the ICC is reliant on the cooperation of States to collect and transfer evidence as well as suspects and accused persons to the Court.³⁴ Even where States are cooperative, in line with their obligations under the Rome Statute,³⁵ the distance of the Court from the territories in which crimes may have occurred is likely to cause delays or obstacles to the pursuit of justice. Where justice is carried out at the national level, access to evidence, witnesses and perpetrators is likely to be easier, and thus facilitate the process of holding perpetrators to account for their crimes.

With regard to the practical application of positive complementarity, the discussions served to highlight the difficulties that States had faced in undertaking the investigation and prosecution of core international crimes.³⁶ Three main challenges facing the application of complementarity in practice were raised during the stocktaking exercise. The first is the lack or inadequacy of national implementing legislation.³⁷ Having legislation in place is the first step in putting an end to impunity for atrocities and constitutes a means of materialising the application of complementarity. Linked to this point was the discussion on whether it would be desirable to prosecute core international crimes as ordinary crimes. At a panel meeting on complementarity which was organised by CICC, it was felt that prosecuting core crimes such as murder or rape, rather than their international equivalents, is not desirable since ordinary crimes do not represent the scope, scale and gravity of the conduct.³⁸ A second problem concerns the lack of operational capacity. In particular, the problems faced by domestic institutions operating in the context of a weak economy, lack of infrastructure, lack of confidence in the judicial structure and disputed authority were highlighted at the Danish and South African panel on complementarity.³⁹ Such operational capacity problems are likely to be exacerbated particularly where there may be a large backlog of cases, which

Conflict: What Impact on Binding the Rule of Law', 38 *Georgetown Journal of International Law* (2007) 2, 251, 260.

³³ Panel discussion on complementarity hosted by South Africa and Denmark, *supra* n.28.

³⁴ Rome Statute, Art. 86: "States are obliged to provide for the various forms of co-operation outlined in Parts IX and X of the Rome Statute".

³⁵ *Id.*

³⁶ Plenary, *supra* note. 28

³⁷ *Id.*

³⁸ *Id.*,

³⁹ Panel discussion on complementarity hosted by South Africa and Denmark, *supra* note 28.

is usually the case in the aftermath of mass atrocity where criminal justice institutions with restricted resources or expertise normally have limited capacity to process cases. Linked to this point is the lack of training, the third challenge identified by the plenary at the stocktaking exercise. Whilst the need for specific training was identified, the panellists at the South Africa - Denmark event reflected on the importance of the design of the training in empowering national judicial systems to oversee justice at the national level.⁴⁰

The meaning of the term “positive complementarity” was discussed during the plenary. Whilst repeated reference was made to the term, some States questioned its use, preferring the term “technical assistance”.⁴¹ It was highlighted that the term had no basis in the Rome Statute and served to confuse judicial capacity building with the principle of complementarity as laid down in Article 17 of the Rome Statute.⁴² Despite some hesitation of the use of the term “positive complementarity”, there was general agreement during all meetings that the active involvement of States and civil society in building national capacity is desirable. Furthermore, doubts as to the use of the term “positive complementarity” may have been outweighed by the frequency with which the term was used.

A significant proportion of the discussion in all events on complementarity was focused on the ways in which national capacity could be increased so as to strengthen the ICC’s overall system of justice. It was highlighted that the role of the Court in positive complementarity should be limited so as to ensure that the construction of national capacity would not interfere with the ICC’s judicial function or divert funds from investigations and prosecutions being carried out by the Court.⁴³ There was general agreement that States, international organizations and civil society should play a leading role in encouraging and assisting States to enact national implementing legislation and to investigate serious international crimes committed on their territory or by their nationals.⁴⁴ Efforts were made to identify tangible means of increasing national capacity. Several projects

⁴⁰ *Id.*

⁴¹ This issue was raised by the Spanish delegation during the plenary session, *supra* note 28.

⁴² This point was made by the German delegation during the plenary session, *id.*

⁴³ This point was emphasized in the CICC side event on complementarity, *supra* note 27.

