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‘2. Panel: The ICC at work – institutional challenges of the Court’

Remarks on ‘prosecutorial strategy’  
in internationalised criminal justice

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# 1. 'Strategic practice' of ICC-OTP 2003-2007

- Reasonable number of investigations.
- Reasonable length of investigations in Lubanga Dyilo and Kony et. al. cases.
- Not too high number of cases per situation.
- Reasonable number of suspects per case.
- Not too many incidents per suspect.
- Not too many legal classifications for every incident.
- In sum:
  - The ICC-OTP has avoided making some mistakes we know from other internationalised criminal jurisdictions.
  - The ICC-OTP 'strategic practice' to date is very positive compared with other internationalised prosecution services.
  - But it is recognized that NGOs, defence counsel and some other actors outside the ICC-OTP have the role of watching, exposing and criticising, independently.

## 2. Possible problem: ‘thematic prosecution’

- Selecting conduct or legal classifications in a way which amounts to singular emphasis on one type of crime.
- Lubanga Dyilo: recruiting, enlisting and using child soldiers.
- ICTY:
  - Foča: sexual assault;
  - BiH: not destruction of religious monuments or incitement;
  - Gagović interview;
  - narrow thematic focus supplemented later.
- Positive:
  - Victims: places emphasis on particular aspect of victimization.
  - Law and policy: can lead to new developments in law and in awareness.
  - Justice: narrows the scope of cases and can make them more manageable.
  - Defendant: can make proceedings and their preparation more swift.
- Negative:
  - Other victims, truth-telling: important victimization may be left out of case.
  - Justice: more serious crimes may not be addressed by jurisdiction.
- ‘Thematic prosecution’ warrants further debate.

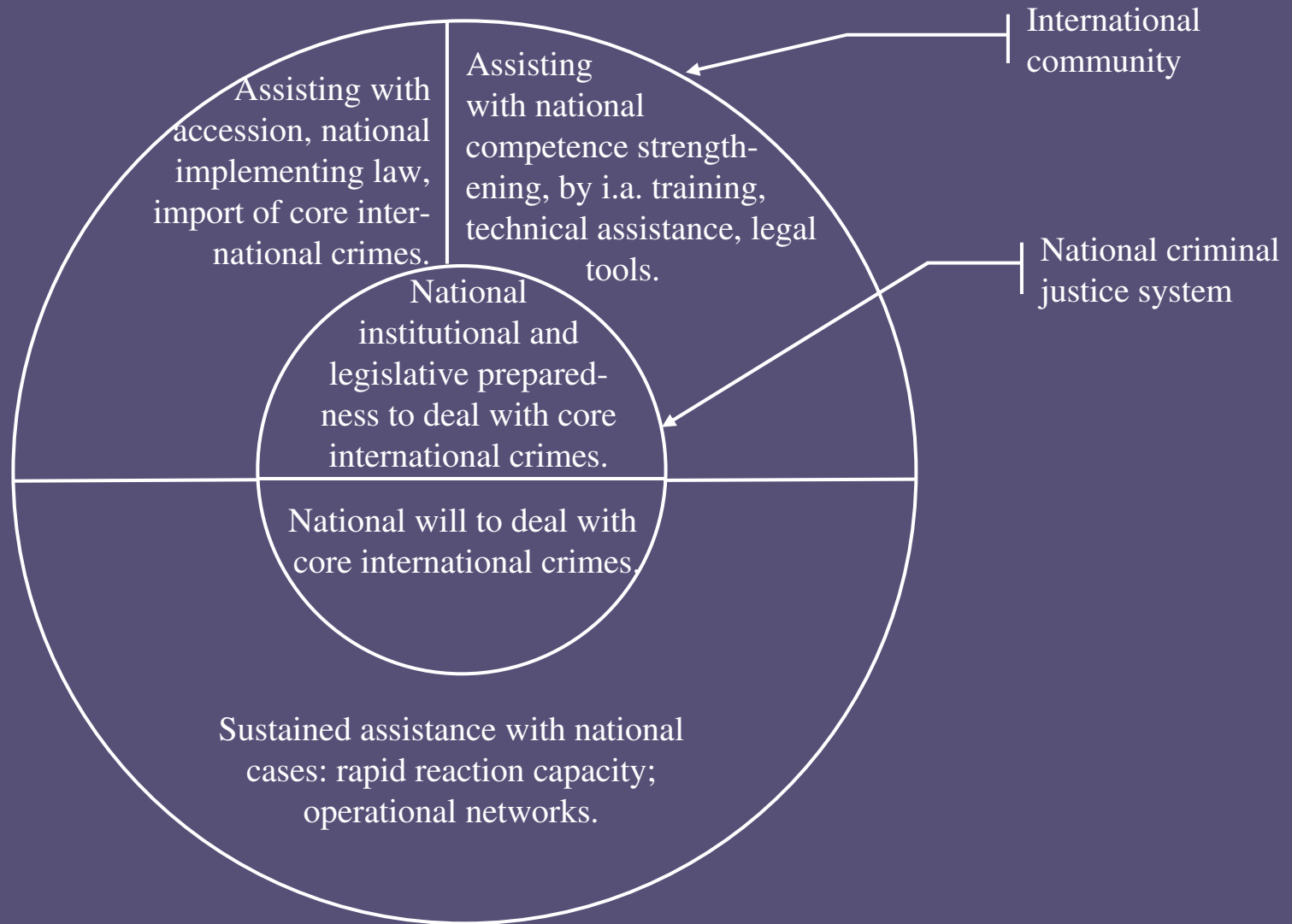
### 3. Architectural problem: highlighting impunity gap

