PROMOTING COMPLEMENTARITY IN PRACTICE - LESSONS FROM THREE ICC SITUATION COUNTRIES

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JUSTICE INITIATIVE

The word "complementarity" appears nowhere in the Rome Statute. Yet the term encapsulates a fundamental principle: that the ICC should be a court of last resort, acting "complementary to national criminal jurisdictions."[1] References to the need to take "measures at the national level" to ensure the "effective prosecution" of the "most serious crimes" are woven throughout the treaty, as is the "duty" of each State to "exercise its criminal jurisdiction over those responsible for international crimes."[2]

However the reality for many countries – particularly those decimated by armed conflict – is that their legal systems have also been destroyed or seriously weakened. Sometimes they will need help from others to bring the worst perpetrators of serious international crimes to account. In order for this to happen, complementarity – ensuring that domestic forums serve as the principal venues for combating impunity – must be increasingly integrated into rule of law and development policy. For far too long, the world of rule of law reform in domestic systems – whether dealing with the police, the courts or the bar - has been viewed as separate and apart from international justice. As a result, national-level accountability efforts have suffered, while the ICC has been saddled with expectations it cannot fulfill.

As Denmark and South Africa, the Assembly of States Parties (ASP) focal points for complementarity, usefully underscored at Kampala earlier this year, states, regional organizations, and NGOs must assume greater responsibility for ensuring accountability for serious crimes.

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

Over the past several months, the Open Society Justice Initiative has carried out research in three countries where the International Criminal Court is actively involved in investigations – Uganda, Kenya and the Democratic Republic of Congo (DRC). Our study, which will be published in January, identifies with greater specificity the gaps in complementarity-specific programming in each country. It confirms that much work is needed to realize the promise in the ideas that Denmark and South Africa laid out at the Review Conference.

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[1] Preamble, *Rome Statute of the International Criminal Court ('Rome Statute')*, U.N. Doc A/CONF.183/9, adopted July 17, 1998, available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

[2] See Preamble and Article 17, Rome Statute, ibid.

Through field research – interviewing rule of law donors, diplomats, national civil society and media, international civil society (in particular, those implementing rule of law and complementarity-specific programming), national prosecutors, defense lawyers, judges, police and government officials – and an analysis of public reports, we have found that some complementarity-specific programming is already underway in all three countries. However, this programming has tended to be *ad hoc* rather than strategic, in part because donors, government officials and civil society groups do not always have sufficient familiarity with complementarity in practice. As a result, much ongoing rule of law programming fails to take into account the interrelated and interdependent nature of complementarity. For example, prosecutors well trained in Rome Statute crimes may not be able to use these skills if investigators are not also well trained in investigative and forensic techniques aimed at investigating international crimes.

Importantly, we found that donors and host governments expressed an openness to the development of an overarching framework that would help them better assess, and respond to, complementarity-specific needs.

The research drew on the three broad categories of assistance set forth by Denmark and South Africa, and added several elements under each of the following headings:

(1) Legislative assistance:

- Drafting a legislative framework implementing Rome Statute crimes and obligations;
- Identifying and instituting ways to overcome domestic hurdles to implementing this legislation.

(2) Technical assistance and capacity building: including

- Training of police, investigators, prosecutors in investigating and prosecuting Rome Statute crimes;
- Training of judges to try such crimes, including courtroom management techniques;
- Training of defense counsel in effectively representing the accused charged with such crimes;
- Capacity building for the protection of victims and witnesses, which is a particular concern in cases of Rome Statute crimes;
- Training in forensic expertise;
- Training on court management systems to ensure a cadre of staff capable of organizing, safeguarding and making accessible as appropriate large quantities of sensitive information;
- Training on archival management;
- Supplying judges and prosecutors to assist national courts to support war crimes chambers or hybrid tribunals;
- Advice in structuring reparations programs for victims of Rome Statute crimes in situations of scarce resources;
- Training for journalists in reporting on Rome Statute crimes and efforts to address them through the domestic courts;

- Assistance to NGOs in conducting – and working with court officials to pursue - public outreach programs; and
- Assistance to NGOs in monitoring prosecutions and trials of Rome Statute crimes, and in advocating on behalf of victims and others affected.

