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Prosecution and prevention of genocide: current developments and historical experience

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Dear colleagues and friends,

I am most grateful for the opportunity to address you at this occasion on a subject that concerns both my work as President of the International Center for Transitional Justice and as Special Adviser to the Secretary-General on the Prevention of Genocide. Transitional Justice and Prevention of Genocide are new horizons of human rights protection. Calling them "new horizons" is not intended to mean that they have not been always with us in terms of challenge and desirability: in fact, punishing those responsible for the Holocaust and for the war crimes of World War II, and preventing their recurrence were at the heart of efforts to create an international human rights canon in the late 1940s. But they constitute "new horizons" in the sense that the human rights movement is only now

beginning to develop effective means and methods to make them a reality. Of course, there are other "new horizons" in human rights protection, some of them quite dear to the founders, the faculty and the students of this University: we are only now beginning to learn how to protect economic, social and cultural rights *as rights* and not as aspirations, on a par with the quite effective means the movement has developed for civil and political rights. And the principle of equality and non-discrimination is becoming central to the movement in ways in which it just wasn't until recently, especially with the emergence of communities claiming their rightful place among rights-bearers: women, racial and religious minorities, original peoples, those discriminated against on the basis of sexual orientation, persons with disabilities and the victims of discrimination on other bases. My reason to concentrate on prevention of genocide and on transitional justice reflects the work that I have been engaged in most recently. As we learn how to realize justice in times of transition and how to prevent recurrence of mass atrocity, we also learn to incorporate the rights, the wishes and the interests of powerless communities, and we learn from them what it will take to remove the ultimate causes of their powerlessness and their victimization.

The creation and the work of the Nuremberg Court were essential for the development of international accountability mechanisms for genocide, war crimes and crimes against humanity. When, at the end of World War II, the Allied Powers adopted the Charter of the International Military Tribunal the newly coined term of genocide was used for the first time in the Nuremberg indictment of 18 October 1945. In 1946, the General Assembly affirmed the principles of international law recognized by the Charter of the International Military Tribunal and, thereby implicitly confirmed that genocide was a crime under international law. Two years later, on 9 December 1948, the General Assembly adopted the Convention on the

Prevention and Punishment of the Crime of Genocide in which the parties confirm that genocide is a crime under international law, which they undertake to prevent and punish. One day after that, the Universal Declaration of Human Rights was enacted. Almost sixty years later, we need periodically to ratify the idea that there are crimes so heinous and so offensive to the conscience of humanity that they simply cannot go unpunished, no matter what justification is alleged for their impunity.

The Genocide Convention focuses more directly on punishment than on prevention, although clearly the punishment of the crime of genocide is meant to have a general preventive effect. In addition, some of the acts referred to in article 3 of the Convention have a preventive dimension, such as the obligation to prosecute conspiracy, attempted genocide and public incitement to commit genocide. Another preventive element can be found in article 8, which provides for the possibility of any contracting party to call upon the competent organs of the United Nations to take action on the prevention or repression of acts of genocide.

Since the Holocaust served as the most deliberate and thorough example during discussions about the Convention, the text reflects the historic experience of the difficulties in prosecuting and punishing acts of genocide within the State where they are committed, during the time the genocide occurs or is about to happen. In most cases in history, the government, its agents and the population participated in these acts or, at least, stood silently by while others committed genocide. Impunity for those crimes was an important element contributing to an atmosphere of fear that disabled the formal and informal mechanisms of accountability within the society in question. Therefore, the Convention calls for the prosecution and punishment of perpetrators of genocide in third countries or before an international

criminal court. Incidentally, though the term "transitional justice" might indicate that the mechanisms of truth-seeking, prosecutions, reparations, institutional reform and reconciliation are only triggered when a real transition from dictatorship to democracy or from conflict to peace actually begins. In fact, we at ICTJ find ourselves increasingly drawn to act while violations are ongoing, or when there is a chance for peace, and the terms to be negotiated inevitably raise the question of how much justice are we all willing to give up for the sake of peace.

According to the International Court of Justice the Convention primarily confirms pre-existing legal obligations that amount to international *jus cogens*. Thus, punishing and preventing genocide is a principle of international law so fundamental that no nation may ignore it. Governments are obliged to take all measures within their power to prevent the commission of the crime of genocide, even before a competent court determines that the Convention actually applies to a case at hand.

Notwithstanding the existing legal obligation to prevent genocide, numerous cases of massive violations of human rights and humanitarian law occurred since the adoption of the 1948 Convention without triggering action as described in article 8 of its text and without even eliciting action by Member States. In hindsight, the United Nations, Member States and NGOs have concluded that many of these situations could have been anticipated and prevented.

On 7 April 2004, in his address to the Human Rights Commission at the occasion of a special meeting to observe the International Day of Reflection on the 1994 Genocide in Rwanda, the Secretary-General pointed to conspicuous gaps in the United Nations' capacity to give early warning of genocide or comparable crimes.

At the same time, he launched an Action Plan to Prevent Genocide, which included the development of a capacity within the United Nations system for early and clear warning of potential genocide. In this respect, the Secretary-General announced his decision to create a new post of Special Adviser on the Prevention of Genocide, reporting through his Office to the Security Council.

The purpose of the Special Adviser is not to determine whether genocide has occurred or is occurring, but to propose steps to prevent it. The last paragraph of the outline of the mandate states clearly that "the Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred." This limitation is not a reflection of political sensitivities but a practical one deriving from the preventive character of the mandate. The role of the SAPG is to provide early warning before all the elements that constitute the definition of genocide under the Convention are present and to suggest appropriate action.

