

ICTJ Side Event During ICC ASP Ninth Session
“Making Complementarity Work: The Way Forward”

December 9, 2010

We are all familiar by now with the discourse that the Rome Statute created more than a court. It created a new system for the application of international criminal law in respect of war crimes, crimes against humanity, and genocide. That system is predicated first and foremost on the obligation of states to carry out genuine investigations and prosecutions in respect of allegations of conduct proscribed by the statute. The Kampala Review Conference in June of this year marked an important step in the development of the Rome system. In its declaration, the conference reiterated the commitment to the centrality of complementarity in the system created at Rome. But it also recognized the limited progress made in states taking up the responsibilities set out in the statute and the need for practical progress to be made in this respect if the fight against impunity for serious crimes was going to be sustainable in the future.

On October 28 and 29 of this year, the International Center for Transitional Justice (ICTJ) convened a meeting at the Greentree Estate (the Greentree Meeting) —sponsored by the UN Rule of Law Unit—that sought to build on the momentum created at the review conference. The Rome Statute provides that a lack of genuine proceedings falls under one of two categories: unwillingness on the part of the state to proceed, or an inability to do so. These two criteria present different challenges, and the means of overcoming them will require different approaches. For the most part, the meeting focused on the question of inability, but not exclusively. Among other things, it was observed that in some senses the concepts of unwillingness and inability do not always represent two distinct categories but often reflect overlapping concerns. Where inability ends and unwillingness begins is not always easy to identify. Further, it may be possible in certain circumstances to limit or overcome political resistance to justice by improving the technical ability of relevant institutions.

Central to the motivation for the meeting was the belief that greater emphasis had to be put on the relationship between those working in the area of criminal justice for serious crimes, both nationally and internationally, and those working in the broader rule of law development sector. The pursuit of criminal justice for serious crimes frequently takes place when massive challenges for the rule of law exist generally. As a matter of general policy, there was clear consensus among participants that, while precise timing of efforts could sometimes be a source of debate, criminal justice in respect of serious crimes was not negotiable; therefore the challenge was to find ways to ensure that affected states increasingly play the primary role in addressing such crimes.

One of the many positives to come from the meeting was the recognition on the part of several parties working in the rule of law development area that the pursuit of criminal justice for serious crimes can have, and indeed has had, a positive spillover effect that enhanced the development of the rule of law in the particular countries concerned. In some circumstances, criminal proceedings had allowed the development of specialist skills among investigators, prosecutors, and judges; in others the impact of delivering verdicts in serious cases, albeit in difficult circumstances, had strengthened the credibility and efficacy of the judicial system. At the same time, there was an acknowledgement of the multiple difficulties that persist in enabling the pursuit of criminal justice for serious crimes when fundamental rule of law development is necessary at the same time.

In addition to reaching a broad agreement on the way forward (outlined below), the meeting also allowed some conclusions to be drawn about what is likely to be the very limited role that the organs of the International Criminal Court (ICC) would play directly in the efforts going forward to make national authorities assume their obligations in practice.

The principal challenges for complementarity, at least in relation to circumstances of inability to investigate or prosecute, are due to complex issues of finance and resources, planning (including accurate needs assessment), prioritization, flexibility, division of labor, and cooperation. The quest therefore is about how to insert criminal justice initiatives for serious crimes into the broader rule of law development programs so that they not only deliver effectively in themselves, but also contribute enduringly to the development of necessary skills and the restoration of long-term confidence in the rule of law system as a whole.

In addition to those from the rule of law development sector, the meeting also included a number of people from the development sector itself. Participants from this sector noted the importance of maintaining a comprehensive focus from the transitional justice point of view, recognizing that even if national authorities assume their obligations in respect of criminal justice to a much greater degree, a broader approach will be necessary to provide meaningful justice and help restore confidence in the institutions of the state. In the same vein, it was noted that assessments of relevant needs and appropriate approaches had to go beyond discussions with only national elites. Furthermore, the participants emphasized that, based on their long experience, the one-size-fits-all approach has to be resisted in a very real way and not just at a rhetorical level. While some generalizations might be possible, what was essential was a context-specific approach with genuine national ownership and empowerment. They also pointed out the vital need for the coordination of the supply of assistance measures not only between donors themselves, but also that between each donor and recipient, there has to be a “whole of government” approach to ensure efficiency and impact.

The meeting was significant for three key reasons. There was high-level representation of important actors in all of the sectors mentioned, including the states parties of the Rome Statute and the presence of all three senior ICC elected officeholders. Second, there was broad agreement on the characterization of the challenges for making national authorities more likely to assume their criminal justice responsibilities for serious crimes. And third, the broad view that rule of law development and broader development per se are entirely consistent with pursuing criminal justice for serious crimes and that there are, in fact, considerable synergies to be pursued.

