

OPEN SOCIETY JUSTICE INITIATIVE

UNITED NATIONS Strengthening the Nexus Between International Criminal Justice and National Capacity to Combat Impunity

**Remarks by James A. Goldston
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Too often “international criminal justice” is seen as something different or apart from “the rule of law” – notwithstanding the fact that, as the concept note for this discussion reminds, the UN itself has consistently underscored their inter-relationship

International courts are typically more expensive than national ones.

They are often located at a greater distance from the affected population or the place where the crimes took place.

They are often the creation of international instruments – like the Rome Statute – or international bodies – like the UN Security Council, which created the ICTY and ICTR.

All of these characteristics lend substance to the perception that international criminal justice is a fundamentally different enterprise from national efforts to build the rule of law.

Of course, we all know this is not correct. To the contrary, international justice and domestic justice are inextricably joined at the hip.

A key question for us here today is: Are there ways to better align initiatives at the international criminal justice level with overall efforts to strengthen rule of law assistance to Member States in this field?

Given the limits of time, I will focus most of my comments on the ICC.

As important an achievement as it represents, the International Criminal Court is limited in its ability to address the global impunity gap. Even in countries where ICC investigations are ongoing, all too little has been done to enhance national capacity to prosecute and try the many perpetrators of crimes other than those few the Court can address.

To date, much discussion has focused on what more the Court itself can do. By contrast, the responsibilities of the international donor community with respect to complementarity have not received adequate attention. This is puzzling.

Though the word “complementarity” nowhere appears in the Rome Statute, it is a core concept. The Preamble provides that “the International Criminal Court ... shall be complementary to national criminal jurisdictions”. The basic idea is that the ICC is the court of last resort, only to be seized of a case when, in the words of Article 17(1), a

”State is **unwilling or unable** genuinely to carry out the investigation or prosecution.” Under such a scheme, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” (RS, Preamble).¹

And yet, the preliminary results of studies we are undertaking suggest that, in a number of ICC situation countries, major donors are not giving sufficient priority to complementarity-specific capacity building. In the wake of the 2008 election violence in Kenya, for example, there has been little if any training of legal actors in international criminal law. Nor has there been much training for court translators in legal translation techniques, though this has been identified as a critical need by civil society monitors. In DRC and Uganda, there has been little effort to improve government capacity to provide witness protection and security in a professional manner, although these are crucial to any serious effort to prosecute Rome Statute crimes.

The UN, member states, and organizations like the Assembly of States Parties can do more to develop complementary national capacity by better aligning donor states’ political and legal commitments to justice for international crimes with their existing rule of law/development funding programs. In this way, States Parties can both bolster their support for the International Criminal Court while working globally to combat impunity at the domestic level. While States Parties to the Rome Statute have a special interest in fostering that system’s success, all states have an interest in securing justice for mass crimes. Thus, promoting complementarity more effectively requires a blend of efforts, some taking place within the Rome Statute system and others more broadly involving all members of the global community.

One example of how to do better is being proposed by Denmark and South Africa, focal points for the stocktaking session on “complementarity in the run up to the Kampala Review Conference.

The complementarity proposal as presently formulated calls for States Parties to the Rome Statute to provide “international assistance on a voluntary basis” to strengthen national jurisdictions and enable them to “conduct genuine national investigations and trials of crimes included in the Rome Statute.” The proposal recognizes that the ICC is

¹ What are the factors relevant to determining whether a state is “unwilling or unable”?

“In order to determine **unwillingness** in a particular case, the Court shall consider ... whether ... (a) the proceedings were or are being undertaken ... *for the purpose of shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court” or (b) “[t]here has been an *unjustified delay* in the proceedings which in the circumstances is *inconsistent with an intent to bring the person concerned to justice*” or (c) “the proceedings were not or are *not being conducted independently or impartially* and ... in a manner ... *inconsistent with an intent to bring the person concerned to justice*” (Art. 17(2))

“In order to determine **inability** in a particular case, the Court shall consider, whether, due to a *total or substantial collapse or unavailability of its national judicial system*, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” (Art. 17(3)).

not, and cannot be “a development agency” but that actual assistance to domestic systems in need should be delivered, as far as possible, “through cooperative programmes between States themselves, as well as through international and regional organizations and civil society.”

Noting that “many development cooperation organizations are operating extensive rule-of-law programmes,” the proposal calls for exploration of “synergies between the Rome Statute system and these activities. Benefits could accrue, moreover, from mainstreaming and integrating issues of international and domestic rule of law and criminal justice across governmental sectors, as well as in the work of other relevant organizations.”

This proposal is a good start. It underlines the all important point that, if the Rome Statute system is to succeed, states must assume their fair share of responsibility for making that happen.

Yet potential exists to strengthen this proposal, even if not formally through the Review Conference, then through complementary initiatives designed to overcome the structural and financial limitations on the proposal’s recommendations.

The UN, Member states and other partners can take practical steps to both complement and bolster the current proposal in order to strengthen coordination and coherence in this area. Let me mention six measures.

1. Working with the ICC and ASP to develop complementarity-specific guidelines for states to meet their obligations to prosecute international crimes domestically.

