INTERVENTION OF THE HIGH COMMISSIONER FOR HUMAN RIGHT DURING THE REVIEW CONFERENCE OF THE INTERNATIONAL CRIMINAL COURT

as the Keynote Speaker on the Stocktaking Panel on Complementarity

By

Navanethem Pillay
(United Nations High Commissioner for Human Rights)

Kampala, 3 June 2010

As High Commissioner, my chief concern is there be no impunity and no impunity gaps in relation to serious violations of international humanitarian law.
In almost every case, these are gross violations of international human rights. While we are on complementarity, we must always keep in view the complementarity between international humanitarian law and human rights law. That notion of complementarity was particularly stressed, as it should, by a Panel of Experts that the OHCHR recently facilitated on the topic of protection of civilians during armed conflicts.

The ICC resulted directly from the international human rights movement, sometimes characterized as the struggle against impunity. That movement placed the rights of victims to justice at its centre, as it continues to do today. The OHCHR sees itself very much as a voice for victims. We will continue to advocate independently and strongly on their behalf, to ensure accountability for atrocities and that real progress is made to ensure their non-recurrence.

The primary obligation rests with States to ensure that impunity and impunity gaps do not exist in respect of these violations. States must investigate and prosecute human rights violations that constitute violations of international criminal law. There is ample legal authority for that proposition. But it is sufficient to note that delegation after delegation that spoke in this Review Conference have clearly stated and restated that understanding.

In cases in which particular States are unable to investigate and prosecute violations, due to a lack of capacity, OHCHR stands willing, ready and able to assist States to build capacity in the justice sector, in order to enable them ensure that impunity and impunity gaps do not exist. It is part of our mandate at OHCHR to assist in such manner of capacity building. We have been giving such assistance in the past. And we continue to do so.

However, it is important that considerations of inability should not be allowed to dominate the discourse on why States do not deliver on their part of the bargain of complementarity. We must recognise that in some cases States have made a deliberate choice to permit the reign of impunity, because of unwillingness to investigate or prosecute gross violations of human rights that amount to violations of international criminal law.

In cases in which particular States are unwilling to investigate and prosecute violators, I will intercede with them to get them to step up to their responsibilities. Failing that, I shall raise concerns about the situation. And I shall not let up in my efforts to encourage States to do the right thing to prevent impunity.

And if all fails, the ICC will then be looked upon to investigate and prosecute those crimes which the concerned State had proved unable or unwilling to prosecute.

***

Complementarity in the Rome Statute may be explained as an expression of the desire of the international community to ensure that impunity and impunity gaps do not exist. It is an affirmation of the principle that the duty to prevent impunity and impunity gaps primarily rests with States. The ICC was created to ensure that when all fails in the realms of States, there will be a credible international criminal court that will ensure accountability.

I note that the term 'complementarity' is not really defined in the Rome Statute. All that the Rome Statute says is that jurisdiction of the ICC shall be 'complementary' to those of States.[1]

One might consider the *admissibility* provisions of article 17 as giving a clue as to what 'complementary' means. They do. But the clue does not go so far as to

[1] See paragraph 10 of the Preamble and article 1.

suggest that the ICC may never assert jurisdiction, unless the State concerned has proved unable or unwilling to exercise jurisdiction at all or genuinely.

In this connection, it is at least reasonably arguable that the issue of inability or unwillingness of a State to assert jurisdiction is a matter that potentially impedes admissibility under article 17 only when the ICC Prosecutor seeks to initiate investigation or prosecution in a case that already 'is being investigated or prosecuted by a State which has jurisdiction' over the case.

In such limited cases, the argument goes, the question of admissibility for the Pre-Trial Chamber becomes whether such a State is willing or able genuinely to investigate or prosecute. Concerns about the genuineness of ability or willingness to investigate or prosecute makes perfect sense in that context, considering that the State that has already began investigation or prosecution may have:

(a) genuinely bitten more than it could chew although its genuine intention to investigate or prosecute is not in doubt; or

(b) commenced a sham investigation or prosecution out of an underlying desire to frustrate accountability.

Those considerations operate in circumstances where a State has already commenced investigation or prosecution of cases of interest to the ICC. It is proper then that article 17 should engage those questions, as it has done.

