

Building on the Complementarity Consensus

Background for the ICC Assembly of States Parties

OCTOBER 2012

The 11th session of the ASP provides an opportunity to discuss the breadth of initiatives necessary to support domestic justice for international crimes, and address misconceptions about the resources these require. The ASP, including the Bureau and the Working Groups, can clarify their own roles, as can member states pondering how most effectively to contribute.

Executive Summary

A plenary session on complementarity during the 11th session of the Assembly of States Parties brings welcome attention to a foundational principle of the Rome Statute: that states bear the primary responsibility for bringing the perpetrators of international crimes to account. Supporting domestic justice for international crimes multiplies the potential venues in which the fight against impunity—the Rome Statute’s *raison d’être*—can be waged and won, while also strengthening the rule of law at the national level.

Since the 2010 Review Conference, where consensus emerged regarding the importance of complementarity support, discussion has shifted to analyzing *how* genuine domestic justice for international crimes can best be nurtured in practice. While effective support undoubtedly requires new financial resources in some locations, overall, the need may be less than assumed. The 11th session of the ASP provides an opportunity to explore the full range of initiatives—financial and otherwise—required to support local proceedings for international crimes. Such discussion also can help to clarify the ASP’s thinking about its own role, as well as that of states pondering how to most effectively contribute, financially and politically. Finally, it can and should provide a venue for states to pledge specific support measures for the year ahead.

The Open Society Justice Initiative promotes human rights and builds legal capacity through litigation, advocacy, research, and technical assistance. Together with numerous partners, the Justice Initiative has supported mobile courts in the eastern Democratic Republic of Congo (DRC) for the past three years, and currently has another complementarity pilot project in Kenya.¹ Since the Review Conference, the Justice Initiative has published a study on complementarity in practice in the DRC, Uganda, and Kenya,² as well as a handbook for rule-of-law development policymakers, implementers, and donors on how to integrate support for international criminal justice into their existing work.³ The Justice Initiative is co-organizing a side event on complementarity at the 11th session of the ASP.

Recommendations

So as to promote complementarity as effectively as possible, the Open Society Justice Initiative makes the following recommendations:

To the ASP, its Bureau, and Working Groups:

1. **Identifying political problems and marshaling political will.** Bring attention to, and help overcome, political obstacles where these impede genuine national proceedings. The ASP President can work with states to urge the domestication of Rome Statute crimes in national law, and press members to improve faulty coordination of their

individual efforts to support national will and capacity to conduct proceedings for international crimes.

2. **Engage in public education.** The ASP President should continue to engage in outreach to counteract misinformation campaigns about the Rome Statute. The ASP can laud successes, note failures, and urge action to confront particular problems, including through the President’s diplomatic activity and adoption of ASP resolutions, explain why complementarity is important, and how, through the Rome Statute, two-thirds of UN member states have committed themselves to it.
3. **Information exchange.** Some states have been engaged in increasingly detailed discussions on complementarity support, while others may come late to advanced discussions. The ASP President and Bureau can serve as a first port of call, providing basic information on complementarity issues and orienting newcomers to the status of relevant ongoing initiatives, including the “Greentree process,” or ad hoc efforts to assist particular states to achieve local justice for international crimes.
4. **Sustaining state engagement.** Mobilize and monitor progress on implementing pledges. While twenty-two states parties, observer states, and other entities made complementarity-relevant pledges in Kampala,⁴ no forum has existed since then to assess progress. The plenary session on complementarity provides an opportunity for those states, and others, to share information on their current and future activities through a round of new pledges. Indeed, the ASP, with the ASP President’s support, should put progress on new pledges on the agenda for the 12th session. States where atrocities have been committed might pledge to introduce Rome Statute implementing legislation, or create a special investigative unit to address Rome Statute crimes. Those states interested in backing such efforts might pledge specific types of support, either singly, or as part of a coordinated group pledge.

To Member States:

1. Break down communication barriers between legal advisors covering Rome Statute issues and development officials.
2. Domesticating international criminal law utilizing Rome Statute definitions.
3. Consult with victims on their expectations regarding justice, and conduct outreach to affected communities before, during and after national proceedings.
4. Pass legislation to create effective witness protection measures (pre-trial, trial, and post-trial), and where necessary, full witness protection programs.
5. Welcome civil society engagement in advocacy on justice issues, and court monitoring by civil society organizations.
6. Ensure the safety of prosecutors, judges, and defense counsel (through the provision of protection, if necessary) working on these controversial cases.
7. Provide psychosocial support to vulnerable witnesses.
8. Uphold international standards of detention, in general and for those accused of grave crimes.

