

Complementarity and the ASP: Opportunities for Impact

Presentation to The Hague Working Group on the Rule of Law

June 21, 2011

James A. Goldston

Executive Director, Open Society Justice Initiative

One year ago at the Kampala Review Conference, the call for a revitalized effort to promote complementarity was an idea just starting to take shape. Since then, much has been done to push forward the thinking and practice of fostering national prosecutions of international crimes. Though much discussion has rightly focused on opportunities for host states and rule of law donors, the Assembly of States Parties can play an important role in reinforcing these efforts.

I'd like to take the few minutes I have today to explain some of the work we have been doing around complementarity since Kampala and then to offer a few suggestions for consideration by the ASP.

For those who may not be familiar with our work, the Open Society Justice Initiative is a human rights law reform organization which uses advocacy, litigation, research and technical assistance to promote open societies. As an implementing organization housed inside a donor network, which works on both international justice and the rule of law domestically, we bring a unique perspective to this topic. Over the past year, we have undertaken research, developed tools and implemented projects to better understand how to operationalize complementarity in practice.

Let me talk briefly about three such efforts: 1) our three country study of complementarity in the context of rule of law promotion; 2) our emerging handbook on complementarity for funders, programmers and national governments; and 3) our support for a mobile gender crimes court in the DRC.

1. Three Country Study of ROL programming

At Kampala and in its immediate aftermath, we took part in a number of discussions contemplating how rule of law donors could promote complementarity. We decided to build on these by conducting a study aimed at mapping the extent to which donors were already integrating complementarity specific elements into their ROL programming in three situation countries – Kenya, DRC and Uganda.

Our research found that some complementarity-specific programming was already underway. However, this tended to be ad hoc and lacked any strategic framework. As a result, such programming often failed to take into account the interrelated nature of

complementarity-focused efforts. For example, prosecutors well trained in international crimes may not be able to use these skills if investigators are not also well trained in forensic and other techniques tailored to the specifics of war crimes and crimes against humanity.

In the DRC, massive challenges exist, not only in terms of capacity and political will, but also donor strategy towards accountability, which is currently fragmented. Although a range of activities have been carried out across the justice sector, there has been to date no overarching strategy for addressing RS crimes. Instead, some donors have focused on particular regions, others on one sector like the police, still others on one kind of judicial mechanism like mobile courts. But there has been no cohesive vision of what they are all trying to achieve.

Of late, much attention has focused on the possible creation of a mixed chambers for the prosecution of serious crimes. Just in the past few days, concern has emerged about which version of a bill establishing such chambers will be considered by the Parliament. Under one version the chambers would reportedly not have jurisdiction over the military or police.

But even once there is greater clarity on the legal framework, the DRC lacks capacity, equipment and physical infrastructure in every area needed to conduct proper investigations, prosecutions and fair trials.

This can be contrasted to Uganda. Here, although capacity gaps exist, there is broad capability to investigate and prosecute perpetrators of serious crimes. The War Crimes Division (WCD) in the Ugandan High Court has dedicated investigation and prosecution teams within the Uganda Police Force and the Directorate of Public Prosecutions. The main questions are two-fold: a) first, the perceived one-sidedness of complementarity efforts – the WCD is expected to apply exclusively to members of anti-government factions – and b) second, the fact that the ICC Act is prospective only from June 2010, so it may do little to foster accountability for past abuses.

As in Uganda, so in Kenya, despite some capacity gaps, there are no insurmountable technical challenges to complementarity. The key issue is whether there exists sufficient political will to pursue domestic accountability for mass crimes committed in the course of the 2007-8 post-election violence.

The ICC's decision to launch proceedings against six senior figures has understandably garnered attention, as it should. And yet, prosecutions of other perpetrators are sorely needed. Last month, Justice Waki called again for the creation of a special tribunal to address the post-election violence. It remains to be seen whether donors, Kenya's vibrant civil society and the government in Nairobi can respond to this challenge in the new constitutional framework. If and when they do, they will have to address major gaps in witness protection and the police, which has long been prone to corruption and political influence.