⁴⁴ At the CICC side event, proposals were made for the Assembly of States Parties to play a role in overseeing and linking different activities aimed at the construction of national capacity so as to streamline activities and reduce duplication of tasks.

tailored to the construction of national capacity were highlighted during the plenary session.⁴⁵ In addition, the role of the United States in projects to strengthen judicial processes in the Democratic Republic of the Congo (DRC) was discussed in the US - Norway sponsored side event on positive complementarity and the DRC.⁴⁶

The stocktaking exercise served to reaffirm the importance of the principle of complementarity but, at the same time, recognised the difficulties faced by States in carrying out investigations and prosecutions of the crimes under the Court's jurisdiction at the national level. Whilst there was some hesitation over the use of the term "positive complementarity", there was general agreement that States needed assistance in fulfilling their role as reflected in the Rome Statute and that States and civil society should take a leading role in building national capacity.

III. The Outcome of the Stocktaking Exercise

The outcome of the stocktaking exercise was a resolution which reflects the contribution of the Bureau of the ASP in its report on stocktaking, as well as the content of the debates that took place in Kampala. The resolution stresses the primary responsibility of States to investigate and prosecute the crimes under the jurisdiction of the International Criminal Court.⁴⁷ It also notes the importance of States Parties "taking effective domestic measures to implement the Rome Statute".⁴⁸ In doing so, it serves to reaffirm the commitment of States to the principle of complementarity that forms the foundation for the ICC's system of justice. The resolution recognises the need for "additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community" and encourages the Court, State Parties and other stakeholders, including international organisations and civil society

⁴⁵ Reference was made to the ICC Legal Tools Project as a means of contributing to national jurisdictions by the delegation of Norway during the plenary debate. During the plenary session, the Netherlands highlighted the Justice Rapid Response Initiative as well as the ICC's Legal Tools. Both projects had been included in the "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes", see *supra* note 24.

⁴⁶ See *supra* note 28.

⁴⁷ Resolution RC/Res.1, adopted at the 9th plenary meeting, on 8 June 2010, by consensus, para. 1.

⁴⁸ *Id.*, para. 4.

“to further explore ways in which to enhance the capacity of national jurisdictions”.⁴⁹ Whilst the resolution does not make explicit reference to the term “positive complementarity”, it acknowledges the activities referred to in terms of positive complementarity during the stocktaking exercise.

The resolution, adopted by consensus of the Assembly, does not introduce any new legal obligations. It does, however, serve to recognise and emphasize the importance of the principle of complementarity and engagement in initiatives to boost national capacity so as to ensure that States are able to apply international criminal law at the national level. In future, it is hoped that the resolution will translate into concrete initiatives which will serve to strengthen the Court’s system of justice and help it work towards ending impunity for international crimes.

C. The ICC’s Legal Tools

The Legal Tools Project was identified in the lead up to the Review Conference by the Focal Points for complementarity as an example of a project directed towards strengthening national jurisdictions and enabling them to address core international crimes.⁵⁰ Moreover, the importance of projects such as the ICC’s Legal Tools Project, were highlighted during the general debate and the stocktaking exercise of the Review Conference.⁵¹

The ICC’s Legal Tools offer a comprehensive online or electronic knowledge system and provide an expansive library of legal documents and range of research and reference tools. The Tools were developed with the aim of encouraging and facilitating the efficient and precise practice of criminal justice for core international crimes. Whilst the Tools were initially created and envisaged for use within the Court, realisation of their value as a means of increasing national capacity led to their development for use by a range of external actors. As the Project expanded, the further development of the Legal Tools was outsourced to a number of academic partners (the “Legal Tools Outsourcing Partners”) with specific expertise in the field,⁵² whose activities are overseen by practitioners and experts in the field,

⁴⁹ *Id.*, paras 3 and 8.

⁵⁰ See the practical examples illustrating how several actors could assist States in enhancing national capacity with regard to the investigation and prosecution of serious international crimes, with a view to stimulating debate in Kampala, compiled by the Focal Points, *supra* note. 28.

⁵¹ See *supra* note 45.

