Seminar on International Criminal Justice:
The Role of the International Criminal Court

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Ambassador Štiglic,
President Song,
President of the Assembly, Ambassador Wenaweser,
Excellencies,
Ladies and Gentlemen,

Introduction

I am honoured to have been invited to join you this morning and to briefly address you on this important and topical subject. It is both a privilege and a challenge to follow the newly elected President of the International Criminal Court in taking the floor.

President Song, allow me firstly to take this opportunity to warmly congratulate you on your election. Please be assured that in carrying out

your important and difficult mandate you will always be able to count on the full support of my Office, and of the Secretariat in its entirety.

In view of the time constraints we are all under, it is difficult for me to do justice to the almost five years of extensive cooperation between the United Nations and the International Criminal Court which has taken place on the basis of our relationship agreement. I would venture to say that this cooperation works so well that I can afford to use my time to address the important issue of complementarity which arises quite frequently in the context of UN-ICC cooperation which has been touched upon by the President.

Before I embark on the substance, I must mention two matters which, although obvious, require to be highlighted:

- Firstly, I will be making the following remarks 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.

On that note, I propose to address the concept of complementarity as a tool or instrument to facilitate the resolution of the quandary of peace and justice in post conflict environments.

The notion of complementarity has, I suggest, to be viewed in the context of the dilemma of peace and justice. I wish to propose to you today that complementarity should be seen as an important element in resolving this conundrum.

In this context, I will venture to go a step further and raise the issue of how an Article 16 deferral by the Security Council, using its Chapter VII powers, can also constitute an important additional factor in this equation of peace and justice. It is possible that, where circumstances are deemed appropriate, the Council can through a "deferral" give a State the necessary time to establish and bring into operation a credible national alternative to a trial before the International Criminal Court.

Peace and Justice

With the growing involvement of the United Nations in post-conflict societies - both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms - the Organization has frequently been called upon to express its position on the relationship between peace and justice.

As Secretary-General Ban has said on a number of occasions: "There are no easy answers to this morally and legally charged balancing act. However, the overarching principle is clear: there can be no sustainable peace without justice. Peace and justice, accountability and reconciliation are not mutually exclusive. To the contrary, they go hand in hand."

On the one side, if we ignore the demand for justice simply in order to reach a peace agreement, the foundations of that agreement will be fragile and possibly unsustainable.

On the other side, if we insist at all times on a relentless pursuit of justice a delicate peace may not survive. If we insist in punishing always and everywhere those responsible for serious violations of human rights it may be difficult or even impossible to stop the bloodshed and save lives of innocent civilians. At times, we may need to postpone the day when the guilty are brought to trial.

While we will uphold those principles, the challenge is always to find the right balance in each specific instance where this issue arises. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the one for the other. Indeed, I firmly believe that peace and justice can and must be pursued in parallel.

Complementarity

So how does complementarity fit into this framework?

The notion of "complementarity" under the Rome Statute is premised on the basis that a case before the Court is only admissible when national courts are

"unwilling or unable" to investigate or prosecute the statutory crimes concerned. And this has been gone into some detail by President Song.

There are several ways in which the question of complementarity can come into play before the Court:

- an accused individual or "indicted" person can raise it in order to challenge the admissibility of a case;
- a State with jurisdiction raises the issue to challenge the admissibility of a case; and
- thirdly, the Court examines the admissibility of a case and raises the issue of "complementarity" on its own motion.

In this brief statement, I would like to focus on the circumstances where a situation has been referred to the Court – either by the State itself or by the Security Council – and the territorial State has indicated that it wishes to investigate and prosecute the situation under its own national system.

In this connection, the situation of Uganda comes to mind. In late 2003, Uganda had referred the situation in the northern parts of the country to the ICC. During the course of 2007, as the peace process gathered momentum and the ICC arrest warrants were seen as a major "stumbling block", a framework of agreements was elaborated, that provided for the establishment of a "special division" of the Ugandan High Court that was supposed to provide a national alternative to proceedings before the ICC. However - as we all know - as the envisaged "final peace agreement" was never signed, this project never fully materialized and the peace process in that case broke down.

A State which has referred a situation to the ICC can "regain" jurisdiction over that situation only if it successfully makes the case before the ICC, under Articles 17 and 19 of the Statute, that it is now "willing and able genuinely" to investigate and prosecute. This is also the case when a situation has been referred to the Court by the Security Council.

That State, if it so chooses, will have to challenge the admissibility of the case by means of a judicial submission before the Chambers of the ICC. The Court will not drop a case or take any other such measures just because of political or diplomatic representations.

The key consideration, I suggest, in this context is the interpretation of the phrase "willing and able genuinely" to investigate or prosecute. Again, please note that I have no intention whatsoever for my reading of this phrase to carry any authoritative weight. The authoritative interpretation of the Rome Statute is a matter for the Court and the States Parties to the Rome Statute and I have utmost respect for this.

That said, my reading of those provisions in the light of decisions of the Court rendered so far is that, to satisfy the complementarity test, a State has to demonstrate that investigations or prosecutions are underway at the very moment when the admissibility is called into question against essentially the same individuals for essentially the same international crimes. This willingness not only should manifest itself in a tangible way, it also has to be genuine, meaning that it needs to be carried out in a "good faith" manner.

Any decision on admissibility is taken exclusively by the Chambers of the Court.

Taking the example of the situation in Northern Uganda in this connection, a decision of 29 February 2008 by ICC Pre-Trial Chamber II which requested information from Uganda on the "status of execution of the arrest warrants" must be seen as a positive development as it can be seen as an effort by the ICC to engage the country - Uganda in that case - in a "judicial dialogue" on the issue of complementarity.

Therefore, in order for a "complementarity challenge" to be successful, the State in question needs to have or to put in place a credible national accountability mechanism that investigates and prosecutes the individuals indicted by the ICC for the international crimes for which they are charged before the ICC. While there are, of course, other requirements, this is the essential one.

A mere political intent or even enacting a requisite piece of legislation that establishes a "special accountability mechanism" to investigate and prosecute those international crimes at the national level is unlikely to suffice.

There is another element that can be regarded as clear or self-evident. It would be for the ICC alone to determine whether the conditions for challenging the "admissibility" of a case have been met, and whether the national accountability process put in place constitutes a viable and credible alternative.

Leaving aside special circumstances, such as for example Article 95 which allows a requested State to postpone the execution of a cooperation request pending a decision by the Court of a related admissibility challenge, the situation is as follows: Until such time as the ICC has decided the matter, a State that is bound by the provisions of the Rome Statute, by virtue of ratification by that State of the Rome Statute or by virtue of a Security Council decision, is still under an obligation to cooperate with the Court in a way that is in conformity with the letter and spirit of the Rome Statute or the applicable Security Council decision. Such obligations can range from cooperation duties during a monitoring or investigation phase to the arrest and surrender to the Court of individuals pursuant to warrants issued by the ICC.

Under Article 16 of the ICC Statute, the Security Council by a Chapter VII resolution may request the Court to suspend any investigation or prosecution for a one-year period. Such a request may be renewed by the Council under the same conditions.

It would, in my view, be within the purview of the Security Council to attach conditions to any such request. The ability to attach conditions arguably provides the Security Council with a valuable opportunity to steer a situation in a direction in which the Council wishes that situation to develop.

It is important to bear in mind, in any consideration of this issue, that any such “deferral” would only constitute a temporary measure that does not “lift” but only “freezes” pending ICC proceedings.

It might be argued that a "complementarity challenge" and a Security Council deferral could be combined. In such a scenario the Security Council could give the target State in question the necessary time to establish a viable and credible national accountability system and get it up and running so as to increase the chances for a successful "complementarity challenge".

UN-ICC cooperation

Allow me to close by getting back to the cooperation between the United Nations and the International Criminal Court under our Relationship Agreement. This autumn, and more precisely on 4 October 2009, we will mark the Fifth Anniversary of this cooperation. We are very pleased about the fact that our partnership with and support to the Court has progressively evolved and expanded. By now, many of the cooperation requests are handled as standard procedure. We have managed to successfully resolve challenges, such as the highly publicised issue of confidential information in connection with the Lubanga case.

The success story of UN-ICC cooperation has only been possible because of the dedication and trust that both parties have demonstrated in this respect. This dedication is also a clear manifestation of the fact that the United Nations wants and needs the International Criminal Court to succeed and that the International Criminal Court fully acknowledges and respects our mandate.

Since the beginning of the cooperation between the United Nations and the Court, my Office has acted as the "point of entry" for every cooperation related matter. Allow me to say that I am proud of how we have shaped this cooperation and assisted cooperating UN entities with a view to ensuring a unified approach throughout the UN system.

Conclusion

Thank you very much indeed, Ladies and Gentlemen, for your kind attention and I look forward to listening to the Panel and to the discussion.

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