In sum, our study offers a snapshot of the kind of assessment of rule of law programming that we believe will be essential on an ongoing basis if complementarity is to be effectively pursued by the donor community.

2. Handbook

A second effort, a handbook on complementarity, seeks to respond to the typical question of a rule of law programmer, or donor, or government official who asks, “OK I understand that complementarity is important. But what practically can I do to make it happen?”

The handbook emerged out of a fruitful collaboration with our colleagues at the European Commission, which had announced at the Review Conference that it would develop a complementarity “toolkit.” We have since worked closely with the Commission to produce a more general framework to accompany the EC’s own document, which of course will be tailored primarily to the needs of its own staff.

Our handbook addresses subjects such as getting the right legislation to allow for prosecution of international crimes; investigations; prosecutions; judges; defence counsel; witness and victim protection and support, victim participation; court management; archival management; prisons and detention facilities; reparations; outreach; policy coordination; provision of international personnel; journalism; and NGO advocacy and court- monitoring capacity. Finally, it discusses needs for physical infrastructure and equipment.

In each area, the handbook examines potential overlap with traditional rule-of-law development, highlights issues that may be unique to proceedings involving international crimes, and provides examples of past success. Finally, it offers a set of guidelines and questions to assist rule-of-law donors in designing programs, as well as lists of relevant resource organizations and publications.

Together with the European Commission, we convened an expert meeting in Pretoria in April, which tested the draft guidelines against the realities experienced on the ground by practitioners and donors alike. We hope to release our handbook in the autumn and to discuss it at an appropriate forum at the ASP in New York in December.

And I should say, a revised draft will be available later this week and we would be happy to circulate for comment to members of this working group if that were of interest.

3. DRC Mobile Court

A third initiative I wish to mention is the support our network has provided for a mobile court dedicated to justice for gender-based crimes in South Kivu in the eastern DRC. Our goal has been to test out the promotion of complementarity in a particular context.

The mobile court, comprised of solely Congolese staff, lawyers and judges, commenced operations in 2009. Following leads, investigators and prosecutors prepare cases related to murder, rape, or other crimes, giving a priority to gender violence. Court officials prepare the files, and space for hearings is identified – often outside or in a private home. Then judges at the level of the Superior and Appellate courts are brought in to hear the cases.

In 2010, the project operated 3 civilian and 6 military courts in remote areas of South Kivu, prosecuting 186 suspects for serious crimes (115 rape, 59 murder, and 12 theft/property crime cases), resulting in 137 convictions. Earlier this year, the court conducted a successful trial of the perpetrators of mass rape which took place in the town of Fizi on New Year’s Day. A senior military officer and eight of his officers and troops, were convicted of crimes of sexual violence and sentenced to lengthy jail terms. By all accounts, the trial was carried out professionally. It operated at a fraction of the cost of an international court, and reached a conclusion only two months after the crimes were committed.

We see this effort as a test case for a no-frills complementarity option that merits consideration for replication in other contexts.

4. Other Activities

In addition to these ongoing efforts, we are also pursuing other potential avenues for fostering complementarity. These include a country initiative in Kenya, where the coming into force of the new constitution and the ICC’s own activity have together opened up possibilities for engagement on national accountability. In May, we convened a retreat outside of Nairobi with a range of civil society actors and are now mapping the contours of a complementarity action plan to be discussed with donors and the government. We will continue to convene meetings in Kenya in coming months.

We are also exploring research on the lessons to be learned from hybrid tribunals, and will be working to foster comparative learning across borders about complementarity experiences that have been successful to date, including in Latin America. And we are discussing with local actors ways to apply complementarity in countries affected by the Arab Spring.

