



Synthesis Report on
“SUPPORTING COMPLEMENTARITY AT THE NATIONAL LEVEL:
FROM THEORY TO PRACTICE”
(Greentree III)
Greentree Estate, Manhasset, NY
October 25-26, 2012

Introduction

1. The International Center for Transitional Justice (ICTJ), in cooperation with the United Nations Development Programme (UNDP), with support from the Governments of Denmark and South Africa, and in close consultation with the Assembly of States Parties to the Rome Statute (ASP), held a high-level retreat on **“Supporting Complementarity at the National Level: From Theory to Practice,”** at the Greentree Estate, in Manhasset, New York, on October 25 and 26, 2012. The meeting was held under the Chatham House Rule. Thus, this report provides a summary of the principal discussions at the retreat without attributing views to individual participants.
2. The meeting was preceded by two related discussions on complementarity also held at Greentree in 2010 and 2011 (Greentree I and II), which brought together high-level actors from three different sectors: international justice, rule of law assistance, and development. Greentree I discussions focused on developing a common understanding of issues facing domestic efforts to investigate and prosecute the most serious crimes of international concern and on building linkages between: those working on international justice, development actors, and rule of law implementers. The principal conclusion of the meeting was that efforts to support investigations and prosecutions at the national level need to be aligned with development priorities and broader rule of law

implementation. Joined-up planning and much better coordination, starting with a comprehensive needs assessment, were identified as key elements in ensuring that an optimal approach suited to local circumstances would be adopted.

3. Discussions at Greentree II addressed the practical steps that could be taken to support states and domestic authorities that are willing to meet their obligations under the Rome Statute of the International Criminal Court but lack adequate resources to investigate and prosecute the most serious crimes of international concern. Building on the experiences of efforts in Bosnia-Herzegovina, Timor-Leste, Sierra Leone, and other transitional states, the meeting concluded that needs assessments, strong engagement of local actors, and accountable mechanisms are essential to ensuring that appropriate technical assistance and support are provided to national authorities. Moreover, in this regard, much of the know-how and resources lie with development agencies and rule of law implementers; thus, a deeper dialogue was required to develop a common understanding with these sectors. Further ways of promoting cooperation among different actors participating in the Greentree process were also vetted.
4. In May 2012, ICTJ and the Government of Sweden convened a meeting specifically aimed at building on the understandings reached at Greentree II, including examining the criteria for donor engagement in domestic accountability efforts. Participants reviewed needs assessments in detail and developed common understandings. Participants also noted the role of policy considerations when addressing complementarity efforts, the links between political willingness and national ownership, and the challenge of incorporating efforts to prosecute the most serious crimes of international concern into existing programs designed to build capacity for broader rule of law initiatives.
5. Building on these discussions, Greentree III focused on the needs and challenges faced by individual states prosecuting the most serious crimes of international concern. The experiences of four countries—Colombia, the Democratic Republic of the Congo (DRC), Guatemala, and Ivory Coast—were highlighted, with a view to looking at current experiences in different contexts where assistance is being provided to national prosecutions. The types of development assistance offered by the international community in these concrete situations were also discussed. Moreover, participants identified and examined ways to enhance and optimize the synergies between specific criminal justice and broader rule of law programs. The meeting included in-depth interviews with the attorney generals and other high-level representatives from the four countries, followed by interactive discussions with participants. The conference brought together almost 70 participants that included representatives from: states, national and international development agencies, foundations, rule of law practitioners, UN agencies, the International Criminal Court (ICC), and civil society.

