

Meeting Summary of the Retreat on “Complementarity after Kampala: The Way Forward”

November 19, 2010

Introduction

1. The International Center for Transitional Justice (ICTJ), with the sponsorship of the United Nations Rule of Law Unit and the support of the Secretariat of the Assembly of States Parties (ASP) to the International Criminal Court (ICC), hosted a retreat entitled “Complementarity After Kampala: The Way Forward” on October 28-29, 2010, at the Greentree Estate in Manhasset, New York. The daylong meeting, which was preceded by an official dinner and reception the evening before, was conducted according to the Chatham House Rule, and this report provides a summary of the principal discussions without attributing views to individual participants.

2. At the Review Conference of the Rome Statute of the ICC held in Kampala from May to June 2010, states parties passed a resolution confirming that the struggle against impunity and the respect for the rule of law require first and foremost that states prosecute serious crimes committed in their territory or by their nationals. While recognizing and supporting the basic principle of complementarity, the ASP emphasized the need for practical steps to be taken to ensure that states willing but unable to investigate and prosecute such crimes are provided with the necessary tools to assume their responsibilities.

3. The purpose of the Greentree retreat was to build on the momentum created at Kampala and to bring together high-level actors in international justice, rule of law assistance, and the development sector to explore how to implement the concept of complementarity. The meeting offered the first post-Kampala opportunity for substantive discussions among a diverse range of actors who will be instrumental in making complementarity work in reality. ICTJ brought together more than 60 officials representing interested state and nonstate parties; the principals of the ICC; rule of law practitioners, including development agencies and actors; relevant actors within the UN system; essential stakeholders from national jurisdictions; and NGOs that work on these issues.

Overview of Discussion

4. One of the most important achievements of the retreat was the confirmation that the pursuit of criminal justice for serious crimes can in fact enhance the development of the rule of law. Presentations demonstrated that there is already a considerable record of rule of law sector engagement in accountability initiatives for serious crimes and that we are not “starting from zero” in any country under consideration. However, many participants agreed that there is a real need for better integration of planning and assessment of needs, as well as a need for configuring specialized justice efforts in ways that more clearly align with broader rule of law and development

priorities. The complementary relationship between the international justice sector and the rule of law development sector can play a pivotal role in helping ensure that states properly meet their obligations to genuinely investigate and prosecute those responsible for serious crimes.

5. The discussion highlighted the fact that in bolstering complementarity, lessons can be drawn from existing practices and, more specifically, from the relationship between international and domestic judicial systems. These experiences can help shed light on the kinds of assistance that can be provided to states that are willing but unable to investigate and prosecute serious crimes. In this regard, former officials of ad hoc tribunals, hybrid tribunals, and other accountability mechanisms provided firsthand accounts of how these accountability mechanisms contributed toward developing national criminal justice capacity. Although experiences have varied, the following is a summary of the kinds of assistance provided to domestic systems: training programs targeting national officials such as prosecutors, investigators, prison guards, and witness protection officials; the transfer of knowledge from the specialized institution to national institutions; making archives accessible to national authorities; provision of technical and logistical support; and raising awareness about the importance of international criminal law through extensive outreach efforts.

6. One of the most important lessons arising from these experiences is that given the inclination of the international community to move away from ad hoc international tribunals, efforts should be made to ensure that when designing future accountability mechanisms—such as specialized chambers, hybrid tribunals, or other mechanisms within domestic systems—the provision of assistance in forms that have broader applications should be part of the design when possible.

7. In determining what kind of assistance is best suited for a particular circumstance, participants noted that a “one size fits all” model is not applicable. Development responses are largely governed by the specific nature of a request received from national authorities. Experience has shown that needs vary across the board, and that the best way to determine what is necessary for specialized support for the investigation and prosecution of serious crimes is to conduct a needs assessment directed at the demands such cases pose. The assessment should ascertain what skills are necessary for the particular circumstances; the kinds of assistance needed in order to address any deficiency; who should provide the assistance; and who should fund it. It was further noted that the voices of victims should be heard when conducting such an assessment.

8. Participants also discussed the role of domestic civil society groups in strengthening national judicial institutions and systems. It is widely recognized that the legitimacy of a justice system requires that citizens of a country play a crucial role in supporting and constructing national systems of justice. Ownership of the process by domestic actors can also ensure the sustainability of any initiatives to strengthen national systems. In terms of the kinds of assistance that domestic civil society groups can provide, reference was made to the fact that such groups can be instrumental in assisting victims and witnesses as well as in exercising pressure for legislative reform, to name a few. The meeting noted the important role of domestic NGOs, especially in providing information during the preliminary examination stages of the ICC’s work. One suggestion was made for states to convene an annual meeting with civil society groups from those countries in the ICC preliminary examinations list.

9. While the discussions at the retreat focused on the issue of inability of states to assume their responsibility to investigate and prosecute, the discussions also touched upon at various times the issue of unwillingness. Many

participants emphasized that there is a close relationship between unwillingness and inability in some circumstances; the provision of technical assistance may be able to alter the nature and strength of political resistance and offer support to national officials who are willing to fulfill their responsibilities. This would likely require a careful and objective process in terms of assessing the needs and sometimes prospects of success in each particular context.

