

CHAPTER 8: BRINGING JUSTICE HOME: COMPLEMENTARITY AND CAPACITY BUILDING – CIVIL SOCIETY IN ACTION

The most important question is whether we are going to continue to maintain a dividing wall between international criminal justice and domestic criminal justice. I think it is time that we bring down this wall when it comes to international crimes. We are now dealing with the phenomenon as if they are two completely separate systems. We need to make it into a single system. It does not make a difference whether the perpetrator is prosecuted before a domestic, regional or international court. The basis has to be that everyone is subject to justice and that we have a shared commitment to fighting impunity and providing accountability. The principle of accountability should not be limited by a jurisdictional battle over the appropriate forum for holding perpetrators accountable.

We should not allow jurisdictional barriers to stand in the way of accountability, and the pursuit of international justice should be a collaborative national and international effort. We should make sure that all States have incorporated in their domestic laws the crimes of genocide, crimes against humanity, war crimes and other international crimes.

We should also make sure that we push all States not only to incorporate these crimes in their civilian and military laws, but to make sure that they enforce them and to cooperate with each other in their enforcement. We need to have effective rule of law assistance training programs for all governments so that prosecutors, senior police officers and judges are trained in these international crimes.

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The Rome Statute's principle of complementarity places the primary responsibility of prosecuting crimes against humanity, genocide and war crimes on states, recognising that their "effective prosecution ... must be ensured by taking measures at the national level".² This principle is given effect in articles 1 and 17 of the Rome Statute. Article 1 states that the ICC "shall be complementary to national criminal jurisdictions" and article 17 sets out how this principle operates in practice by applying the "willing and able" test to determine when the Court must defer to national proceedings.

A solid legal case can shape jurisprudence and set a precedent applicable to hundreds of other cases; a thorough investigation may result in the arrest of a war criminal; an informed and educated population can make demands on their governments; well-trained lawyers and CSOs can effectively protect victims in their home countries; and capacitated judiciaries, prosecuting and investigating authorities ensure that international criminal justice is more than an ideal, but a tangible, realistic and desirable objective.

Civil society must play a major role in ensuring that states live up to their end of the bargain. In carrying out this task, CSOs are faced with a number of diverse and context-specific challenges, as well as opportunities. As already noted, an important part of this process is ensuring that the necessary legal frameworks exist for the domestic prosecution of these crimes, and that the institutional and human capacity exists to do so effectively. Although civil society can encounter unforeseen obstacles even when there is an institutional foundation, the significant results of CSOs' work far outweigh the possible difficulties.

In this respect, four case studies will be used to demonstrate the role civil society can play in promoting complementarity.

The Obligation to Investigate and Prosecute in South Africa

This is an example of justice taking place in a conventional, domestic courtroom, but in a somewhat hostile and inert political-institutional environment. In this example, the role of CSOs was to ensure that the South African organs of states mandated to prosecute international offences were accountable for their decisions and, where necessary, reproached when they made incorrect decisions.

Civil Society and Government Working Together: Mobile Courts in the Democratic Republic of Congo

This case study examines the cooperative relationship between CSOs and the government to ensure justice is secured for victims of sexual abuse through unconventional courtrooms established in remote areas of the DRC.

Empowering the People: Outreach in Kenya

This case study demonstrates the need to educate citizens on the processes and benefits of international criminal justice.

The Prosecution of Hissène Habré – A Prosecution on the Horizon

The fourth involves a combination of domestic and international CSO pressure, as well as international judicial intervention, to ensure that Senegal fulfils its responsibility to prosecute international crimes when circumstances allow. Here the mechanism is a hybrid of domestic and regional justice.