⁵² See <http://www.legal-tools.org/en/work-on-the-tools/> (last visited 27 August 2010)

including the Legal Tools Advisory Committee of the ICC, with representation from the different Organs of the Court, as well as a Legal Tools Expert Advisory Group with some of the leading legal informatics experts serving as members.

The Legal Tools Project includes three main clusters of services, (i) the Legal Tools Database and Website,⁵³ (ii) digests on the law and evidence of international crimes and modes of liability, and (iii) the *Case Matrix* application for organising and structuring evidence in core international crimes cases.

The Legal Tools Database and Website provide a free, publicly accessible platform for the dissemination of legal information relating to the investigation, prosecution, defence and adjudication of serious international crimes. The Database contains over 44,000 documents, including decisions and indictments from all international and internationalised criminal tribunals, preparatory works of the ICC, jurisprudence and decisions from the ICC, treaties, information about national legal systems and relevant decisions from national courts, which are fully searchable using a state of the art search engine. The Legal Tools Database also contains a specific search engine which allows users to search specific aspects of national legislation implementing the Rome Statute.

The Elements Digest provides raw data and notes on the elements of crimes as well as the modes of liability contained in the Rome Statute and Elements of Crimes document. The text is drawn from all sources of international law. Relevant sources will be hyperlinked in the Digest to allow users direct access to primary material. The Means of Proof Digest allows users to see the types or categories of evidence that have been used in national and international criminal jurisdictions to satisfy the elements of crimes and modes of liability contained in the Rome Statute. The two Digests can be accessed through the Case Matrix. They do not represent the views of the ICC, its Organs or any participants in proceedings before the Court.

The Case Matrix is a law-driven case management and legal information application developed for the efficient and precise investigation, prosecution, defence and adjudication of international crimes. The Case Matrix allows users to access documents selected from the Legal Tools Database (the "Legal texts" function) as well as access to the Elements and Means of Proof Digests. The application also serves as a database for the

⁵³ See <http://www.legal-tools.org> (last visited 27 August 2010).

organisation of information and evidence relating to core international crimes, tailored to the specific crimes that have been committed and relevant modes of liability. It can also be adapted for use by different actors involved in the processing of core international crimes, such as human rights personnel, investigators, prosecutors, defence teams, victims' representatives, judges and civil society.

D. The Legal Tools and Positive Complementarity

Access to legal information is the bread and butter of lawyers. Without adequate access to legal information lawyers can not write proper legal motions, arguments and decisions. It is not enough to have talented and well-educated lawyers and investigators. Providing effective access to legal information on war crimes, crimes against humanity and genocide is therefore one of the first steps in all capacity building in criminal justice for such crimes. If the access is expensive, it can not be effective insofar as many potential users are excluded.

The Legal Tools seek to provide basic legal information with respect to core international crimes. The Tools are not a mere aspiration. Rather, they are in place and they have been developed and are maintained in a sustainable manner. Additionally, the related *Case Matrix Network*⁵⁴ provides capacity building activities which enhance positive complementarity in more than twenty countries, drawing, *inter alia*, on the technical platform of the Legal Tools. The *Network* seeks to reach all countries which have recently had or are currently engaging in core international crimes cases by mid-2012.⁵⁵

The *Case Matrix Network* provides several layers of services including those presented in the following three sections.

I. Access to Legal Information Relating to Serious International Crimes

The Legal Tools provide free and easy access to legal information relevant to core international crimes. The wide range of resources contained in the Legal Tools Database, which can be easily accessed through the search or browse functions on the Legal Tools Website, is of potential value

⁵⁴ See www.casematrixnetwork.org (last visited 27 August 2010).

⁵⁵ See <http://www.casematrixnetwork.org/users/> (last visited 27 August 2010).

for any lawyer or institution operating in the field of international criminal law. Such resources may not be of existential value for legal actors who have access to a wealth of legal materials and expertise. Such actors constitute a small minority. The resources in countries that have suffered the commission of mass atrocities may be particularly limited. In the aftermath of international crimes, there may not be the budget to build up resources necessary to hold perpetrators to account for their crimes.