To the European Union:

1. Complete the complementarity toolkit, endorse it in relevant Council Working Groups, disseminate it to EU institutions and member states, and begin working with policymakers in Brussels and delegations to create a greater understanding of complementarity needs, and how consideration of these can be mainstreamed into EU development planning for conflict/post-conflict states.

To donors in general:

1. Include a review of complementarity needs as a matter of course in rule of law program planning for states where atrocities have been committed.
2. Ensure that in-country donor coordination mechanisms are functional. Without effective donor coordination on rule of law initiatives, there is no forum into which complementarity discussions can be integrated.

Background

A plenary session on complementarity during the 11th session of the Assembly of States Parties brings welcome attention to a foundational principle of the Rome Statute: that states bear the primary responsibility for bringing the perpetrators of international crimes to account. The Review Conference resolution on complementarity recognized “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.”⁵ Fostering domestic will and capacity to handle international crimes brings justice closer to affected communities; strengthens national rule of law development; and enables the ICC, as a court of last resort, to focus its limited resources where will or capacity to investigate and prosecute grave atrocities still falls short. Supporting domestic justice for international crimes multiplies the potential venues in which the fight against impunity – the Rome Statute’s *raison d’être* – can be waged and won.

Fostering national capacity to address international crimes requires many actors. The Review Conference resolution encouraged “[...]the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern[.]”⁶ In various situations, all of these actors have made valuable contributions. Within the ASP, South Africa and Denmark have worked admirably as co-focal points on complementarity issues. Yet the role of the ASP as a body in advancing domestic justice for international crimes has remained hazy, notwithstanding the Review Conference resolution’s grant of a limited mandate to the Secretariat of the ASP to work within (extremely limited) existing means to facilitate the exchange of relevant information.

The ASP as a forum for frank discussion about the benefits and costs of advancing domestic justice

Supporting domestic justice for international crimes, it is often assumed, will require an immediate and considerable infusion of new resources, but close examination of the requisites to advance domestic justice challenges this supposition. At a time when many states are confronted with budget austerity at home, they naturally may have reservations about devoting new resources to priorities beyond their borders. Concerns about complementarity support based on financial considerations should be discussed openly at the ASP, taking into account the following important factors:

- **Not investing in justice likely will cost more.** States parties have recognized that “[...] grave crimes threaten the peace, security and well-being of the world,” and have determined that ending impunity for such crimes contributes to their prevention.⁷ If a modest investment in complementarity reduces the need for such expensive forms of emergency assistance as peacekeeping operations or refugee assistance, then it is money wisely spent. In its 2011 World Development Report, the World Bank called for refocusing development assistance on the prevention of political and criminal violence as a vital measure to break cycles of political and criminal violence that mire countries in persistent poverty.⁸ New investments in justice, including international criminal justice, can ensure that other, often more expensive forms of development assistance are not squandered by further violence rooted in lawlessness.
- **More efficient use of existing resources, not new ones, is required.** In many, if not most, situations, major new commitments may not be needed beyond what is otherwise required for effective rule-of-law development. Complementarity promotion consists of support to reform and build capacity in the justice system. Building witness protection capacity in support of international criminal proceedings leaves the state with greater capacity to investigate and prosecute other serious forms of crime, including organized crime, corruption, and terrorism. The converse is also true. Refurbishing courtrooms, conducting trainings in courtroom management, and developing a legal aid scheme for indigent suspects charged with international crimes need not create a bubble of efficiency within an otherwise dysfunctional justice system. Such support can be structured both to build on existing rule of law or security sector reform efforts, and to maximize spill-over benefits for the system as a whole.

Donors and supporters concerned about international justice should be fully aware of existing rule-of-law priorities and seek to identify areas of overlap. Similarly, those already undertaking rule-of-law assistance should consider how they can adjust their programming to incorporate building domestic justice capacity for international crimes.⁹ To realize greater efficiency, more emphasis must be placed on designing integrated

strategies for national justice development, fostering coordination among officials within the justice sector, improving donor coordination, and involving affected communities in the process.