(3) Physical infrastructure

- Construction of courthouses and prison facilities as well as the consolidation of national and local capacity necessary to "ensure that the functioning of such institutions comply with international" standards;[3]
- Ensuring sufficient hardware for court management systems capable of safeguarding and making accessible as appropriate large quantities of sensitive information;
- Creating archive storage area and systems capable of keeping material accessible (eg not degrade through inadequate temperature controls, adequate security); and
- Security infrastructure for detention cells

In each country, we found that gaps exist, but of different kinds:

DEMOCRATIC REPUBLIC OF CONGO

During the course of 2010 in the **Democratic Republic of Congo** – particularly in the wake of the United Nation's draft conflict mapping report released in August[4] -- the international community has increased its resolve to work with the DRC government to deliver credible domestic justice for serious international crimes. A mixed war crimes chamber, bringing together national and international expertise, is currently being considered as a replacement for the current patchy and problematic practice of Rome Statute prosecutions in the military justice system. Other efforts – such as building complementarity expertise in certain regions, and the advent of mobile courts in the country – have also evolved in recent years. But massive challenges remain in promoting complementarity efforts generally in the DRC – not only in terms of capacity and political will, but also in creating a coherent donor strategy towards accountability efforts (to date, donors have split their efforts between a regional focus, mobile courts or the mixed chamber proposal).

Of particular relevance to the ASP, donors in Kinshasa evinced little knowledge of decisions made in Kampala earlier this year at the Review Conference. Indeed, while donors had a vague familiarity with the Review Conference, none knew about the complementarity resolution adopted at Kampala, and significantly, none of the field representatives of governments that made complementarity-specific pledges at the Review Conference seemed to be aware of those pledges. This raises questions about both communication between officials at headquarters and those in the field, and coordination among political, legal and development arms.

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[3] See also ibid, at pp.4-5, para 17.

[4] See United Nations Office of the High Commissioner for Human Rights, *DRC: Mapping Human Rights Violations 1993-2003*, available at http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/RDCProjetMapping.aspx.

Donors have supported some complementarity-related projects, but without taking a systematic approach. In terms of the three broad categories we examined, the ***legal framework*** was in a state of flux. Currently, only military tribunals had legislation enabling them to prosecute war crimes, crimes against humanity and genocide. New legislation domesticating the Rome Statute is currently before the DRC Parliament which would shift jurisdiction over serious international crimes from the military to the civilian courts. This is a positive step, but even with clarity on the legal framework, the DRC lacks ***capacity*** in every area needed to conduct proper investigations and prosecutions and hold fair trials. Police are, on the whole, ill-prepared and ill-equipped to provide security, undertake investigations or make arrests in support of domestic war crimes proceedings. A severe shortage of legal professionals to serve in the DRC legal system exists, including prosecuting and trial magistrates along with defense lawyers – and systematic training in international criminal law is lacking. Capacity for court management was described as being "close to zero" -- officials still use paper and pencils to track the proceedings, and little international assistance has been directed towards the area of court management. No legal basis currently exists in the DRC for the protection of victims and witnesses. The draft statute currently before Parliament would remedy this – but the country still faces enormous capacity and resource challenges to implement it. Capacity to handle judicial archives is practically non-existent and there have been few efforts by the international community to develop such capacity.

Even with improved technical capacity, the DRC sorely lacks ***equipment and physical infrastructure*** required to carry out investigations and trials of any crimes, let alone handle complex and sensitive cases of international crimes. Where court buildings and offices do exist, they usually lack even the most basic office equipment, and modern case management systems are virtually unknown.

UGANDA

In Uganda, although there are capacity gaps, a broad capability to conduct investigations and trials does exist. The Ugandan government has set up a War Crimes Division (WCD) in its High Court, which has dedicated investigations and prosecution teams within the Uganda Police Force and Directorate of Public Prosecutions. The first indictment – against a lower level LRA figure named Thomas Kwoyelo -- has been issued and his trial is expected to begin in the near future. The main concern reported by donors about the WCD is the perceived one-sidedness of complementarity efforts – the WCD is expected to apply exclusively to members of anti-government factions.