The availability of the Legal Tools serves to level the playing field in the investigation, prosecution, defence and adjudication of core international crimes, allowing national judicial institutions to process international crimes involving their nationals or committed on their territory that may otherwise have lacked the means to do so. National institutions working on one or more core international crimes cases which do not have access to the Internet can access relevant information from the Legal Tools Database via the Case Matrix. In offering universal access to relevant information in the field of international criminal law, the Legal Tools can make a significant contribution to local empowerment, the importance of which had been stressed throughout the stocktaking exercise in Kampala.

The resources included in the Legal Tools Database and Website assist not only in the investigation, prosecution, defence and adjudication of core international crimes, but also in the drafting and amendment of implementing legislation. The specific search engine for national implementing legislation (NILD) allows States to compare approaches that have been taken in different jurisdictions and to model their legislation on that of States with similar characteristics, for example those sharing the same legal tradition. NILD also highlights the approaches which are likely to facilitate States in fulfilling their role under the ICC's complementarity regime and those which might be narrower than what is required, thus falling short of the Statute.

The resources found in the Legal Tools have value not only for the States that would normally exercise jurisdiction over crimes following territoriality or nationality. They can also be used by States wishing to investigate and prosecute serious international crimes through the exercise of universal jurisdiction. Furthermore, they can be used by States, international organisations and civil society wishing to place political pressure on States to discharge their obligations under the Rome Statute. The Legal Tools can also be used by civil society working in the documentation of human rights violations amounting to core international crimes and which may lead to the investigation and prosecution of international crimes.

In sum, the Legal Tools provide a complete library of materials relating to the practice of international criminal law. The materials provided by the Legal Tools are likely to have value for fully-functioning national judicial institutions. However, their significance is of particular importance within States which have access to fewer resources. Use of the information contained within the Legal Tools may allow States that would not have been able to engage in investigations and prosecutions to fulfil the role that has been attributed to them by the principle of complementarity under Article 17 of the Rome Statute.

II. Facilitating Transfer of Legal Knowledge and Expertise

International criminal jurisdictions have not only produced a wealth of legal documents since the mid-1990s. They have also contributed to the development of detailed knowledge and expertise in international criminal law. Making these resources available to national legal actors is essential.

The ICC's Legal Tools have been designed and developed by practitioners and experts with over fifteen years of experience in the practice of criminal justice for atrocities. The Tools serve as a means of transferring this experience to national criminal justice institutions in a manner which is practical and user friendly, respectful of local legal traditions and according to the logic of the law.

The Case Matrix application offers a low cost and instant means of increasing the capacity of national legal actors. It offers a comprehensive system which can be integrated within existing infrastructure and used by domestic personnel without the need for lengthy training or international oversight. Furthermore, following the installation of the Case Matrix, the application remains within the national judicial system, ensuring that the State in question will be ready to respond to possible future conduct that may form the basis of investigations and prosecutions. The fact that the Case Matrix can be incorporated into existing legal structures and operated by local personnel increases its value as a mechanism for local empowerment.

Once installed, national legal actors have ready access to the necessary resources and an effective methodology to conduct investigations, prosecutions, defence and adjudication of international crimes. Users will have access to the Elements and Means of Proof Digests which incorporate knowledge and experience derived from theory and practice in a format that can be easily accessed and imparted into national judicial institutions. The

Digests not only provide valuable guidance for legal actors who are not familiar with the processing of international crimes; they can also encourage compliance with international standards and practices by providing a model for national jurisdictions.

The case management application contained within the Case Matrix provides a methodology for the oversight of serious international crimes cases. The application has been designed by practitioners with considerable experience in criminal justice for atrocities with the intention of increasing the efficiency and precision of the justice process. The application allows for the efficient organisation of evidence by reference to the elements of crimes and modes of liability being charged. In doing so, it facilitates effective case assessment by indicating which charges are supported by sufficient evidence to allow for prosecution and potential conviction. It also allows for the development of more effective prosecutorial strategies and the focusing of time and resources on the weak points of strong cases. Furthermore, it reduces the potential for duplication of work by providing a platform for sharing and transferring information between teams and amongst different elements of the criminal justice system. The efficiency and precision of the criminal justice process, which is encouraged by the use of the Case Matrix, is particularly important for national institutions working on a limited budget, especially where there is a large backlog of serious crimes cases. The application can be customised to suit the needs of particular institutions. This allows national capacity to be constructed in a manner which is sensitive to cultural differences.