The notion of complementarity needs to be given more practical, concrete meaning - not as an alternative or competitor to rule of law assistance, but rather as a component of it, or even as an example of best practice. All parties involved – the ICC, the ASP, the UN, member states and civil society – need to develop a set of common tools focused specifically on enhancing the capacity of states parties to the Rome Statute to carry out genuine, effective and fair investigations, prosecutions and trials of Article 5 crimes.

To be sure, complementarity and the rule of law more generally are related. Thus, the capacity and will to carry out effective prosecutions and trials of Rome Statute crimes require as a foundation the basic outlines of a rule of law – competent courts, independent judges, a professional bar, and functioning judicial infrastructure. And yet, Rome Statute complementarity requires more specific skills and tools as well. This reflects the reality that trying a case of genocide or crimes against humanity will often be more challenging – technically, logistically, and in other ways – and require more developed skills, knowledge and capacity - than trying a case of simple murder.

What would these common tools relevant to complementarity include? Three categories of assistance have already been identified by South Africa and Denmark in the Report of the Bureau on stocktaking: Complementarity²:

- (1) Legislative assistance:
 1. drafting a legislative framework implementing Rome Statute crimes and obligations
 2. identifying and instituting ways to overcome domestic hurdles to implementing this legislation
- (2) Technical assistance and capacity building: including
 1. training of police, investigators, prosecutors in investigating and prosecuting Rome Statute crimes,
 2. training of judges to try such crimes, including courtroom management techniques
 3. training of defense counsel in effectively representing the accused charged with such crimes
 4. capacity building for the protection of victims and witnesses, which is a particular concern in cases of Rome Statute crimes,
 5. training in forensic expertise
 6. supplying judges and prosecutors to assist national courts to support war crimes chambers or hybrid tribunals
- (3) Physical infrastructure
 1. not just the construction of courthouses and prison facilities but also the consolidation of national and local capacity necessary to “ensure that the functioning of such institutions comply with international” standards.

This is all sensible. One can imagine other forms of assistance which also contribute to complementarity such as

- Advice in structuring reparations programs for victims of RS crimes in situations of scarce resources
- Help in devising court management systems capable of organizing, safeguarding and making accessible as appropriate large quantities of sensitive information
- And apart from assistance to the courts and court actors themselves, there is a need for aid of different kinds to civil society. Time and again we have seen how civil society action may contribute to the generation of “willingness” to carry out genuine investigations and prosecutions under Article 17(2),. Examples of civil society support that may be specifically relevant might include:

² ICC Assembly of States Parties, Resumed eighth session, New York, 22-25 March 2010, “Report of the bureau on stocktaking: Complementarity” (18 March 2010), para. 17.

1. Training for journalists in reporting on RS crimes and efforts to address them through the courts
2. Assistance to NGOs in conducting – and working with court officials to pursue - public outreach programs
3. Assistance to NGOs in monitoring prosecutions and trials of RS crimes, and in advocating on behalf of victims and others affected.

To be sure, the prosecution of international crimes cannot be reduced to a simple checklist that can be mechanically slapped on to a country's institutions. Any model must take account of, and adapt to, the particular context in which it is applied. Nonetheless, a set of general criteria specific to complementarity – as opposed to the ROL more generally – would help guide states' efforts and serve as a useful barometer for the purposes of tracking progress.

It bears emphasis that examples of complementarity-focused rule of law donor programming already exist. In Uganda, Rule-of-law donors coordinate funding through participation in the Justice Law and Order Sector (JLOS) Development Partners Working Group, which provides approximately 6-7% of the JLOS sector's total budget. The Development Partners Working Group comprises several sub-committees. The transitional justice sub-committee is "actively supporting the Rome statute" through support for revision and enactment of Uganda's international crimes bill, which will domesticate the Rome statute; and training of judges, prosecutors and bar association members in international crimes. In the DRC, although there are gaps, there is considerable coordination amongst rule-of-law donors and the Minister of Justice through the Comité Mixte de la Justice (CMJ), and groups like the ABA Rule of Law Initiative and others are implementing mobile court projects, including for gender-based Rome Statute crimes. And while it cannot do everything, the ICC OTP itself launched in 2009 an innovative program to strengthen an international law enforcement network of national-level prosecutors to address a range of criminal activity – including financial crimes, corruption, weapons trafficking and illegal natural resources exploitation – linked to RS crimes.

2. A second step the UN and/or its member states can undertake is to create a bureaucratic locus or secretariat to help governments focus these efforts – and thereby to actualize, practically and institutionally, a more dedicated effort to fostering complementarity

The Denmark-South Africa proposal for Kampala suggests the ASP Secretariat be tasked "with facilitating the exchange of information between the Court, States Parties, signatory states, international organizations, civil society and other stakeholders aimed at strengthening domestic jurisdictions. This function would be established within existing resources and be limited in its role."

Such a modest effort risks being inadequate to the task. In practice, this proposal may mean that one or more existing staff members in the ASP secretariat will be asked to take on this role, on top of their existing duties. This seems a precarious basis on which to implement such an important and potentially transformative concept. It is understandable that states do not want to open the floodgates to massive additional spending. But doing too little risks failure.