That said, donors have coordinated well to help this WCD prepare for its first cases. Donors collaborate with the Ugandan government's own internal coordinating body – the Justice, Law and Order Sector (JLOS) – comprised of representatives of 15 government agencies. When JLOS attempted to draw up its own list of transitional justice needs based on requests of each government agency, it recognized that the agencies themselves were not confident in their own lists, and that donors were unable to help shape the list effectively because they, too, were unfamiliar with the requirements of international criminal investigations and trials to be able to effectively assess needs. As a result, both

donors and JLOS decided to ask the Public International Law and Policy Group (PILPG) and the International Center for Transitional Justice (ICTJ) to conduct a needs assessment mission on their behalf in November 2010. Pending how it is approached, this assessment may be helpful for complementarity-specific programming and planning.

Currently, Uganda's ***legal framework*** specifically designed for complementarity efforts is in the form of the *International Criminal Court Act* (*ICC Act*) – however, this piece of legislation may have no bearing on the first trial, or indeed any trials related to past crimes as the *ICC Act* is prospective from June 25, 2010. Instead, cases before WCD may rest on previously enacted legislation, such as the legislation domesticating the *Geneva Conventions*. Another complicating factor for Uganda is its *Amnesty Act*, which allows for ex-combatants to apply for amnesty unless their name appears on an ineligibility list drawn up by the Interior Minister and approved by parliament (to date, no such exemption list has been tabled). Concerns exist that the amnesty regime may dramatically circumscribe the reach of complementarity efforts.

In terms of ***capacity,*** the WCD prosecutors are reportedly working well with a dedicated War Crimes Investigation Unit within the Uganda Police Force – but are hindered by frequent personnel transfers. Though a number of trainings have been organized for prosecutors and investigators, again the staff turnover has tended to dilute the impact. Ongoing training is needed. The Ugandan legal community generally lacks international criminal law knowledge, though some trainings for both prosecutors and defense have been conducted. Most Ugandan judges have been trained in public international law, but not the specific field of international criminal law. Two judges in the WCD are exceptions, having either practical or academic knowledge of international criminal law. Currently, there is a lack of equipment for court recording and expertise in operating such equipment, there is no standardized education or training requirement for judiciary support staff, and no professional court interpreters. WCD officials cite archive management as one area in which the division is in need of trainings, and witness protection as a specific priority area which needs to be addressed.

In terms of ***physical infrastructure***, the WCD and War Crimes Prosecution Unit share a rented compound with the Anti-Corruption Division of the High Court. WCD officials would like a permanent building of their own to provide adequate space for offices, archives, a library and a teleconferencing room.

KENYA

Despite some capacity gaps, there are no insurmountable technical challenges to complementarity proceedings in **Kenya**. The key question on donors' minds is whether there is sufficient political will to pursue domestic accountability for mass crimes committed in the course of the 2007-8 post-election violence.

The approach donors took to Kenya in the wake of the post-election violence reflected these concerns: while recognizing a need to support Kenyan capacity in international criminal law, donors nonetheless scaled back their assistance to the Kenyan government,

waiting to see if the government is committed to serious legal reform before committing funds.

The Kenyan approach to complementarity proceedings to date has not done much to inspire confidence in donors. As of November 2010, plans for a hybrid tribunal to address the post-election violence have been indefinitely shelved. The trials that have taken place – for six lower-level accused – have tended to reinforce the perception that the government is not completely committed to accountability for the violence. In one case, the three accused were acquitted for murder, and the Attorney General failed to file an appeal in the required 14 day time period. The new constitution adopted in August 2010 includes a raft of provisions that, depending on implementation, could result in the significant strengthening of prosecutorial and judicial independence.

Political will issues aside, questions remain about the legal framework that currently exists and whether it can be applied to any post-election violence accountability efforts. The *International Crimes Act* took effect January 1, 2009, and it is unclear whether it can be applied retroactively to the post-election violence.

