

Supporting Complementarity at the National Level: An Integrated Approach to the Rule of Law

**Dinner remarks by Ms. Patricia O'Brien,
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Minister Nel
Ambassador Staur
Mr. Tolbert
Colleagues and friends,

[Introduction]

It is a great pleasure to participate in the opening of the second Greentree Retreat. Allow me at the outset to congratulate the organizers, the ICTJ and UNDP, as well as the delegations of Denmark and South Africa, for bringing together a truly exceptional group of experts on the subject.

About a year ago the first Greentree retreat on complementarity was organized as a follow-up to the 2010 Kampala ICC Review Conference, to discuss the concept of complementarity and its implementation at the national level. Tonight and over the course of the following two days, this discussion will focus on technical and operational aspects of strengthening complementarity at the national level.

In my brief remarks, I will summarise the different dimensions of complementarity from our perspective.

[Complementarity issues before the ICC]

Complementarity is one of the fundamental principles underlying the Rome Statute. Yet the Rome Statute does not say much on how to make complementarity work in practice.

The preamble to the Rome Statute and its Article 17 stipulate that the Court shall be complementary to national criminal jurisdictions. The Court is not meant to replace national proceedings, and should be considered only as a safety net – a court of last resort. States retain their primary responsibility to conduct criminal proceedings with respect to mass atrocities. However, the International Criminal Court shall step in whenever national authorities are unable or unwilling to genuinely investigate and prosecute international crimes. This much is clear.

But I believe that we all agree that the fight against impunity will not be won at the international level alone. It must be fought and won inside States, with the political will of the Governments and in the hearts and minds of the citizens. And, in this regard, the Rome Statute does little, other than to recall in its preamble that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

It goes without saying that the full potential of a proactive approach to complementarity is far from realized.

So, to briefly review complementarity in the history of the ICC so far: In the Darfur situation, the Court confirmed that complementarity is currently not a viable option. The Kenya situation perhaps looked more promising at one point, in the sense that there was a commitment to establish and mount national proceedings against the suspected perpetrators; but words were not followed by concrete actions and this turned out not to be a viable complementarity case, either. In the Uganda situation, national proceedings might still be a possibility — if it weren't for the continued failure to arrest the individuals wanted by the ICC.

In the situations of Colombia and Guinea, the ICC Prosecutor is “giving complementarity a chance”.

[Libya and complementarity]

A very interesting test for complementarity is arising in the situation in Libya – a situation which was, of course, referred to the Court by the Security

Council under SCR 1970. With the arrest of Saif Gaddafi and of Abdullah Al-Senussi by Libyan authorities, the issue of complementarity is now at the fore. You will have seen the statement of the President of the ICC Assembly of States Parties, Ambassador Wenaweser, on the arrest of Saif Gaddafi, where he said that "should the Libyan authorities wish to try him in Libya, they can make the case before the Court that their national judicial system is willing and able to do so in an independent and impartial manner." I agree with this, of course.

What is, in my opinion, important, is that Libya fully complies with its obligations under Security Council resolution 1970 (2011), in particular, its obligation under that resolution to cooperate with the Court and its Prosecutor. Libya has essentially three options in this regard:

- (1) it can transfer Saif Gaddafi and Abdullah Al-Senussi to the seat of the Court at The Hague in execution of the arrest warrant;
- (2) it can choose not to transfer them, but lodge an "admissibility challenge" on the basis of the principle of complementarity, if it decides to prosecute them for essentially the same acts and essentially the same crimes as are detailed in the arrest warrant. This procedure follows articles 17 & 19 of the Statute;
- (3) it can choose to investigate and prosecute them for a crime different from those for which their arrests are sought, in which case it must consult with the Court.

In the event that Libya chooses to prosecute Saif and Abdullah Al-Senussi "at home", it will fall to the Pre-Trial Chamber of the Court to decide whether the principle of complementarity applies on the facts: in other words, whether Libya is genuinely willing and able to prosecute them. If this is what Libya chooses as it seems it has with respect to Saif, then it is absolutely indispensable that this discussion & decision takes place before the Chambers of the ICC and nowhere else. It is important that it takes place not in the language of diplomacy, but in the language of law.

At the end of a brief visit to Libya on 22 and 23 November, the ICC Prosecutor reportedly said that he would not object to Saif Gaddafi and

Abdullah Al-Senussi being tried in Libya if the complementarity criteria are satisfied.

This does not change the assessment of the options and the fundamental point that any decision on the admissibility of the case lies under the sole competence of the judges of the ICC.

[Enhancing complementarity through strengthening national judiciaries]

There is another dimension of complementarity which was contemplated at the Review Conference in Kampala and this is the steps to be taken to address the challenges of inability and unwillingness at the national level. The reasons for inactivity of national criminal courts in trying alleged perpetrators of serious international crimes are manifold, but can often be explained by the lack of capacity to conduct genuine domestic prosecutions. This gap can be closed by means of international assistance, including legislative and technical support.

The Resolution on Complementarity adopted at the Review Conference in Kampala recognized *the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level; and it encouraged the Court, State Parties and other stakeholders, including international organisations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions (...).*

We have seen just this kind of action with respect to what some would call the original "international crime": piracy. By its nature and by virtue of the negative impact it can have on international peace and security in certain regions, the lives and livelihoods of seafarers, and the security of global navigation and trade, international cooperation is vital for the effective repression of piracy. Indeed, the 1982 United Nations Convention on the Law of the Sea requires all States to cooperate to the fullest possible extent in the repression of this crime and provides them with universal jurisdiction over acts of piracy.

To this end, particularly with regard to piracy off the coast of Somalia, States and international organizations are actively assisting regional States, including Somalia, to develop and enhance capacity of their domestic legal systems to effectively investigate and prosecute suspected pirates, including those who incite or intentionally facilitate piracy operations. This is being done through targeted capacity-building and technical assistance programmes aimed at the adoption of counter-piracy legislation, the training of law enforcement and judicial personnel, and the enhancement of national courts and prison infrastructure to increase prosecutions and meet international standards.

This is what constitutes the essence of positive complementarity. This is why events, such as this retreat, are crucial for coherent and organised implementation of Kampala's call to strengthen national capacities to combat impunity.

[Conclusion]

This brings me to the end of my brief *tour d'horizon* of the different dimensions of complementarity. The Greentree II retreat provides a welcome and necessary opportunity to further develop them.

Thank you very much.