- **Political will is often as important as (if not more important than) funding.** The challenges associated with promoting complementarity are not primarily about gaps in capacity. In many countries where victims clamor for justice for serious crimes, political obstacles prevent genuine investigations and prosecutions. Obstruction can take many forms, including refusal to domesticate international criminal law; resistance to genuine investigations or prosecutions (or allowing only politically selective proceedings); executive interference in the judiciary; spreading misinformation about proposed justice mechanisms in order to undermine popular support for them; and refusing to respect the rights of suspects and the accused. International actors seeking to support domestic proceedings for serious crimes can deploy various diplomatic tools in response to these and other political hurdles.

The resource question in three countries

The points above are illustrated by three case studies in which domestic officials and communities and the international community have joined forces to advance local justice, in the Democratic Republic of Congo, Kenya, and Guatemala.

A. Democratic Republic of Congo

In the DRC, international crimes have been committed on a vast scale, and impunity for them has fuelled conflict. In recent years, this has begun to change. Even as cases proceed before the ICC, military tribunals are directly applying the Rome Statute in response to past and ongoing atrocities in the east. The United Nations is creating hands-on support cells to improve investigations and prosecutions while building domestic capacity. Mobile courts authorized by the Congolese constitution and supported by donors including the European Union and The Netherlands are giving victims in the remotest parts of the country new hope that their tormentors can be held to account. In the Kivus, the Open Society Foundations (OSF) have supported mobile courts with an emphasis on sexual and gender-based violence. These entirely Congolese proceedings have included convictions of military officials – including one colonel – on charges of crimes against humanity.¹⁰ Mobile courts represent the successful integration of two important rule-of-law development approaches: complementarity support and access-to-justice initiatives.

Despite these successes, many challenges remain, and there are many opportunities for the Congolese government, the diplomatic community, and development partners to build on progress to date:¹¹

- **Adopt legislation:** The DRC has yet to adopt Rome Statute implementing legislation or proposed legislation that would create “mixed chambers” to deal with cases falling

- between those being heard in local courts and the ICC. These two legislative proposals should be made consistent with each other and passed as soon as possible.
- **Add more mobile courts:** Efficient and relatively inexpensive mobile courts in the east can be sustained and expanded to reach more affected communities and heighten the risk of prosecution for potential perpetrators of rape or other serious crimes. In the near term, there is a need for institutional funding for mobile courts in the Kivus, where at the end of March 2013, OSF funding will end after a successful three-year demonstration project.
 - **Increase coherence:** Myriad international efforts to support justice sector development, including for purposes of dealing with international crimes, remain inconsistent. A clear, agreed roadmap is needed for how the DRC government and its development partners can build justice institutions across the country. Absent a rational plan, complementarity initiatives – including mobile courts, prosecution support cells, and proposed mixed chambers – may not mesh efficiently with broader rule-of-law initiatives.
 - **Enhance coordination:** The existing mechanism for the coordination of justice sector assistance is dysfunctional. As a result, donors, other international supporters, and domestic actors fail to synchronize efforts to strengthen justice. Although the DRC is one place where more financial resources will be needed to meet a vast impunity gap, improving coordination and communication requires few, if any, new resources.

B. Kenya

In Kenya, while two cases against four accused are proceeding towards trial at the ICC, the government has almost entirely failed to investigate and prosecute other alleged perpetrators of crimes against humanity committed during the post-election violence of 2007-2008.¹² Nonetheless, domestic justice may be possible as a result of broader justice sector reforms fueled by a new (2010) constitution. Public confidence in the independence of the judiciary is on the rise, thanks to a new Chief Justice selected through a remarkably transparent process, a Judicial Service Commission to nominate judges, and a vetting process to remove sitting judges accused of malfeasance or non-performance. A new Witness Protection Agency, designed with UNODC involvement, has the potential to conduct operations without threat of dangerous information leaks. Furthermore, a network of civil society organizations has proposed a legal framework on reparations for victims of historical abuses, including international crimes committed during the post-election violence.

Despite important progress, many challenges remain, including:

- **Lack of political will:** Among many government officials, claims of support for domestic investigations and prosecutions have ebbed and flowed with developments in the ICC proceedings. Largely rhetorical commitments, combined with the lack of progress in pursuing specific investigations and prosecutions, and a public campaign

by some officials against the ICC, are widely interpreted as laying the political groundwork for non-cooperation with the Court.