Even with a legal framework in place that could address the post-election violence, capacity gaps exist. Kenyan police lack skills, are poorly organized, and are prone to corruption and political influence. In the low level trials for post election violence, police reportedly mishandled crime scenes, failed to preserve forensic evidence, and had little capacity to analyze the forensic evidence that did exist. Police, however, are in the process of reform – if they show progress, donors may be more willing to address current capacity gaps, including how to deal with traumatized victims and witnesses, and investigation skills. Specific trainings in international criminal law will be necessary for any prosecutors and judges involved in trials related to post-election violence. Meanwhile, on the court management side, judicial officers still hand-write court records, no good system of judicial archiving is in place, and there is an absence of trained judicial interpreters. Significantly, Kenya currently has little capacity to protect witnesses and victims and has been reliant largely on NGOs to undertake this task in the past. A special agency has been created and its staff has been trained in addressing witness protection needs, but this agency is still is regarded as ill-prepared to protect witnesses in such sensitive cases as those relating to the post-election violence.

Given the big expectations for the ICC in Kenya – and the limited capacity of the ICC itself to undertake the levels of outreach for which there is a hunger in-country -- more investment in civil society outreach efforts could have outsized policy benefits. Donors do appear to be redirecting their investments to civil society given the reluctance to fund the government on complementarity-related efforts, but whether this has been coupled with a diplomatic strategy to engage the Kenyan government on accountability for the post-election violence is unclear. Finally, ***physical infrastructure*** is not a large hurdle for Kenyan trials related to the post-election violence.

PRELIMINARY CONCLUSIONS

Attempting to draw broad lessons for complementarity policymaking from the experiences of the DRC, Uganda and Kenya is inherently difficult. Surface similarities are obvious; each is an African state and an ICC situation country. But prospects for genuine international criminal justice proceedings in each are more precisely characterized by a unique combination of variables. These include the scale and nature of the conflicts they have experienced; the security situation; the capacity of government, the legal profession and the judiciary; the strength of civil society; popular attitudes towards international criminal justice and other transitional justice mechanisms; and the levels of commitment to positive complementarity by the each government and international community. Nonetheless, here are a few conclusions we can draw:

1. **Efforts to promote complementarity are not starting from scratch:** As the three case studies demonstrate, a number of initiatives are already underway which provide a foundation upon which to build.

2. **Providing guidance to donors and other rule of law actors in how to integrate complementarity into their ongoing work is valuable**: In the three countries analyzed, rule of law donors and other actors expressed a willingness to consider using an overarching framework that can help think through ways to integrate complementarity-specific activities into their rule of law programming. The "complementarity toolkit" being developed by the European Commission, announced at the Review Conference, will be a useful resource for donors interested in trying to promote complementarity in practice. The Open Society Justice Initiative will partner with the European Commission in hosting a meeting in March 2011 to develop the framework for this toolkit. Trainings for interested donors in complementarity concepts could also be a valuable additional investment.

3. **Strategic rather than ad hoc interventions to promote complementarity may yield more effective and efficient results:** Recognizing the interlinked and interdependent nature of complementarity-specific efforts will assist in insuring that interventions by rule of law donors are as effective as possible. Even with well trained judges, prosecutors and defense lawyers, trials may collapse because witnesses are too afraid to testify if there is no functioning witness protection scheme in place both inside and outside the courtroom – particularly if there is a history of threats and harassment of potential witnesses in similar types of cases or investigations.

4: **No one-size fits all solution can exist:** Each country has a unique combination of technical capacity needs and political will challenges. Any toolkit or other framework developed will need to be adjusted according to each individual context.

5. **Creating technical capacity is not the only place donors can engage usefully – using diplomatic channels to help create willingness to prosecute is**

also fundamental to making complementarity work: Funding civil society and media to help increase knowledge about complementarity and to generate political will is both a necessary and useful investment by donors. However, this alone is not sufficient: donors must also invest their own political capital into pushing for domestic investigations and prosecutions where it is clear political will is lacking.

6. Developing effective communication channels not only *between* donors, but between ministries *within* individual states is crucial to promoting complementarity through rule of law efforts: The example provided by donors in Kinshasa who were not aware of the complementarity-specific pledges their own governments had made during the Review Conference suggests that communications between ministries on complementarity may need to be improved, even if only to ensure that commitments made by countries in the context of their treaty obligations can – and are seen to -- have real meaning in practice.

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