

**MEETING SUMMARY OF THE RETREAT ON:
“COMPLEMENTARITY AFTER KAMPALA: THE WAY FORWARD”
12 NOVEMBER, 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 ICC, hosted a retreat entitled: “Complementarity After Kampala: The Way Forward” on 28-29 October 2010 at the Greentree Estate in Manhasset, New York. The full day meeting, which was preceded by an official dinner and reception the evening before, was conducted according to 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 in May-June 2010, states parties passed a Resolution which reconfirmed 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 which are 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 to have substantive discussions between a diverse range of actors who will be instrumental in making complementarity a reality. ICTJ brought together over 60 officials representing interested State and non-State Parties; principals of the International Criminal Court; rule of law practitioners, including development agencies and actors; relevant actors within the United Nations system; essential stakeholders from national jurisdictions; and NGOs who work on these issues.

Overview of Discussion

4. One of the most important achievements of the retreat was the recognition 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 in no country under consideration are we “starting from zero.” However, many participants agreed that there is a real need for better integration of planning and assessment of needs, as well as configuring specialized justice efforts in ways that more clearly align with broader rule of law and development priorities. The complementary relationship between these two sectors can play a pivotal role in helping to 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 courts. 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, representatives from ad-hoc tribunals, hybrid tribunals, and other

accountability mechanisms such as the International Commission Against Impunity in Guatemala (CICIG) provided first-hand accounts as to how their respective accountability mechanisms contributed towards 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 one institution to the other; making archives accessible to national authorities; provision of technical and logistical support; and raising awareness about the importance of international humanitarian 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 a specialized chambers and hybrid tribunals within domestic systems, the provision of assistance in forms that have broader application should be part of the design where 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 by conducting a needs assessment directed to 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, however, that the voices of victims should be heard when conducting such an assessment.

8. 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 on 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.

9. 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 between complementarity and widely-accepted development principles. Within the world of development cooperation, much work has been done with fragile and stable states which strongly correlate with those states that are respectively willing and unwilling to pursue accountability. In some circumstances, assessments of a state’s ability and willingness to provide services already exist.

10. 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.

11. 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, to name a few. Despite these opportunities, there is a disconnect and an imbalance in regards to visibility and resources allocated for combating impunity for serious crimes at the international and national level.

12. 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 between police forces; and (c) creating a support community that will consist of international justice and humanitarian actors on the one hand, and development and peacebuilding efforts on the other. Other means for advancing complementarity included developing a comprehensive tool kit on complementarity as well as developing a roster of expertise comprising of ex-Tribunal personnel to be administered by some mechanism.

13. 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.

14. The possibility of employing other mechanisms or institutions that could bolster complementarity, such as the ICC or the Assembly of States Parties of the ICC, was also explored. 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 it 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 were to take 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.

15. 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 meeting heard examples of current activities in this regard. Further discussion is needed to consider what a deeper arrangement would mean for the different rule of law actors.

Conclusion and next steps

16. Overall, the retreat triggered a critical first step in the discussion amongst the various key stakeholders 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. One suggestion was that the retreat be followed-up by two additional meetings that would convene donors from around the world. The first meeting 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. It is intended for the second meeting that mission directors of various development cooperation agencies would be in attendance. Additionally, ICTJ is planning a side event at the upcoming ASP meeting which will highlight the discussions at Greentree and look at concrete steps to carry this issue forward.

17. All participants recognized that we are at the beginning of a renewed and successful 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.

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