While these important advances were made, it should also be borne in mind that some substantive and conceptual issues still require discussion and clarification. Among these are questions about where to concentrate

efforts: whether the focus of attempts to assist national systems should be on ICC situations in the preliminary examinations phase but are not yet the subject of investigation, or whether assistance should be offered when investigations are ongoing, and there is clear evidence of a serious impunity gap in that many high- and mid-level perpetrators are escaping justice at the national level and are not being pursued by the ICC. In addition, from the UN perspective, assistance to states pursuing justice cannot be predicated solely on the issue of ICC relevance. A second issue of considerable importance is about the nature of assistance, in particular when the ICC has jurisdiction. Is there any sustainable argument against internationalized forms of assistance in states where the ICC may be acting or wish to act? How real is the threat of usurping the ICC mandate in circumstances where only very small numbers are likely to be prosecuted by the ICC? If internationalized assistance should be considered either prior to or simultaneously with ICC action, how is a workable division of labor to be established?

Having made considerable progress in both the Kampala review conference and in the Greentree Meeting, the challenge is to maintain the momentum and move toward practical steps. Some of the issues that are outstanding will need more deliberation before consensus can be reached; others may well simply have to be the subject of trial and error but based on as much informed judgment as possible.

The development of the process should focus on both procedural and substantive steps. One of the clear lessons from Greentree is making sure that the right people are included in the appropriate conversations at the right time. Without this, the prospects of incoherence and flawed diagnoses are sharply increased, and with it, wasted resources and opportunities.

Today the Democratic Republic of the Congo (DRC) presents a challenge and an opportunity for making complementarity work in practice. While the ICC has been investigating there since 2004, widespread impunity remains a real problem. Serious crimes have continued to be committed since the ICC opened its investigations, especially in Ituri and the Kivu provinces. As set out in the UN Office of the High Commissioner on Human Rights' (UNHCHR) Mapping Project, massive crimes were also committed prior to the entry into force of the Rome Statute that have not been investigated. The ICC has thus far brought five applications for arrest warrants; as a result, three people are currently on trial. Given the scale of the crimes committed in the DRC, it is clear that the national authorities will have to assume a real, direct role in addressing the massive impunity that prevails and presents a direct threat to sustainable peace. The urgency of this need has become even more pronounced in light of a number of recent developments that highlight both the nature of the crimes committed, as well as the serious problems this need poses for UN interaction with elements of the DRC state.

Following the understanding shared at Greentree, the impunity challenges in the DRC present an opportunity to put into practice some of the procedural steps necessary to ensure that the pursuit of justice for serious crimes is developed in a way that is both effective in doing justice and sustainable in supporting the longer-term development of the rule of law. A large number of initiatives are already ongoing in the DRC—some have been in existence for many years—that aim to improve the rule of law. These include efforts by states, regional organizations, various UN agencies, and a significant number of nonstate actors.

A follow-up to the Greentree discussions would appear to be an ideal opportunity for the UNHCHR and the Office for Legal Affairs as lead entities on complementarity, either in New York or through the UN Organization Stabilization Mission in the DRC (MONUSCO), to convene an appropriate group including not only UN

departments and agencies, but also other relevant actors. The aim of such a meeting would be to apply some of the Greentree lessons directly to the context of the DRC: ensure that the right people are talking to each other from the beginning; and ensure that the right kind of diagnostic process is carried out.

The issue of adequate diagnosis was touched upon in the course of the Greentree Meeting. One of the challenges that faces the pursuit of criminal justice in a situation where long-term efforts in rule of law development are under way is to identify what the particular needs of a criminal justice initiative might be. Such efforts have to be designed so that they do not undermine ongoing efforts but also in a way that allows them to contribute positively. In a context of scarce resources, it is vital that the right diagnosis is made and the correct resources applied. This means addressing the specific challenge and not trying to overburden an initiative with unnecessary or overly demanding objectives.

Aside from the specific opportunity presented by the DRC, there is a need for continued thinking and debate that will lead to operationalizing the complementarity principle. One of the concrete suggestions to come out of the Greentree Meeting was for a small number of states to host or convene an informal meeting on an annual basis that would allow for discussion on complementarity measures in respect of specific countries (perhaps those under analysis by the ICC Office of the Prosecutor). While this may be a positive step, it must be accompanied by an effort to maintain the discussion at a broader level, including states not necessarily affected by the ICC directly. Whether states with a particular interest in these matters convene the discussion alone or do so with the appropriate UN department or agency can be determined in due course. Yet it seems clear that both states and the UN have to work together closely on these matters, along with relevant civil society partners.

In practical terms ICTJ will focus its immediate attention on trying to assist the development of a positive process in respect of the DRC and that steps are taken to convene a follow-up discussion at an operational level with the relevant parties to develop how the ideas expressed at Greentree can be applied in practical terms.

Having reached an important level of consensus on the nature of the challenges in addressing complementarity and the experience and synergies that already exist vis-à-vis those involved in criminal justice for serious crimes, the rule of law sector, and the development sector, the next steps must focus on profiting from those synergies in a practical way. Our hope would be a specific initiative immediately in relation to the DRC that seeks to do three things: that some form of working group be convened, possibly under the auspices of the UNHCHR, whose primary goals would be to ensure (a) a detailed understanding of the steps already undertaken with respect to the rule of law development by the plethora of actors involved, (b) on the basis of such an understanding, the development of a context-specific needs assessment/diagnostic process that would include technical assessment as well as a national consultative mechanism and (c) only when such steps are taken to move toward the specific and substantive proposals for the way forward in terms of accountability mechanisms.