- Successful ICC-OTP ‘strategy practice’ means that the ICC will only have a few cases in every situation.
- The visible justice of the ICC will highlight a large number of cases where justice is unlikely: the ICC’s work will open and highlight the impunity gap (the gap between exceptional cases of justice and mainstream impunity).
- The impunity gap is a necessary consequence of the jurisdictional architecture of the ICC. As such, it is not primarily a functional problem of the ICC.
- But it is a problem of expectations for the ICC.
- And it points us to the main ‘strategic problem’ in the prosecution of core international crimes.

## 4. Real problem: many crimes means many criminals

- Prosecutors' dilemma: too many war criminals for even well-functioning criminal justice systems to deal with.
- For example, Colombia.
- For example, Bosnia and Herzegovina: challenges:
  - First challenge: *mapping* the open case files or substantiated complaints. DOCF.
  - Second challenge: *selecting* the 'right' cases: criteria.
  - Third challenge: *prioritising* the 'right' cases: criteria.
  - Fourth challenge: ensuring that prosecutor, judges and other *stakeholders* play their role in the selection and prioritisation process.
  - Fifth challenge: making the proceedings fair but *effective*.
- All in all this amounts to a paradigmatic problem of *building and strengthening the capacity of national criminal justice systems* in (potential) territorial states to deal with core international crimes.

# 5. The national reinforcement challenge



## 6. Success problem: cases beyond national capacity

- Even with strengthened capacity in national criminal justice systems there will simply be too many cases for full trial in many territorial states.
- Option 1: *do not deal with the problem*: postponement; draining the resources of the criminal justice system; witnesses and suspects start to die; no closure of the ‘war crimes issue’.
- Option 2: *take the case files out of the criminal justice system*. TRC - amnesty.
- Option 3: *abbreviated criminal procedures*? Frontline issue.
- BiH:
  - Group of national experts on abbreviated criminal procedures.
  - Reform of the BiH Code of Criminal Procedure.
  - Procedures must meet standards of fairness and reasonable sanction.
  - Seminars in Sarajevo on abbreviated procedures and selection/prioritisation criteria. ‘BiH model’?
- Is the international criminal justice movement becoming a victim of its own success? Will it now have to give back ground to more political solutions?

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