

New York City Bar Association

International Justice Day Celebration

New York, 13 July 2010

Remarks by Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel

Mr. Stoelting,

Distinguished Chairmen and Directors of the sponsoring entities,
Distinguished Members of the Association of the Bar of the City of New York,
Ladies and gentlemen,

It is always a great pleasure to be here at the Home of the Bar of the City of New York. I know that my Office, the Office of Legal Affairs, has many friends and supporters among you.

Introduction

When I heard that the Association is organizing an event to celebrate International Justice Day and David Stoelting asked whether I would contribute, I immediately accepted. After the first Review Conference of the ICC in Kampala and before the informal "summer break" is a good time to discuss what we have achieved for international criminal justice and where we go from here.

Tonight, I wish to share with you a few thoughts on international criminal with a focus on the ICC justice from the perspective of the Legal Counsel.

It might be interesting for you to hear my impressions from Kampala. I am sure that the President of the ICC ASP, Ambassador Wenaweser, and the President of the International Center for Transitional Justice, David Tolbert, will address this topic in some detail.

Before I embark on the substance, I will briefly mention two matters:

- Firstly, I am here in my personal capacity;

- Secondly, in addressing provisions of the Rome Statute it is not my intention to offer interpretations of these provisions. As the United Nations is not a party to the Rome Statute, it is clearly not our role to interpret its provisions. However, I will be referring to provisions of the Rome Statute in the course of articulating my observations.

Following-up on Kampala

Let me take you back to the end of May of this year when many of us travelled to Africa for the First Review Conference of the Rome Statute.

The preconditions and overall climate for the Review Conference were anything but favourable, particularly from the perspective of the maintenance of international peace and security. In Uganda, the Conference location, the so-called “Juba peace process” had collapsed since 2008 because Joseph Kony, ICC-indicted leader of the Lord’s Resistance Army, refused to sign the final peace instrument which would have activated a series of agreements. These agreements had been painstakingly negotiated over the course of years. In the Sudan, host to two major peacekeeping operations, the Government of President Al-Bashir, indicted as he is by the ICC, continues to refuse any cooperation with the International Criminal Court. And in Kenya, the Government did not manage to establish a specific national accountability mechanism to look into the post election violence which eventually led to the decision of an ICC Pre-Trial Chamber to authorize the ICC Prosecutor to commence a formal investigation into the situation.

Moreover, the ICC Review Conference had an extraordinarily ambitious agenda. Not only did the agenda include proposals for amendments to the Rome Statute, including an amendment to define and establish conditions for jurisdiction on the crime of aggression. It also included a series of stocktaking exercises on important topics of cooperation, victims, peace and justice and complementarity.

Against this background, it will not surprise you that we had a number of discussions in the Secretariat about our role with regard to the Review Conference.

It was clear that the UN Secretariat would certainly maintain its well established position of steadfast and unwavering support for international criminal justice and the ICC. This resulted in the Secretary-General's decision to personally attend the Review Conference as its Convenor.

Addressing the Review Conference, the Secretary-General reaffirmed his principled position on the relevance of accountability by re-emphasising that in the face of crimes so heinous that they shock the conscience of the international community as a whole, there must be accountability.

Placing the Kampala Conference in this context, the Secretary-General said – and I quote: – “I see this as a landmark in the history of international criminal justice. The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability.” I know that many of you have heard or read the SG's speech, and we are pleased that you have not been disappointed.

With regard to the second element of the Review Conference, the amendments to the Rome Statute - we took a different approach. Out of respect for the prerogative of States to amend international treaties, we did not express any views on this issue.

General Debate and High-level segment – Kampala Declaration

The outcome of the General Debate of the Conference was the “Kampala Declaration”, a document adopted at the by the high-level segment of the Conference by which the States Parties to the Rome Statute solemnly reconfirmed their strong and unwavering commitment to the International Criminal Court. For us in the UN Secretariat it was very gratifying to see the full support of States Parties for two campaigns launched by ICC President Song and actively supported by the Secretary-General. The two campaigns are, of course, the efforts to encourage States to become parties to the Rome Statutes and the campaign to encourage States Parties to make tangible commitments, or pledges to the Court. These campaigns turned out to be a major diplomatic success for both the ICC President and the Secretary-General.

During the General Debate, 37 States Parties made a total of 112 pledges. And prior to the Review Conference, Bangladesh joined the Rome Statute as its 111th State Party. This success was expressly acknowledged and welcomed in the Kampala Declaration.

The other, equally important, element of the Kampala Declaration, regarding stocktaking, demonstrated the resolve of States to arrive at concrete results. After Kampala, Ambassador Wenaweser said that the high-level segment and the leadership role assumed by individuals such as President Kikwete of Tanzania and the Secretary-General created the positive atmosphere which was indispensable for achieving the consensus arrived at during the difficult second week.

Stocktaking and other resolutions and decisions

The outcome of the second part of the first week of the Review Conference was a number of resolutions and declarations on the stocktaking and other issues:

In the resolution on “complementarity”, further to paragraph 5 of the Kampala Declaration, the States Parties specify their understanding of the principle of complementarity and request the Secretariat of the Assembly of States Parties to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations, aimed at strengthening domestic jurisdictions.