The ICC's Legal Tools amount to a technical platform which can be used as a means of transferring the expertise that has amassed at the international level and feed it into national institutions, particularly those lacking resources and expertise in the field of international law. The provision of resources and a methodology for the processing of core international crimes cases may assist States in overcoming some of the challenges they face in such activities in a manner which is fast, cost-efficient, respectful of local traditions and capable of being sustained in future years.

III. Provision of Legal Skills in the Field of Criminal Justice for Atrocities

Alongside the expansion and development of the ICC's Legal Tools, a network of experts and practitioners in the field of criminal justice for atrocities has been established to assist with installation of the Case Matrix

and training in the use of the Legal Tools, in addition to a range of other capacity building services. The *Case Matrix Network* was created with the specific purpose of strengthening national ability to investigate, prosecute and adjudicate core international crimes and to increase the cost-efficiency and quality of justice delivered by national institutions,⁵⁶ by transferring skills linked to key work processes in criminal justice for atrocities. The *Case Matrix Network* offers two categories of services.⁵⁷ The first category of services relates to the installation and use of the Case Matrix and the training and use of the Legal Tools Database. Some members of the *Network* assist the Coordinator of the Legal Tools Project with the implementation of such services. The second category draws on the combined expertise of a team of Network Advisers and the Director of the *Case Matrix Network* with regard to the investigation, prosecution, defence and adjudication of core international crimes. The Network Advisers have amassed considerable expertise in the processing of serious international crimes, as well as in the legislative and administrative aspects of the process.

The Network Advisers can provide a wide range of services upon request by national criminal justice institutions. The range of services includes advice on the establishment and organisation of units for the investigation and prosecution of serious international crimes; advice on or organisation of work processes relating to the documentation, investigation, prosecution, adjudication or defence of core international crimes cases; and advice on the drafting and review of legislation and other legal documents relating to serious international crimes. The services can be offered remotely or *in situ*, on an *ad hoc* basis or through secondment and can be provided confidentially.

Through the provision of such services, the *Case Matrix Network* allows expertise developed in international criminal jurisdictions to be quickly and easily utilised by national legal actors. In doing so, it can contribute to national empowerment by ensuring that national institutions have the capacity to carry out their vital role in the fight against impunity.

⁵⁶ See <http://www.casematrixnetwork.org/purpose/> (last visited 27 August 2010).

⁵⁷ See <http://www.casematrixnetwork.org/services/> (last visited 27 August 2010).

E. Conclusion

The ICC's Legal Tools, together with the *Case Matrix Network*, provide an effective means of overcoming several of the problems faced by States in the pursuit of justice which were raised throughout the stocktaking exercise. The resources contained in the Legal Tools Database can be used to assist States in accessing legal information, including the drafting of legislation implementing the crimes under the jurisdiction of the Court into national law. Use of the Legal Tools can strengthen national institutions and increase their capacity to investigate and prosecute core international crimes. The resources available through the Case Matrix can facilitate the documentation, investigation, prosecution, defence and adjudication of serious international crimes. The logic and methodology provided by the Case Matrix allow knowledge and experience accumulated through the practice of international criminal jurisdictions to be transferred to national institutions in a fast and cost-effective manner which is empowering and respectful of local traditions. The separate services offered by the *Case Matrix Network* provide a further source of assistance for legal actors engaged in the application of international criminal law.

To conclude, the ICC's Legal Tools and the *Case Matrix Network* offer an effective way of building the capacity of legal actors to investigate, prosecute and adjudicate international crimes. In doing so, they contribute to strengthening the ICC's complementarity system in the manner envisaged by the stocktaking exercise at the ICC Review Conference. The debates in Kampala suggest a growing tendency to refer to this kind of assistance as "positive complementarity". Regardless of the terminology that was used during the Review Conference, the stocktaking exercise served to highlight the importance of projects such as the ICC's Legal Tools Project in contributing to the ICC's complementarity regime.