- **Lack of support for witness protection:** Ongoing problems of political will are exemplified by the government's failure to adequately fund the new Witness Protection Agency. In May, parliament indicated that it would meet only 15% of the agency's request for 2012/2013, noting that the shortfall would prevent the agency from hiring needed staff and from providing protection to more than eight witnesses.¹³

C. Guatemala

In recent years, Guatemalan prosecutors have been trying cases of crimes against humanity and genocide related to the civil war of the 1980s, including a case against a former head of state, Efraín Ríos Montt. Guatemala's attorney general has led the way, with technical and financial assistance from the international community. Her work complements that of the UN-backed International Commission Against Impunity in Guatemala (CICIG), mandated to help extricate the state from the influence of organized crime, support the reform of justice sector institutions, and build national capacity.

Despite this progress, many challenges remain:

- **Political opposition:** In shining a light on atrocities committed under former governments, whose sympathizers still wield considerable power within and outside of government, Guatemala's justice process is at considerable political risk. For it to succeed, victims and the prosecutors trying to serve justice on their behalf need the diplomatic community's consistent and energetic engagement and attention.
- **Lack of public awareness:** As the cases proceed through a justice sector still in need of reform, a simple court monitoring program will be important to keep the proceedings on track. More public outreach also would benefit national reconciliation by improving understanding of the process and the underlying crimes.

Conclusion

The plenary session on complementarity at the 11th session of the ASP is a welcome development. The ASP President and states parties can use this opportunity to build on the consensus that supporting domestic justice for international crimes is important to realizing the Rome Statute's goal of ending impunity for the most serious crimes of concern to humanity as a whole. The session can build an understanding of the various ways that support for complementarity can be improved: through diplomatic engagement to overcome problems of political will; through making better use of existing development resources; and, where necessary, allocating new resources to an investment in justice that may obviate a need for costlier forms of support down the road. On the basis of these understandings, states can pledge concrete measures to advance prospects for domestic justice for international crimes in the year ahead. If they do, they will help the ASP develop as a unique venue for discussion and action in support of complementarity.

¹ The project in DRC is undertaken with the Open Society Initiative for Southern Africa; the project in Kenya is undertaken in partnership with the Open Society Initiative for Eastern Africa.

² See Eric A. Witte, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, Open Society Foundations, January 2011, available at:

<http://www.soros.org/reports/putting-complementarity-practice>.

³ See Eric A. Witte, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, Open Society Foundations, 2011, available at:

<http://www.soros.org/reports/international-crimes-local-justice>.

⁴ Those making complementarity-relevant pledges in Kampala were: Austria, Bulgaria, Burkina Faso, Colombia, Costa Rica, Finland, Ireland, Liechtenstein, Mexico, The Netherlands, New Zealand, Peru, Poland, the Republic of Korea, Spain, Switzerland, Trinidad and Tobago, Uganda, the United Kingdom, Venezuela, the United States, and the European Union. See: Review Conference RC/9, *Pledges*, available at: [http://www.icc-](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-9-ENG-FRA-SPA.pdf)

[cpi.int/iccdocs/asp_docs/RC2010/RC-9-ENG-FRA-SPA.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-9-ENG-FRA-SPA.pdf).

⁵ Resolution RC/Res.1, para. 3, 9th plenary meeting, adopted 8 June 2010, available at: [http://www.icc-](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf)

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⁶ Resolution RC/Res.1, para. 8.

⁷ Rome Statute, Preamble.

⁸ The World Bank, *World Development Report 2011: Conflict, Security, and Development*, available at:

www.worldbank.org/wdr2011.

⁹ The Open Society Justice Initiative developed a handbook (soon also available in French) to assist the rule-of-law development community to integrate complementarity into its work. See Eric A. Witte, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, Open Society Foundations, 2011, available at: <http://www.soros.org/reports/international-crimes-local-justice>.

¹⁰ For more information, see *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*, Open Society Foundations, June 2012, available at: <http://www.soros.org/publications/justice-drc-mobile-courts-combat-rape-and-impunity-eastern-congo>.

¹¹ For more information, see Eric A. Witte, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya*, Open Society Foundations, January 2011, available at:

<http://www.soros.org/reports/putting-complementarity-practice>.

¹² *Ibid.*

¹³ Kenya National Assembly, Tenth Parliament, Fourth Session (2011), The Departmental Committee on Justice and Legal Affairs, *Report on the 2012/2013 Budget Estimates for Votes 117, 125, 126, 163, 134, 203, 201, 165, 168, 169 & 213*, pp. 20-22.

**E-mail: info@justiceinitiative.org
www.justiceinitiative.org**



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