In the resolution on “the impact of the Rome Statute system on victims and affected community”, the States Parties emphasized the specific needs of victims. I fully agree with those who remind us that it is the victims who need to be right at the centre of the Rome system. It is their dignity we must seek to restore. It is their suffering we must not forget in our fight against impunity.

In the resolution on “strengthening the enforcement of sentences”, the States Parties call upon States to accept convicted individuals to serve their sentences. In this connection, it was very encouraging to see three States Parties - Belgium, Denmark and Finland - sign enforcement of sentences agreements with the Court at Kampala.

And in the declaration on “cooperation”, the States Parties recall the cooperation obligations and encourage the extension of meaningful cooperation to the Court.

As a participant in the Stocktaking Panel on cooperation, I had an opportunity to update the Review Conference on UN-ICC cooperation under our 2004 Relationship Agreement. I noted that it is important to bear in mind that the primary responsibility to provide the Court with the cooperation it needs to discharge its mandate lies with States, and, first and foremost, with States Parties to the Rome Statute. The United Nations is but a secondary source on which the Court can count, along with other international organizations and NGOs. However, while it is only a secondary resort, the United Nations has and will continue to be a reliable partner for the ICC. My Office and the various organs of the Court have put in place a working relationship which develops and grows stronger year by year.

Amendments to the Rome Statute

The second week of the Review Conference was, of course, dominated by the discussions on the amendments to the Rome Statute, and in particular the crime of aggression. And the Conference rose to the occasion by eventually adopting amendments to the Statute by consensus resolutions.

The States Parties decided to keep Article 124 in the Rome Statute. Article 124 is a seven year opt-out provision with regard to war crimes for new States Parties to the Rome Statute. It never had much practical relevance. The States Parties also agreed to an important amendment to Article 8 of the Rome Statute to include the prohibition of the use of certain types of weapons during non-international armed conflicts.

And, of course, the States Parties agreed on an amendment with regard to the crime of aggression.

I fully agree with the Secretary-General’s assessment that the agreement on the definition of the crime of aggression in the Rome Statute and on the conditions under which the Court is to exercise its jurisdiction with respect to that crime marks a historic event. While the jurisdiction of the ICC over the fourth statutory crime of the Rome Statute will not be activated immediately, the compromise reached at

Kampala represents a significant step forward in the fight against impunity and towards an age of accountability.

I'm sure that Ambassador Wenaweser will provide us with a more detailed account on how the historic compromise on the crime of aggression was achieved in Kampala. Congratulations again, Christian, on this important diplomatic success.

Complementarity

The Kampala Declaration spelled out the resolve of the States Parties "to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity." This issue of complementarity is at the heart of much of our current work.

Against this background and in light of the outcome of the ICC Review Conference in Kampala, the principle of complementarity is – in my opinion – of crucial importance for the future of international criminal justice and the ICC.

We are all aware that international justice mechanisms, whether permanent or ad hoc, are not intended to supplant States where they have organized criminal justice systems which are willing and able to ensure that there is accountability for the crimes concerned.

It is clear that the primary role of national jurisdictions in the prosecution of crimes has been thrown into greater relief as international justice has evolved and as the ICC in particular has become operational. The principle of complementarity has thus become the bedrock of international criminal justice.

International mechanisms are not substitutes for national mechanisms. Thus we see that, within the Statutes of the international criminal courts and tribunals, there is ample room for the exercise of national jurisdiction.

If we want to remain on the offensive in our quest to end impunity and to ensure the prospects for a genuine age of accountability, we must be truly committed to strengthen national judicial capacities. The United Nations can and will assist States with technical cooperation and rule of law support. But again it

will, first and foremost, be up to States to embrace and implement the principle of complementarity.

Justice is a nation's choice. In its realization, the United Nations and the International Criminal Court can assist to a certain extent. But the fight against impunity will not be won at the international level. It must be fought and won inside the States, with the political will of the Governments and in the hearts and minds of the citizens. Only then will we truly see the dawning of an age of accountability.

For this, the principle of complementarity is key. Kampala has provided us with an important inspiration and foundation in this direction.

Conclusion

Finally, I would like to briefly touch upon two recent Security Council open debates which were very important from an international criminal law perspective.

On 29 June, the Mexican Council Presidency organized an open thematic debate on the promotion and strengthening of the rule of law in the maintenance of international peace and security.

In my view, an important element of the Council's debate that day was the focus on the struggle to end impunity for international crimes. In the recent past, the Council has amply emphasised the importance it attaches to the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for the most serious crimes.

The outcome of this debate was a strong Presidential Statement which brought together many important elements of the Security Council's positions on the rule of law in the maintenance of international peace and security, and further developed them in some respects.

On 7 July, the Nigerian Council Presidency organized an open thematic debate on the protection of civilians in armed conflict.

At this debate, the Secretary-General, the High Commissioner for Human Rights and the Emergency Relief Coordinator spoke out strongly in support of accountability. Their message was that accountability is key to protecting civilians.

In his most recent speech to the Security Council on 7 July, the Secretary-General once again emphasized the importance of interaction between international and national judiciaries for accountability. And I will end by this statement.

“There have been significant advances in the normative capabilities of national and international systems. Much of this progress is linked to the work of the International Criminal Court and its beneficial effects, including the integration of the Rome Statute crimes into national legal systems.”
