AALCO meeting with Legal Advisers of the Ministries of Foreign Affairs and Members of the Sixth Committee

"Ending impunity"

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Dr. Mohamad,

President Owada,

I am honored to have been invited to speak again with you this year.

I have chosen to focus my speech today on the topic of: "Ending impunity", a topic which has featured significantly in my first year as Legal Counsel.

It has struck me very often that, when we discuss the fight against impunity, we often dwell on international efforts, and fail to appreciate the significance and importance of strengthening and using national criminal law mechanisms.

So, in my remarks today, I intend to stress the complementary roles of national and international criminal accountability mechanisms and how their complementarity can address and avoid impunity gaps. The basic concept is of course that if States genuinely act to hold perpetrators of crimes accountable within their national systems, there will be less need for resort to international criminal tribunals.

Rule of law at national level

Before we speak of criminal accountability, we must remember that the first step towards ending impunity is the establishment and maintenance of the rule of law at the national level.

The rule of law at the national level implies that within a state, the exercise of power in the public domain should be performed with full respect for the laws that apply. Everyone, including the head of state, the parliament, the government, the judiciary, and other authorities is bound by the law.

An essential requirement of accountability is an impartial and independent application of the law by the judiciary. Other state or local authorities are required to apply the law objectively in accordance with its letter and intent.

It goes without saying that the law has to be consistent with applicable international human rights standards and must be properly published and accessible to the

general public. The rule of law also presupposes that the application of the law is entrusted to persons with the necessary integrity, independence, and impartiality.

What I wish to emphasize is: the obvious point that if the rule of law prevails at the national level, fewer atrocities will be committed. If committed, victims and the international community will be assured that the perpetrators will be held accountable in a manner consistent with international human rights norms and standards.

International criminal accountability mechanisms

We often hear that the robust pursuit of criminal justice at the international level is an erosion of sovereignty, or a new form of western colonialism. But we should recognize, I suggest, that international criminal accountability mechanisms have only been engaged where there is a real need to do so.

In some cases, after a conflict, there is no proper national criminal justice infrastructure. Sierra Leone and some parts of the former Yugoslavia were so devastated by war that they did not have the resources or expertise to conduct criminal prosecutions to hold accountable the persons responsible for the atrocities.

In other cases, the national judicial system is so overwhelmed that prosecutions are not feasible. Rwanda, after the genocide, had no capacity to try all tens of thousands of those who were arrested and detained and many fugitives who had fled to neighbouring countries, Europe, and North America.

But it is not only weak legal and judicial infrastructures that prevent the use of national criminal accountability mechanisms. The gaps in the Sierra Leonean criminal law, which did not encompass the relevant crimes was, for example, motivation for the request for a special court.

Aside from legal gaps, there may also be legal obstacles to **national** prosecution. We have had situations where national amnesties made it difficult for national courts to do justice to the victims. Without an international court that was not bound by the amnesty, there would have been no accountability; instead, the perpetrators of the horrendous crimes would have enjoyed impunity.

Unfortunately, there are also cases where a State may be unwilling to conduct prosecutions due to internal tensions or outside political interference.

The competence of international criminal tribunals established as *ad hoc* responses to specific events is, naturally, limited. As a permanent institution, the International Criminal Court has we believe, the advantage of having a continuing deterrent effect on decision-makers at the highest level. Indeed, the Rome Statute is designed to reach those who bear the ultimate responsibility for actions of State organs.

The ICC provides a standing complement to national criminal accountability mechanisms; and complementarity, as we all know, is a fundamental principle of the ICC regime. The Court may determine that a case brought before it is inadmissible if the case

is being or has been investigated or prosecuted (or a decision not to prosecute has been made) by a State that has jurisdiction over it.

The International Criminal Court is not intended to supplant States where States have organized criminal justice systems that are willing and able to ensure that there is accountability for the crimes concerned.

Rather, the purpose of international criminal accountability mechanisms, whether permanent or *ad hoc*, is to fill in when there are impunity gaps. They are not substitutes for national mechanisms. Thus we see that, within the Statutes of these international criminal tribunals, there is room for the exercise of national jurisdiction. I will give some examples:

First, crimes falling within the jurisdiction of the international tribunals may nevertheless be prosecuted at the national level because there is concurrent jurisdiction. Second, international tribunals may refer an indictment to the State in whose territory the crime was committed, or where the accused was arrested, or having jurisdiction and being willing and adequately prepared, and able to accept and prosecute the case. Third, in the particular case of the Special Court for Sierra Leone, transgressions by peace-keepers are to be prosecuted in the jurisdiction of the sending State.

These examples show that international criminal accountability mechanisms are not a hindrance to genuine and effective national accountability mechanisms. They are, and should be seen as, complementary. Indeed, as far back as 1948, the Genocide Convention provided for the complementary co-existence of national and international criminal justice mechanisms.

We are now heading towards a critical phase for international criminal justice when the *ad hoc* tribunals are completing their work. An appetite to establish further *ad hoc* tribunals is not evident. Instead, the international community is reiterating its commitment to end impunity by confirming its support for the ICC – as shown by the recent two ratifications – and also by supporting national efforts – as demonstrated by the Security Council's endorsement of the strategy of transferring cases involving low level indictees from the *ad hoc* international tribunals to competent national jurisdictions.

Concluding remarks

It is now generally accepted that perpetrators of war crimes, other serious violations of international humanitarian law, and gross human rights violations must be held accountable and must be brought to justice in accordance with due process of law.

What should also be accepted is that ensuring accountability cannot be the work of one court, one judicial system, one State, or one region. Ending impunity must, and does, rest upon the complementary efforts of national and international criminal accountability systems, the existence of the rule of law within nations and among nations, and the unwavering commitment of the international community to maintain conditions under which justice and peace prevail.

Thank you.