Overview of the Discussion

Assessing the situation

6. Conference participants acknowledged that states at the UN General Assembly High-level Meeting on the Rule of Law on 24 September 2012 had committed to ensuring that impunity is not tolerated for genocide, war crimes, and crimes against humanity and that perpetrators of such crimes are brought to justice through domestic mechanisms or, where appropriate, regional or international mechanisms. In this respect, the Outcome Document of the High-Level Meeting on Rule of Law encouraged States to strengthen their national judicial systems and institutions in view of investigating and sanctioning these serious crimes of international concern. More broadly, conference participants also referred to the importance that the High-level Meeting accorded to enhanced technical assistance and capacity building, such as sharing knowledge, best practices, and strengthening international cooperation, including regional and South-South cooperation. The discussion of ICC-related issues and rule of law assistance at the national level was recognized as a step forward, acknowledging the role of the cofacilitators of the Outcome Document, the Permanent Representatives of Denmark and Mexico.
7. Participants discussed the challenges and difficulties faced by the four countries in the promotion of accountability in national jurisdictions. These include: lack of infrastructure and/or financial resources, limited human resources, and lack of adequate training of existing staff. Two key elements common to all of the situations were the issues of political will and the difficulty of prioritizing cases against those “most responsible for the most serious crimes.” These two issues are intertwined in some cases, as political will is often at its most tenuous when those with the highest level of responsibility are to be held to account.
8. Regarding political will, the issue is often a complex one, as national institutions are not monolithic and some parts of a government may support prosecutorial efforts while others seek to undermine these same efforts. In several of the situations discussed, variations of this issue emerged. The critical importance of reinforcing the independence of the judiciary and national prosecutors was stressed by many of the national practitioners. An important element in addressing this issue was encouraging key states, donors, and international organizations to provide support to relevant judicial actors in the form of both development assistance, which strengthens capacity and independence, and political support, when independence is at risk. In some cases, it

is not enough to provide development assistance without providing political support, either continuously or at crucial junctures.

9. Each of the countries in question referred to the lack of sufficient capacity to bring all perpetrators to justice, even with maximum assistance. Thus, the importance of prioritization in informing prosecutorial decisions was emphasized. Prioritization requires the adoption of criteria for evaluating cases, preferably in domestic legislation and following general patterns adopted by international tribunals and other courts, though, of course, adapted to the specific situation. Each of the participating countries gave concrete examples of how they had addressed or intended to address this issue. Moreover, it was stressed that given the limits of prosecuting only those bearing the greatest responsibility, it was essential that other transitional justice measures be pursued, including truth-telling processes, reparations programs, and institutional reforms.
10. Much of the discussions concerned the challenges faced in the four focus countries. In Colombia, the ongoing conflict between insurgents, paramilitaries, and armed forces is an obstacle to accountability. While the justice system has focused on prosecuting individual cases, it was noted that an effective investigation of organized crime structures, a critical element of the ongoing conflict, is complex. Acknowledging the specificity of these investigations and the limited resources available to conduct them, the Colombian Congress is currently addressing the definition of the term “most responsible” in the context of the possible prioritization of cases. The issue has particular relevance in the context of the initiation of peace talks between the government and the FARC. These ongoing reforms and changes may require the creation of new institutions to ensure their effective implementation.
11. In the DRC, the existence of an active, conflict in the east of the country remains a major challenge to conducting investigations. Congolese military courts have exclusive jurisdiction over the most serious crimes of international concern; thus, prosecution efforts depend on the cooperation of the operational military structures to, among other responsibilities, conduct investigations and execute arrest warrants against alleged perpetrators, who are often themselves members of those military structures. Additionally, these courts are seriously understaffed and underresourced (e.g., 50 military courts have jurisdiction over 105,000 soldiers and 110,000 police officers, with a total budget of approximately USD\$2 million). The lack of resources for the protection of victims and witnesses and the lack of adequate detention facilities are additional major obstacles.
12. In Guatemala, political resistance to trying certain cases, the lack of independence of some magistrates, and the existence of an amnesty law were identified as being the

greatest challenges to the promotion of accountability. The culture of impunity and the strong linkages between past serious crimes and current criminality in Guatemala were also salient features.

13. In the context of Ivory Coast, in addition to the general lack of staff, resources, and general infrastructure, which was greatly damaged during the revolution, the judicial system is faced with the lack of a functioning court with exclusive competency to decide on serious criminal matters. Additionally, the penitentiary system is inadequate to respond to existing needs.