One way to give this idea more substance would be for states parties to create a standing committee, or working group, based within the ASP itself but explicitly open to all states and interested organizations, such as the UN, non-states parties, and private donors and implementers. This working group would not require additional costs, but it would benefit from the diplomatic and intellectual savvy of diplomats whose regular job involves IJ and RoL funding and programming. Indeed, its creation could be proposed either in the context of the Review Conference, or at the ninth session of the ASP here in New York in December.

The Working Group would coordinate with the ICC's OTP and Registry to develop a list of standard criteria to be employed in identifying impediments to justice for mass crimes in a national system. This set of criteria might draw, not only on the experience of developmental agencies and national actors to date, but also on relevant emerging jurisprudence from the ICC on admissibility issues. The Group might also identify types of programming which help states improve both their will and their capacity in this area.

If this committee is comprised of ASP members, non-states parties and international organizations, each member would take responsibility for disseminating the conceptual tools and guidelines to relevant fora – to ASP states, to relevant departments in the UN, and to other rule of law fora, in which other non-states parties, but major rule of law donors, may participate.

3. A third step would be to improve coordination of complementarity-focused assistance.

In more general ROL discussions, the absence of coordination among donors is a common lament. But when it comes to complementarity, while more inter-governmental coordination is surely needed, there is a separate challenge of coordination within individual governments. Diplomats and even desk officers in foreign affairs ministries who are intimately involved with the ICC are often not the same individuals who deal with broader rule of law and development issues. It would behoove governments to look at ways to streamline complementarity principles internally through their own state apparatus to ensure that development and aid agencies coordinate regularly with their international justice colleagues, as well as those who are responsible for domesticating Rome Statute legislation and other rule of law reforms at home. And within each ministry, more must be done to ensure that complementarity principles are transmitted between headquarters and field offices, where much donor coordination takes place and development aid/programming is determined. Internally tracking best practices and lessons learned in complementarity-specific programming will be an important

contribution to our evolving understanding of what works and what doesn't. This is essential if the field of Rome Statute complementarity is to avoid the "reinvent the wheel" syndrome that has plagued many ROL assistance efforts over the past few decades.

4. A fourth area where the UN and States can assist in building complementarity capacity is through the creation of hybrid courts, or internationalized war crimes chambers.

Indeed, this idea is encouraged by South Africa and Denmark in their proposal, suggesting that state "assistance could take the form of supplying judges and prosecutors to assist national courts or other forms of support to special war crimes divisions of domestic institutions and hybrid tribunals."

- The idea of a hybrid court is appealing in a complementarity setting, as domestic judicial reform efforts take time. Often it takes years to build up the legal framework, logistical capacity and technical expertise to try international crimes. The ICC, meanwhile, can only deal with a handful of alleged perpetrators.
- A hybrid court can be one way of speeding up that process of programming and funding rule of law efforts to promote complementarity – a hybrid court's very existence can prompt adoption of domestic legislation needed to try international crimes; it creates on-the-job training opportunities for lawyers, investigators, judges and other courtroom professionals (translators, case managers, law clerks etc); and, by trying a second tier of perpetrators, can fill some of the gap between the ICC's shorter-term intervention and the long-term revival of a domestic justice system.
- Some of the more successful hybrid efforts have included the Bosnia State Court in Europe and the Special Court for Sierra Leone in Africa. At the same time, we have seen that hybrids are by no means a panacea.

5. A fifth step is for Member states and the UN to more consistently use diplomatic fora to address concerns about national-level willingness and capacity to try Rome Statute crimes.

While many categories of complementarity-focused assistance would typically be encompassed within many states' rule of law donor programming, a different category of activity, no less essential, is the diplomatic efforts of governments in persuading, pressuring and cajoling governments at issue through a mix of carrots and sticks to undertake the necessary prosecutions and trials. These kinds of concerns can be raised bilaterally, as part of a general effort to support the ICC, or in fora such as the Universal Periodic Review or other UN mechanisms where national efforts come under scrutiny, or in statements at the Security Council or General Assembly when country-specific issues related to rule of law, stability, peacekeeping or justice efforts are being discussed.

And the UN itself can do more to mainstream ICC complementarity concerns across the realm of its programs – whether through UNDP (by addressing the relationship between complementarity and access to justice), or DPKO (in terms of the relationship

between complementarity and peace building), or by country missions like MUNOC and UNAMID.

6. A sixth step that would help align international criminal justice with national level rule of law would be for those states who are parties to the RS to take more seriously their obligations to support the Court.

All states can help to build a culture of support for accountability by voicing and reinforcing the ICC's independence and its value in fighting impunity. Creating a supportive diplomatic environment for the ICC and its work paves the way for support at the domestic levels in states, so that complementarity specific programming can flourish at the national level. To take one example, in respect of the Sudan situation, we have seen national governments publicly stand up for the Court by making clear that President Bashir would risk arrest were he to visit. This kind of statement has a powerful demonstrative effect in enhancing respect for the rule of law not just internationally, but at national level as well.