Beyond the matter of the terms of reference the SAPG is expected to follow, it is wise to move away from the need to make a prior determination that a certain set of atrocities constitutes genocide before we decide to act. Too often the debate over whether genocide is occurring has become more important than taking action to reverse the situation and prevent further violations. Both legally and morally, our obligation to protect populations at risk is triggered not only by genocide, but also by crimes against humanity and war crimes.

The mandate of the Special Adviser on the Prevention of Genocide involves gathering information, providing early warning and presenting appropriate recommendations to prevent genocide from occurring. To this end, the functions

as outlined to the Security Council involve: (1) Collecting existing information, in particular from within the UN system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (2) Acting as an early-warning mechanism to the Secretary-General, and, through him to the Security Council, by bringing to the latter's attention potential situations that could result in genocide; (3) Making recommendations to the Security Council through the Secretary-General, on actions to prevent or halt genocide; and (4) Liaising with the UN system on activities for the prevention of genocide and working to enhance the UN capacity to analyze and manage information relating to genocide and related crimes.

Prevention of genocide requires both early warning and early action. Early warning should always be accompanied by practical proposals and recommendations that enable the international community to act in a timely fashion. Both in the short and long term, the prevention of genocide seems predicated on acting comprehensively, as early as possible, in four interrelated areas: the protection of civilians, establishing accountability for violations of human rights and humanitarian law, humanitarian relief, and steps to settle underlying conflicts through peace agreements.

Let me concentrate more specifically on accountability. Accountability in the form of punishment for genocide, crimes against humanity and war crimes is crucial to prevention of similar acts in the future. The sense of impunity for the crimes already committed breeds insecurity among populations at risk and creates an incentive for repetition among the perpetrators. This insecurity in turn complicates the task of protecting civilian population at risk, increases the difficulty of

providing humanitarian relief, and ultimately makes peace negotiations uncertain. That is why, in case after case, during my tenure I found myself arguing in favor of measures to break the cycle of impunity: early on I urged the Security Council to refer the Darfur case to the International Criminal Court, which finally happened on April 1, 2005. In late 2004, in the midst of a frenzy of hate speech in Cote d'Ivoire, I reminded all actors that the ICC has jurisdiction over the country and that instigation and incitement to commit crimes under the Statute of Rome could indeed trigger an eventual indictment.

Breaking the cycle of impunity is greatly aided by the existence of an institution like the permanent International Criminal Court. However, we must realize that in the best case scenario the ICC will only prosecute and punish a handful of those bearing the highest responsibility for the crimes. It is important, therefore, to press the domestic judicial authorities to assume their responsibilities, and for government and civil society to contribute efforts towards a comprehensive set of policy prescriptions that will meet everybody's expectations of justice and do so with respect for international standards of fair trial and due process. This is where the mechanisms of transitional justice can serve to bridge the otherwise inevitable "impunity gap" that will develop between what the international community can accomplish and the expectations we raise among victims.

National and international initiatives to address impunity for genocide, war crimes and crimes against humanity, including the Nuremberg Court, the Rwanda Tribunal and the Tribunal for the former Yugoslavia have also been key to help advance the fight against impunity and, in the process, provide important elements for prevention. In their decisions, these Courts have clarified legal terms, established historic accounts of events, identified indicators for early-warning and,

indirectly, revealed opportunities for preventive action that were missed in the past. A systematic review of court decisions to analyze their contribution to the prevention of genocide is still outstanding. I am confident that the work of the International Criminal Court will be an important contribution in this regard.

In the meantime, there is no doubt that the doctrine of Responsibility to Protect and its rapid emergence as a norm of international relations has provided a large measure of legitimacy and recognition to the Office of the Special Advisor on the Prevention of Genocide. The inclusion of RtoP in the Summit Outcome document approved by the consensus of 191 heads of state and government in September 2005, and the resolution to the same effect passed later by the Security Council go a long way towards validating efforts to prevent genocide. It must be noted, however, that we still need – urgently – to move from the expression of commitment and principle, to the effective implementation of the rule in specific situations.

Accountability and international norms are important, and so are early warning based on accurate information and reasonable, practical suggestions for action. But in all recent cases of genocide or genocide-like situations what has been missing is the political will to act. Experience shows that political will never exists in a vacuum and never appears spontaneously; it is constructed over time by dedicated individuals and organizations of civil society whose mobilization eventually forces leaders to reckon with the problem. In that sense, raising public concern remains a crucial element for effective genocide prevention. In an analysis of the past reactions of United States governments to situations of massive violations of human rights and international humanitarian law, Samantha Power has pointed to the indispensable role of public opinion in providing the motivation

and creating the political will to address crimes of genocide abroad. The same is true, for sure, for other governments. There have always been early signs of a deteriorating situation, some concrete proposals for preventive action and some degree of public concern. However, history has shown that governments intervened when urged to do so by their citizens. The leadership of national and international civil society organizations as well as of influential, respected individuals cannot be overstated. For that reason, Secretary General Kofi Annan instructed me to act also as a public spokesman whenever I thought that public advocacy would save more lives than quiet diplomacy. My successor has proven talents and experience as a public advocate and we can all be confident that he will contribute very effectively to shaping and mobilizing public opinion so that eventually the member States of the United Nations decide to implement their obligations under the Genocide Convention and the emerging norm of Responsibility to Protect.

Thank you.