

OPEN SOCIETY
JUSTICE INITIATIVE

**PROMOTING COMPLEMENTARITY:
Where Does the Assembly of States Parties Go from Here?**

Assembly of States Parties, New York, December 2010

Although the term “complementarity” does not appear in the Rome Statute, it encapsulates the court’s fundamental operating principle: national justice systems have the primary responsibility for prosecuting serious international crimes, and the ICC should be a backstop. A number of countries, for a variety of reasons, need assistance in developing the domestic capacity to prosecute serious crimes. One way to make sure national trials can happen is for governments to work with rule of law donors to promote efforts focused on complementarity.

The Assembly of States Parties (ASP) comprises both major rule of law donors and states whose justice systems are in need of assistance. The current ASP meeting—the ninth overall but the first since the June 2010 Kampala Review Conference where complementarity was first raised—is a perfect opportunity for states parties to further commit to practical steps that will transform the idea of complementarity into reality.

The Open Society Justice Initiative is committed to working with states to promote complementarity in practice. To that end, we are collaborating with the European Commission to develop a “complementarity toolkit.” This toolkit is a practical resource that can channel rule of law resources to most effectively assist national justice systems in undertaking their own prosecutions for war crimes, crimes against humanity, and genocide. We will continue to work with the European Commission (EC) throughout 2011 and hope to join with donors and host governments to pilot the toolkit in one or two countries once it is completed.

In the past three months, the Justice Initiative has also undertaken a mapping exercise in three situation countries—Kenya, Uganda, and the Democratic Republic of Congo (DRC)—to assess the extent to which complementarity is already being integrated into current rule of law programming. These studies, as highlighted in our paper *Promoting Complementarity in Practice – Lessons from Three ICC Situation Countries*, demonstrate that the three countries have very different complementarity needs. In DRC, a coherent strategy to channel complementarity efforts is desperately needed. In Uganda, no technical issues are hindering complementarity efforts; rather, the main concern is that trials will only target anti-government suspects. Similarly, in Kenya technical capacity is not the issue; donors instead question the political commitment to holding trials. We will publish those studies in full in January 2011.

From our work on these case studies and with the EC, five key recommendations for ASP members have emerged:

1. **Seize the moment to consolidate ASP complementarity dialogues:** After the Review Conference and a high level Greentree conference in October 2010, major rule of law and international justice actors—including ASP members and others—are

coalescing around the notion of realizing complementarity through rule of law efforts. The current ASP meeting must capitalize on this momentum. One option is to include a recommendation in the omnibus resolution committing the ASP's Bureau to further dialogue on complementarity.¹

2. **Streamline internal communication channels:** Our case studies revealed that in the DRC, Kinshasa-based rule of law donors had only a vague awareness of the Review Conference, none knew of the complementarity resolution adopted, and none demonstrated any familiarity with the complementarity-specific pledges that their own governments had made. This raises questions not only about communication between diplomats in capitals and the field, but also between them and their rule of law colleagues. If relevant staff are not aware of the pledges made, this also raises questions about the commitment to implementing them.
3. **Develop effective communication with other entities focused on complementarity:** The ASP has an important role to play in promoting complementarity, but it cannot and will not be the only entity working to promote it. To the extent that other forums promote complementarity (for example, international organizations such as the United Nations, or regional ones such as the European Commission), bridges must be built between the ASP and these organizations to ensure the ASP is informed of, and contributing to, broader developments. The ASP Secretariat and the Complementarity Focal Points can serve as potential communication channels, but all states parties need to take responsibility for ensuring communication.
4. **Use political capital to promote complementarity:** Our three cases studies demonstrated that technical capacity is sometimes not the biggest obstacle to promoting complementarity—political will is. Donors cannot simply support civil society and media in the hope of building political will for domestic trials (though this is certainly necessary and useful). Donors must be prepared to use their diplomatic leverage too. ASP legal officers can assist their rule of law counterparts in developing a strategy to foster political willingness. Similarly, host governments must recognize and act upon their obligations under the Rome Statute to be willing and able to hold trials for serious international crimes.
5. **Use existing avenues to coordinate complementarity efforts:** Although no money or appetite exist to support a complementarity coordinating mechanism, other existing forums could help fulfill this need: existing donor groups, for example, could be valuable networks that can bring ASP members and other donors and civil society together to better coordinate the promotion of domestic trials.

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¹ See *Human Rights Watch Memorandum for the Ninth Session of the International Criminal Court's Assembly of States Parties*, available at http://www.hrw.org/en/news/2010/11/16/human-rights-watch-memorandum-ninth-session-international-criminal-court-assembly-st#_Toc277604880. They propose including "language in the omnibus resolution mandating the Bureau to continue its dialogue on complementarity in order to provide a basis for the re-appointment of focal points."