Providing assistance

14. The role played by development partners was extensively discussed, including in providing assistance for direct and indirect capacity building of judicial and legal actors, operational support, as well as other innovative mechanisms specifically designed to facilitate and strengthen national response to the most serious crimes of international concern.
15. In the DRC, efforts to advance national prosecutions included such initiatives as Joint Investigation Teams and Prosecution Support Cells within the UN peacekeeping mission (MONUSCO). The former, led by the Joint Human Rights Office, are composed of UN human rights officers who work with national investigators on specific joint investigative missions, facilitating immediate access to evidence and crime scenes. The latter are composed of international investigators and prosecutors who work daily with national investigators and prosecutors, providing them with technical and logistical assistance. In DRC, mobile courts have also been used so that trials can occur near affected communities. However, questions about the sustainability and true impact of this initiative were raised.
16. In Guatemala, technical support has been provided to the public prosecutor's office, allowing for the creation of a special investigative unit. More recently, this support has included the drafting of regulations and other prosecution tools, such as general instructions and training materials for national prosecutors. Specifically under UNDP, this support is grounded in a broad-based security and justice development program with a component on transitional justice. In Colombia, UNDP has provided specific capacity-building assistance as part of a basket fund modality.
17. In Ivory Coast, the European Union's justice program includes a full-fledged program encompassing different parts of the justice system. More specifically, the Special Investigative Unit, under the Attorney General's Office, has benefited from technical assistance from international experts assigned to the unit. Previously, the National Commission of Inquiry had also benefited from specific training that significantly contributed to the improvement of its final report.

18. In some instances, the balance to be reached between assistance to national prosecutions and donors' general justice portfolios raises difficult issues, particularly when a significant investment in a judicial response to the most serious crimes may divert resources from the justice system as a whole. Moreover, development actors may have limited flexibility in the direction of their program funding and, thus, not prioritize accountability efforts. It is clear that more work needs to be done so that donors realize the link between fighting impunity for past crimes and building rule of law in the present.

Coordination

19. As identified in previous Greentree meetings, coordination among the various actors—national justice actors, international assistance programs, and donors—is essential. The example of Ivory Coast is instructive: the government has created several mechanisms to deal with post-electoral crimes that are now expected to collaborate and exchange on the results of their work. However, for these processes to succeed, it is important that there is sustained sharing of information and needs assessments, in order to avoid overlapping activities or misusing resources. In Guatemala, the UNDP Transitional Justice Program (PAJUST) provides the platform for coordination among all national actors, institutions, and groups involved in accountability processes (e.g., prosecutors, forensics, archives, victims, reparations). Additionally, coordination efforts involving international agencies and national stakeholders are needed to ensure that projects are adequately responsive.

Assistance to national prosecutions and the ICC

20. In line with the Kampala Resolution on Complementarity, it is clear that the ICC will only deal with a small number of cases and that the primary responsibility for the fight against impunity rests with states. The ICC's role as a potential catalyst for national proceedings was discussed, particularly in the cases of Colombia and Ivory Coast. Participants also noted that the ICC may be able to cooperate with national authorities by providing information and evidence and sharing best practices.

Conclusion and Way Forward

21. Participants from previous Greentree retreats recalled that three of the four countries discussed at Greentree III were also discussed at Greentree I, namely, Colombia, DRC, and Guatemala. The extraordinary amount of work being done at the national level and the significant progress made in these countries in the short time interval was described as striking by several attendees. Nevertheless, it was also noted that

remaining challenges should not be underestimated and that progress in this area requires a continuous and sustainable effort.

22. The advancement made through Greentree discussions on articulating the nexus between international justice and development community in ensuring adequate national capacity for complementarity initiatives was well recognized. However, there was also acknowledgement that work still needs to be done to make the development community more aware of complementarity issues and take greater ownership of the process. As proposed at the Stockholm meeting in May, UNDP indicated a plan to hold consultations with development organizations on this issue in 2013.
23. The momentum gained around the complementarity debate should be used to move forward with national prosecutions by ensuring implementation of concrete initiatives in these four countries. ICTJ and UNDP indicated their commitment to facilitate more focused discussions at the country level to identify needs through an inclusive process that brings together donors, aid recipients, and national stakeholders. These meetings would allow for the development of national strategies on complementarity.
24. In view of the need for resources to support complementarity efforts, it was suggested that donors may, themselves, constitute an informal group to discuss issues related to complementarity efforts and exchange on relevant lessons learned from other contexts.