10. The roles of the rule of law assistance sector and broader development community in bolstering complementarity were a recurrent theme at the retreat. It was noted that a great deal of similarity in approach existed among complementarity and widely accepted development principles. Within the world of development cooperation, much work has been done with states deemed “stable” and “fragile” – these terms correlate with a states respective willingness or unwillingness to pursue accountability. In some circumstances, development sector assessments of a state’s ability and willingness to provide services to its population already exist.

11. The meeting noted the current challenges to engaging the broader development community in helping to bolster complementarity at the national level. The first issue relates to timing and the long-term nature of most capacity-building endeavors in contrast to the need for victims to see justice being done, or to react to opportunities to pursue justice, in the short term. Secondly, a sector-wide approach to development requires strategic planning, whereas the international justice community requires flexibility as a result of the often volatile and changing environment in which it operates. Thirdly, rule of law assistance depends largely on partnerships with governments, which may be negatively affected if states are unwilling to cooperate.

12. Despite these challenges, a number of initiatives have already been undertaken by development actors in many countries around the world, aimed at strengthening domestic judicial capacity. These initiatives have included logistical and infrastructure support, training programs for national officials, developing capacity on witness protection, and facilitating the transfer of knowledge. Despite these opportunities, there is a disconnect and an imbalance regarding visibility and resources allocated for combating impunity for serious crimes at the international and national levels.

13. Ways in which the development community can help take complementarity forward were discussed at length. The following suggestions were made: (a) ensuring that donors place on their agenda the need for legal reform, such as domestication of the Rome Statute and implementing legislation; (b) adopting a whole of government approach to complementarity, i.e. aligning development cooperation projects with other forms of bilateral technical cooperation such as among police forces; and (c) creating a support community that consists of international justice and humanitarian actors on the one hand, and development and peace-building efforts on the other. Additional means for advancing complementarity included developing a comprehensive tool kit on complementarity as well as developing a roster of expertise comprising ex-tribunal personnel to be administered by some mechanism.

14. The link between complementarity and broader efforts to fight impunity arose repeatedly in the discussions. Several participants noted that complementarity extends beyond the realm of criminal justice and should be accompanied by other transitional justice measures, such as reparations for victims, truth-telling, and security sector reform. These references to transitional justice constituted a recurrent theme, and it was noted that

guidelines should be developed with development and multilateral agencies on how to mainstream transitional justice in broader justice sector programs.

15. In terms of the way forward by the donor community, it was suggested by one participant that the retreat be followed up by two additional meetings that would convene donors from around the world. The first would serve as a donor coordination meeting to take stock of what state and private donors are doing in relation to complementarity. The purpose of the second meeting would be to convene the “unconverted” or those unfamiliar with the concept of complementarity within the broader development community. This would bring together mission directors of various development cooperation agencies.

16. The possibility of employing other mechanisms or institutions that could bolster complementarity, such as the ICC or the ASP, was also explored by participants. With regard to the ICC, it was noted that while some efforts have been made by the various organs to strengthen judicial capacity in domestic countries and that a role may exist for the court to catalyze support and action in certain circumstances, some concern exists about the ICC’s ability to advance the issue of complementarity. The view that concentrating efforts to bolster complementarity could detract from the core functions of the court was expressed. Likewise it was suggested that there may be a potential financial impact if the ICC took on what could be perceived as additional responsibilities. In relation to the ASP, although it was recognized that the forum would play some role, the lack of human and financial resources would mean that its role would be limited.

17. The role of the United Nations system in bolstering complementarity was also discussed, and the willingness of the relevant UN bodies working in the area to participate and assist in developing support for complementarity was noted. The participants at the meeting heard examples of current activities in this regard. Further discussion is needed to consider what a deeper arrangement would mean for the different UN rule of law actors.

Conclusion and Next Steps

18. Overall, the retreat triggered a critical first step in the discussion among a number of key actors on how complementarity can be advanced. It was acknowledged that further discussion was essential to build on the clear agreement established at a policy level about the need to develop the relationship between justice sector and rule of law actors. Such discussions are needed within national governments, within the UN system, within development agencies and elsewhere. Further thought must also be given to specific mechanisms and institutions that can play an instrumental role in strengthening complementarity, given the limited role that the ICC and ASP can play. In terms of the way forward, ICTJ is planning a side event at the next meeting of the ICC ASP in December 2010, which will highlight the discussions at Greentree and look at concrete steps to carry this issue forward. A series of in-country meetings are also envisaged with international justice and rule of law development actors to discuss how complementarity can be strengthened in those specific countries. A follow-up technical meeting on the tools necessary to bolster complementarity among European Union actors is being planned by the Open Society Justice Initiative.

19. All participants recognized that we are at the beginning of a renewed effort to make serious advances in ensuring that justice for serious crimes begins at home and in understanding that meaningful respect for the rule of law depends very much on that hope becoming a reality.