What is not entirely clear is how well, if at all, article 17 covers situations in which a particular case is not already 'being investigated or prosecuted by a State which has jurisdiction' at the time that the ICC Prosecutor seeks to bring proceedings at the ICC. It may not be supposed that there is derogation from the idea of 'complementarity' under the Rome Statute, were the ICC Prosecution to trigger the Court's jurisdiction in circumstances of complete inaction on the part

of the State with the natural jurisdiction. I note that the ICC Appeals Chamber have expressed a similar view in one decision at least.[2]

***

One need not be High Commissioner to appreciate that all States are not equal in their abilities to do those things that require money, and that having a sophisticated judicial system does require money. But this may not be an excuse for permitting impunity. It is for all these reasons that OHCHR has committed itself to the mandate of assisting with judicial capacity building in States.

We also help in monitoring violations, in order not only to train the spot-light on instances of violations in need of remedy, but also to assist States in identifying violations of concern to the international community from the point of view of the need to avoid impunity. OHCHR also facilitates commissions of inquiry into violations, which do much to highlight patterns and gaps in the ability of the concerned State to protect humanity from gross violations of human rights.

We also have a mapping project which enables us to maintain in respect of specific countries a clear picture of the incidence of human rights violations, the patterns of violations, the frequencies of the violations, places, and other pertinent information about such violations.

All these activities and more are part of what the OHCHR does to assist and encourage States to prevent impunity.

***

The policy of prosecuting those most responsible is a recently evolved phenomenon in the administration of international criminal law. It really took off

---

[2] See *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* dated 25 September 2009, especially paragraphs 75 to 78.

with the creation of the Special Court for Sierra Leone, where it was enshrined in the Statute.

It was not in the Statute of the ICTR and the ICTY when those Tribunals were created. However, it has since made it into the language of those Tribunals by virtue of Security Council resolutions 1503 of August 2003 and 1534 of March 2004, which defined the Completion Strategies of the two Tribunals.

I understand that the ICC OTP has adopted it as an OTP prosecution policy.

The 'most responsible' strategy, like the Gacaca proceedings, is an expedient strategy. Take Rwanda's example where at least 100,000 people were suspected of involvement in the Rwandan Genocide of 1994. The expediency thus becomes this: Although we cannot prosecute everyone, we must be seen to be doing some justice, rather than none at all, in the face of an overwhelming number of suspects.

In the case of the ICC, there is a need to be mindful how the 'most responsible' strategy of the Prosecutor plays out in the underlying context of complementarity. It is important to not allow the 'most responsible' policy of the OTP be taken by States as a signal to prosecute only some and not all. There may be problem with a situation in which States see their obligations in complementarity with the ICC to be limited by what the OTP is doing. We may end up with a 'matching' policy of prosecuting the 'most responsible'. I am not sure that this is what we want to see.

***

As the United Nations High Commissioner speaking on this panel, I will not discuss specific country situations. There are proper forums in which I do that.

I can, however, comment on the notion of the so-called 'Positive Complementarity.' My understanding of the term 'Positive Complementarity' is that it is a notion of complementarity that involves affirmative measures on the part of the international community. Those measures have the aim of actively putting States in a position of ability, at least, to investigate and prosecute instances of violation of international criminal law norms within the jurisdiction of the ICC. I pause to note that in most cases these will be gross violation of international human rights norms.

The notion of 'Positive Complementarity' was borne out of the idea that States—not the ICC—have the precedence[3] of duty and jurisdiction to investigate and prosecute those international crimes set out in the Statute of Rome. In this connection, the ICC enjoys only a default jurisdiction—in such instances, where the State with the first option jurisdiction has failed to exercise it due to inability or unwillingness.

Positive Complementarity is thus to be contrasted with the passive — or the "sit-back-and-wait" — notion of complementarity. In the latter sense of complementarity, States are left entirely to their own circumstances to step up, if they can, and make good on their responsibility to investigate and prosecute the relevant crimes as expected of them. If they disappoint, the ICC will then assume jurisdiction.

[3] The term 'precedence' as used here speaks only in terms of sequencing of claims of jurisdiction, in the sense that all States enjoy in virtue of the doctrine of complementarity the right of first option to exercise jurisdiction. It connotes no superseding or overriding sense. There is a temptation to think of the jurisdiction of States under the Rome Statute as one of 'primacy'. This is an uneasy idea. Primacy of jurisdiction is a heavy notion with serious implications, some of which may not augur well for the ICC in the long run. For one thing, the language of the Rome Statute could (as in the Statutes of ICTR and ICTR) have explicitly used the term 'primacy' to characterize the jurisdiction that it intended to describe as such. But the Rome Statute describes no jurisdiction as enjoying 'primacy'. What is more, one feature of primacy of jurisdiction is that the dominant jurisdiction may at any time intervene and deprive the servient jurisdiction of the case, which it is already investigating or even prosecuting. It may be too much to claim that this was intended in the relationship between States and the ICC, in virtue of complementarity.