DRAFT CONCEPT NOTE
FOR THE
REGIONAL WORKING GROUP ON TRANSITIONAL JUSTICE
RABAT, NOVEMBER 2007

Background
The Mediterranean and the Middle East is a region in which there has been little focus on accountability for the past, despite the widespread commission of violations of international human rights and humanitarian law in many countries: it is one of the most under-represented regions at the International Criminal Court’s Assembly of States Parties and there have been few attempts to address accountability needs through formal or informal mechanisms, with the exception of the Equity and Reconciliation Commission in Morocco, the Iraqi Special Criminal Tribunal and, most recently, the Special Tribunal for Lebanon. There are many voices in the region calling for justice and accountability, in particular from civil society, which has identified a clear need for transitional justice to be included among reform priorities as countries in the region make the transition towards peace and democracy.

International criminal justice and accountability
The international criminal justice system is based on the principle that there is individual criminal responsibility for the commission of war crimes, crimes against humanity and genocide, most recently codified in the Rome Statute for the International Criminal Court. All States have an obligation either to prosecute individuals suspected of having committed such crimes or to extradite them for prosecution elsewhere, either because a State has become a party to a treaty that establishes that obligation, or through customary international law that is applicable to all States. The Rome Statute is founded on complementarity: the ICC can only act where States are unwilling or unable genuinely to investigate and prosecute crimes under its jurisdiction: those crimes should be addressed at a national level wherever possible, with the ICC acting as a catalyst, as a guardian and as a last resort. Although non-States Parties are not generally subject to the ICC’s jurisdiction, the Rome Statute provides a useful starting point for all States concerning their obligations under general international law.

Since each State, whether party to the Rome Statute or not, is responsible for addressing violations of international criminal law and human rights, the role of national mechanisms and institutions is critically important to addressing impunity worldwide. Non-judicial, quasi-judicial and neo-traditional accountability mechanisms can play an important role in conflict, post-conflict and transition countries, aiming to promote peace, justice and reconciliation through ensuring accountability for crimes under international law. However, formal judicial institutions may claim to be mindful of other accountability mechanisms without fully understanding the potential they may have for contributing to their own mandate, and without appreciating their limitations. Similarly, accountability mechanisms can be designed and operated without sufficient consideration about whether, how and to what extent they can contribute to the implementation of ICC complementarity and promote the rule of law.

The lack of interaction between institutions and individuals can inhibit the exchange of experiences, policy priorities and information, which prevents growth of capacity, political will and knowledge on how to integrate efforts to implement ICC complementarity, narrow the impunity gap and promote the rule of law. It is therefore becoming increasingly important to give
support to the practical operation of ICC complementarity and to promote local efforts to narrow the impunity gap designed to strengthen the rule of law, including an assessment of whether, how and to what extent other accountability mechanisms could or should interact with international criminal proceedings.

**Complementarity and the Impunity Gap**

Recognising the significance of these issues, particularly at a time when the international community is increasingly debating how to address impunity in various situations, No Peace Without Justice (an international NGO) and the Kawakibi Democracy Transition Centre (KADeM), together with PILDAT (from Pakistan) and Manifesto 99 (from Sierra Leone), are working together to take stock of the realities on the ground and ensure that discussions on these issues are shaped by the thoughts and experiences of actors with direct experience in non-judicial, quasi-judicial and neo-traditional accountability mechanisms, particularly in conflict, post-conflict and transitional settings. The specific objectives of this activities are to contribute to the effectiveness of national accountability mechanisms in implementing ICC complementarity, including through more effectively designed and operated non judicial, quasi-judicial and neo-traditional accountability mechanisms, thereby promoting positive complementarity through more effective integration of the roles of formal judicial institutions and non-judicial, quasi-judicial and neo-traditional accountability mechanisms. To that end, roundtable discussions are being organised to bring together those people with knowledge, experience and interest of the realities on the ground, first to identify what justice or accountability processes the country has experience with; and second, what systems are there or have there been to address accountability.

The results of the discussions will feed into the production of develop a Global Report on whether, how and to what extent non-judicial, quasi-judicial and neo-traditional accountability mechanisms have, could or should contribute to implementing ICC complementarity, narrowing the impunity gap and promoting the rule of law rather than provide an alibi for impunity. The Global Report is designed to be a lobbying and advocacy tool and an impetus for more rigorous consideration of the interplay between different mechanisms and their potential contribution to integrated -and more effective accountability for war crimes, crimes against humanity and genocide.

The Global Report foresees addressing two categories of questions about accountability mechanisms used or foreseen in a variety of countries, to allow for the identification of how the ingredients and components of the various accountability mechanisms relate to their explicitly declared, and/or non-declared objectives, and provide examples for future reference to other countries.

**Assessment of needs**

There is now a need to start focusing on accountability needs in the region, by making realistic assessments of the options available and developing considerations on how to strengthen potential mechanisms so that they can contribute to implementing the principle of complementarity, narrowing the impunity gap and promoting the rule of law.

In assessing the needs in the region and in considering what type of accountability mechanism would be useful to address those needs, two sets of questions can be posed. The first category of questions relates to the contextual factors surrounding the establishment or operations of the accountability mechanism, such as:
• whether there has been a change of leadership in the area/country and its impact, if any, on the accountability mechanism;
• what percentage of the population was affected by the crimes to be addressed through the accountability mechanism;
• how many years have gone by since the crimes were committed or are they ongoing;
• has there been an official amnesty;
• what sorts of laws exist, if any, to address the crimes.

The second category of questions relates to the accountability mechanism(s) in theory and in practice, including the following types of questions about various non-judicial, quasi-judicial or neo-traditional accountability mechanisms:

• what are the ingredients and components of the mechanism, such as:
  o who selects the members and with what method;
  o can they recommend prosecutions;
  o does it hold public hearings and/ or closed hearings;
  o does it have subpoena powers;
  o does it work mainly in the capital or does it have regional or itinerant components;
  o what sort of outreach strategy does it have;
• what were these mechanisms designed to achieve, such as:
  o confidence in the rule of law;
  o redress for victims;
  o individual or systemic accountability;
  o preventing the involvement of the courts;
  o "closing the chapter";
  o preventing repetition of the crimes;
  o insulating current and future governments from other claims from victims;
  o determining who should be excluded from running for public office;
• does the mechanism have a limited life span?
• was it intended to comply with rule of law?
• was the rule of law part of its purpose?
• did the mechanisms achieve what they were meant to or did they achieve something better or worse?
• did the mechanisms work? If so, how? If not, why not?
• what impact did the mechanisms have on victims and on the population in general?

It is anticipated that the elaboration and analysis of the variables and the results of each of the accountability mechanisms assessed will allow an analysis of which contextual elements or “external components”, together with which ingredients or “internal components”, have the potential for achieving which results.

In partnership with: