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Remarks by Elizabeth Wilmshurst

Is there accountability for human rights violations?

I've been asked to talk about the International Criminal Court. You may well protest that the ICC is not a human rights court. It does not deal with violations by States of their obligations under human rights treaties and covenants. Of course you are right. The ICC is a criminal court, not a human rights court. It has jurisdiction over individuals who have violated international humanitarian law – committing war crimes - and those who have violated other provisions of international criminal law – committing crimes against humanity and genocide. Nevertheless there is overlap; for example when State officials commit genocide or crimes against humanity they are undoubtedly committing human rights violations. It is indeed appropriate to discuss the ICC within this panel.

The International Criminal Court is coming up to its eighth birthday. An intergovernmental conference for the purpose of reviewing its Statute finished early this morning in Kampala. It was attended by a large number of NGOs,

As well as looking at proposals for a limited number of amendments to the Statute (which included an agreement on the crime of aggression), the conference undertook what it called a stock taking. It chose four important subjects: the impact on victims and affected communities; complementarity (the relationship between the ICC and national jurisdictions); governments' cooperation with the Court; and peace and justice. There emerged from the discussion what may be reasonably useful resolutions and declarations. The discussion performed an educative function, although it was perhaps preaching to the converted. The stocktaking exercise was not concerned with the performance of the Court itself

In the five minutes available to us, let us do our own stock taking.

On the one hand, I note four of the major challenges to the Court.

- The Court is not yet universal. The fact that it has 111 States Parties is a major success, but in the some 80 States which are not yet parties are included India, Indonesia, most of the Arab States, Russia, China and the US. Why does it matter which States are parties? Because of course it affects the jurisdiction of the Court. In the absence of a UN Security Council referral of a matter to the ICC (and there has been only one – Darfur), the Court cannot try a case unless either the State where the crimes were committed or the State of nationality of the alleged criminals is a party – though a state can also accept the jurisdiction of the Court for a particular matter.

So there remain many cases over which the Court has no jurisdiction - it cannot investigate or prosecute them. I mention only two examples, which have been in the press over the last year:

1. The alleged war crimes committed in the Sri Lanka civil war, which ended a year ago. There have been many calls for accountability for those on both sides of the conflict, for example in the recent report of the International Crisis Group. The UN Secretary-General is still working on setting up a panel of experts to advise him on accountability issues. ('I am still working on the establishment of a group of experts who will advise me based on international standards and experiences on implementation of the commitment the government made in the area of human rights accountability', he said recently) This is a matter which will not get to the ICC unless the Security Council refers it – and there is surely no chance of that.
2. The alleged war crimes committed in Gaza during the 2008/2009 Israeli Operation Cast Lead, and the rockets sent into Israel by Hamas. The Palestinian Authority has made a declaration accepting jurisdiction for the purpose, referring to Article 12(3) of the ICC Statute. Lawyers from around the world are arguing on both sides of the question whether the PA can validly make such a declaration. On the one hand it is not a 'State'; on the other hand, to deny it this possibility would be to leave a gap in the ending of impunity,

and perhaps the term 'State' in Article 12(3) should be interpreted flexibly for this purpose. It is not clear which side of the argument the Court will take.

- The ICC has not yet completed any trial within its first eight years. The trials that are ongoing have involved numbers of lengthy procedural challenges. Establishing effective procedures is a challenge for any new court.
- Most of the defendants are still on the run or are openly defying the ICC. (There are only four persons in detention, and at least eight arrest warrants outstanding). Examples are the leaders of the 'Lord's Resistance Army' and, of course, those in the Darfur situation. The Court has to operate a system of criminal law without police.
- There is a possible perception that investigations by the Court have the effect of prolonging wars rather than stopping them. This is a perception that was discussed at the Review Conference and reflects a tension in certain circumstances between short-term peace and justice; the problem arose in the LRA situation and in that of Darfur. A Resolution adopted at the Review Conference emphasises 'that justice is a fundamental building block of sustainable peace'; the current US National Security Strategy states that 'the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs.' But if that is true, it is something that politicians and diplomats do not appear to acknowledge in all situations. Civil society can perform an important function in continuing to lobby governments to support the Court.

Of the many favourable developments, I mention four.

- The very existence of the Court raises the possibility of accountability which in some parts of the world is a new thing. The UNSG said at the beginning of the Review Conference: 'the era of impunity is over. We are witnessing the birth of a new age of accountability' It was also noted at the Conference: 'the advent of international criminal justice was a development as revolutionary as the end of slavery or the recognition of women rights...We were only in the early days of the process...' (Summary of the discussion on Peace and Justice)
- The ICC includes victims in the process, and has set up a trust fund for them. Although the inclusion of victims in the Court's proceedings raises many complications, the full acknowledgment of what is due to them marks a first for international criminal justice.
- The existence of the Court has encouraged States to enact their own national laws allowing for national prosecutions for war crimes, crimes against humanity and genocide.
- The ICC continues to attract support. Although opposed vehemently by the first years of the Bush admin and still by many in the US, the Obama administration, as Ambassador Rapp said in Kampala, is looking 'for ways to support this Court constructively'. There has been opposition from within the African Union, particularly in the light of the indictment against President Al Bashir, but there are 30 African States parties to the Statute and their stance is by no means hostile. The Review Conference was of course held in Uganda.