

Statement to the 12th Assembly of States Parties to the Rome Statute The Hague, November 21, 2013

Madame President, Your Excellences:

The Open Society Justice Initiative welcomes the remarks of many states in highlighting the need for continuing focus on the development of justice for grave crimes at the national level. The ICC is the linchpin of the Rome Statute. But for most victims of atrocity, even within the Rome Statute system, the greatest hope to see justice done rests with domestic investigations and prosecutions, and fair trials for grave crimes. There are many important efforts ongoing to build capacity to this end. But in many locations, it appears that political will is the primary hurdle to realizing investigations, prosecutions and trials of grave crimes.

- There has been much debate about the situation in Kenya at this ASP. Despite the controversy, at least at a rhetorical level, there is general agreement among all involved on the need for domestic justice for grave crimes committed during the post-election violence of 2007/8. The Kenyan government has said so, the African Union has said so, Kenyan civil society has said so, and the ICC Prosecutor has said so. But the question of justice in Kenya is about more than the three alleged perpetrators who stand accused before the ICC. Over one thousand people were killed, there were nearly a thousand incidents of sexual violence that were reported - with the actual number painfully higher – and violence displaced 350,000 Kenyans, some of whom remain in IDP camps. Why is it that almost six years later, survivors and their communities are still waiting for justice?

There have been very few investigations and prosecutions in Kenya, and none for mid-level and senior perpetrators. The government of Kenya has said that it intends to undertake such investigations and prosecutions, but there are at least three significant questions about its will to do so.

- First, we recall that in 2009, multiple attempts to establish a special court for international crimes were defeated in parliament. The current parliament now echoes its forebear by moving to revoke the International

Crimes Act, under which Rome Statute crimes were domesticated in Kenyan law. Why is it that here in The Hague, the government talks about building an International Crimes Division in the High Court, while at home the governing coalition is attempting to remove from the books the substantive law that such a division would apply?

- Second, frustrated survivors of sexual violence committed during the post-election violence and civil society organizations – with support from the Open Society Foundations – filed litigation against the Attorney General, Director of Public Prosecutions, and other senior officials in February. We have heard Kenya’s rhetorical concern for victims of crimes committed during the post-election violence. But why is it that despite court orders, none of the respondents in this case have filed responses to the survivors’ case – most recently missing a deadline to do so last Thursday?
- And third, key to any domestic ability to investigate and prosecute grave crimes is government resolve to protect witnesses. If the government wants to undertake genuine investigations and prosecutions, why did it only meet 15 percent of the budget request of its own Witness Protection Agency in 2012? A parliamentary committee found that would allow from protection of only eight witnesses. Why, this year, did the government provide even less than that meager funding – cutting the Agency’s budget a further 16 percent? How many Kenyans would trust the Agency to protect them if they held evidence against powerful perpetrators?

Kenya has significant capacity to conduct investigations and prosecutions for grave crimes, and there is significant goodwill internationally to assist it in filling any capacity gaps that may remain. The missing ingredient appears to be political will.

Issues of political will also loom large in Guatemala and the Democratic Republic of Congo.

The landmark domestic prosecution of Efraim Rios Montt in Guatemala this year – the first ever domestic trial of a former head of state on charges of genocide – was an inspiration for those pursuing justice for grave crimes in domestic systems around the globe. However, an initial guilty verdict was quickly overturned in a controversial decision, by a divided Constitutional Court, and the trial has been thrown into legal limbo in a process rife with political overtones. Any chance for the victims to see the trial brought to conclusion, and hopes for other trials related to grave crimes in Guatemala, rest on protecting the independence of the judiciary and the operational independence of the attorney general. Both are now in question as Guatemala prepares to select new leaders for its justice sector in 2014 and there are rampant indications that the process is being politically manipulated. This is a clear case where political will on the part of the Guatemalan government

and its development partners is necessary to rescue prospects for justice in relation to grave crimes. Across the board, the rule of law is on the line.

In the Democratic Republic of Congo, President Kabila recently reiterated a commitment to create specialized chambers to deal with international crimes. Meanwhile military courts continue to directly apply the Rome Statute. Just last week, 39 Congolese army officers were charged with committing acts of sexual violence and other war crimes in the village of Minova during 2012. Despite these positive indications, questions of political will remain. In the Minova case, why are all of the accused of low rank? Will the specialized chambers be designed in such a way that they are sufficiently independent and capable of investigating and prosecuting suspected perpetrators – even senior army officials and senior government officials? Will the government provide adequate resources to its own justice sector coordination group? In this regard, there are also major questions of political will for the international community in the DRC. When will the United Nations and major donors, including the European Union and United States, finally engage in meaningful coordination of their efforts to support the justice sector? The Open Society Justice Initiative urges any international support for specialized chambers in the DRC to be rooted in broader, coherent national justice sector development. That broader development plan should be led by Congolese state institutions and supported by a well-coordinated donor community.

The project of supporting domestic justice for grave crimes has made great strides. With more concerted effort to build political will in such places as Kenya, Guatemala, and the Democratic Republic of Congo, much more can be achieved.

Thank you.

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