Recommendations to ASP

Over the course of this past year, it has become clear that complementarity requires the engagement of all actors – the ICC itself, civil society, national governments, the international development community, and, last but by no means least, the Assembly of States Parties.

The resolution which emerged from Kampala last year gave the Assembly of States Parties (ASP) Secretariat the authority, “within existing resources, to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions.” Even within this limited mandate, there is much the ASP Secretariat can do. Let me focus on three tasks – education, convening, and information-sharing.

- a. The most important role the ASP can play with respect to complementarity is *educational* - to highlight the subject’s very importance as a matter that other actors – development agencies, embassies on the ground, national governments, and civil society – should prioritize.

The ASP’s greatest strength is its members’ knowledge of – and commitment to – the principle of accountability for serious crimes. The ASP should exploit that strength to the full, underscoring in its own resolutions and public statements the reasons why complementarity is and should be important beyond the narrow field of actors concerned with IJ:

- i. First, accountability for serious crimes is now the law – the Rome Statute has been ratified by 115 countries in all regions – and this needs repeatedly to be made clear
- ii. Second, the experience of the Court to date has confirmed what its creators understood when they asserted the primacy of national prosecutions – the Court can not address more than a handful of the most egregious cases of war crimes and CAH. National courts must take on the lion’s share of this work – and in many countries they are not yet able to.
- iii. Third, in settings where international crimes have been committed, accountability is often a necessary foundation for progress on standard rule-of-law development. It is difficult to promote a culture of the rule of law, and build trust between a society and the state, when the worst crimes, often orchestrated by officials who remain at large and in power, are left unaddressed
- iv. Fourth, positive complementarity is one way of exploiting synergies between the narrow field of international crimes and the broader remit of law reform. These synergies are many:
 1. A focus on redressing international crimes can catalyze justice reforms by bringing broader and more engaged domestic and international constituencies on board.
 2. New financial resources that come with the commitment to international justice can also benefit areas of concern to the justice system as a whole. For example, a witness protection system needed for international criminal trials could also help combat domestic abuse, sexual violence, corruption, drug trafficking, or organized crime. Criminal investigators who have undergone specialized training in

international criminal justice may also learn better how to secure crime scenes or take witness statements – skills that will benefit the justice system as a whole.

3. Finally, enforcement of the law for the gravest of crimes can boost public confidence in the justice sector, which in turn can contribute to the deterrence and punishment of domestic crimes.
- b. A second function the ASP should perform would be to use its prestige to *convene* on a regular basis the cross-section of actors needed to address complementarity effectively.

Meeting the vast challenges of complementarity requires extensive contributions from international justice supporters, but overwhelmingly must rely on the efforts of others, including the rule-of-law development community. The latter network of international organizations, aid agencies and other donor and implementing bodies has extensive programs in place around the world, and much experience and expertise in fostering the rule of law. When they were brought together for a high-level conference at Greentree, Long Island, in October 2010, participants from the international justice and development communities acknowledged a need to cooperate in integrating international criminal justice into traditional rule-of-law programs.

The ASP is a logical locus for such discussions. At a minimum, the ASP should take the opportunity presented by the new buzz about complementarity to invite leading development community representatives for a discussion about how to better insure alignment of priorities between these two all-too-often disparate communities.

- c. Finally, it would not require substantial resources for the ASP to improve the *sharing of information* among different actors engaged in complementarity on an ongoing basis. Establishment of an electronic resource information or web-based platform would allow more transparent and real-time identification of needs, help avoid duplication of effort, and improve interaction among UN agencies, regional institutions, national governments; and civil society. The ASP should be regularly communicating both with this working group and the rule of law working group in New York on these issues. A freer flow of information would also make it easier to seize opportunities to inject complementarity into fora where it is appropriate, whether the 6th Committee, the UN's Rule of Law Unit, the General Assembly or in regional convenings.

In short, there are a number of ways the ASP can make a significant contribution to complementarity with the limited resources at its disposal.