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Preventing, Implementing and Enforcing International Humanitarian Law

Juan E. Méndez*

I am very grateful to the American Society of International Law, The Robert H. Jackson Center, The Chautauqua Institution, Syracuse University Law School, The Whitney Harris Center at the Washington University in St. Louis, and the Planethood Foundation for the invitation to speak at this important conference. It is a great pleasure to be here tonight in front of such a distinguished audience.

My presentation will concentrate on the importance of the prevention of mass violence and international crimes, including war crimes, and I will do so mainly from the perspective of programs the ICTJ carries on in several countries, and also from my experience as the former Special Advisor to the Secretary General on the Prevention of Genocide.

Breaking impunity and fostering accountability is a crucial component in the prevention of future violence and mass atrocities: no prevention efforts can take place without a serious attempt to break the cycle of impunity for past human rights violations, especially if they are so widespread or systematic as to constitute war crimes, crimes against humanity, or genocide. The failure to do justice to the victims can lead to the desire to obtain

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revenge, and thus to more crimes. Accountability is essential to halt the vicious cycle of revenge, to enable the victims, their families and communities to live peacefully with the communities that the perpetrators of atrocities claimed to represent, and to avoid blaming descendants for the crimes committed in earlier generations.

Accountability for such crimes must be comprehensive, balanced and holistic, meaning that policies and practices must address the need to discover and disclose the truth, to bring perpetrators to justice, to offer reparations to the victims, and to promote deep reform in the institutions through which State power is exercised. While criminal prosecutions should not be the sole response to impunity, there is no doubt that they must play a central, indispensable role in any policy of accountability.

Prosecutions also represent the States' fundamental obligation to give victims access to justice. In addition, concerning international crimes, States have a clear international legal obligation to ensure that justice is done. This is particularly the case for serious violations of international humanitarian law. For war crimes, international humanitarian law, as defined notably in the Geneva Conventions and their Additional Protocols, establishes a duty for States to prosecute and punish those responsible or to hand them over to be prosecuted by another State-Party (under the *aut dedere aut judicare* principle). As such, in the late 1940s international humanitarian law created a new set of obligations, which

in turned paved the way for the enforcement of these norms.

Therefore, to fully foster accountability for such crimes, a dual approach should be favored. On the one hand, the international community must pay more attention to helping States live up to this obligation by building independent, impartial judiciaries that can prosecute mass atrocities with full respect for due process of law and fair trial guarantees. On the other, our support of the role of the International Criminal Court and other international or hybrid criminal jurisdictions must also be oriented towards supplementing the absence of will or capacity to produce fair trials domestically, but also to help generate that capacity in the future.

This year we celebrate the 100th anniversary of the 1907 Hague Rules, as well as the 30th anniversary of the 1977 Additional Protocols to the Geneva Conventions. In the 70 years that elapsed between these two dates, 1907 and 1977, the world suffered two World Wars, the Holocaust and other genocides, and many terrible war crimes. But these years have also marked the codification of the body of international humanitarian law, the materialization of the principle of individual criminal responsibility at the international level, and the strengthening of all forms of accountability for these crimes. The near-universal ratification of the Geneva Conventions -- as well as the recognition that many of their key provisions have the status of customary international law -- bears witness to this reinforcement of

international law, and in particular of international humanitarian law.

If we only just look back to less than fifteen years ago, we see how far we have come from the pervasiveness of impunity for grave human rights crimes and from the permissive attitude towards that impunity by the international community. Many of you present here tonight have personally and professionally played a big part in these developments. Since 1993, we have notably witnessed the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, of the Special Court for Sierra Leone, of the Extraordinary Chambers in the Courts of Cambodia, and of other hybrid mechanisms in East Timor, Bosnia-Herzegovina, Kosovo, and recently Lebanon and Guatemala. Important too are efforts to prosecute these crimes at the domestic level in Argentina, Chile, Peru, Colombia, Rwanda, and Ethiopia. The creation of the International Criminal Court in 1998 was the high point of this evolution, signaling that accountability for war crimes, crimes against humanity and genocide is now paramount. But the Rome Statute is not only the culmination of a clear historical trend, it is also the means to establish an instrument that makes justice possible even when the national domestic jurisdictions are unable or unwilling to afford it. And yet, for each situation in which the ICC has acquired jurisdiction, we hear voices calling for amnesty, withdrawal of indictments or other forms of exercising discretion and avoiding prosecutions, supposedly in the name of peace.

With the best of intentions, some are urging measures that implicitly give in to the blackmail of the parties to the armed conflict: peace can only come if those accused of atrocities are given guarantees that they will not be touched. We are concerned by the revival of this debate that some of us had hoped was more settled. To those who have followed the evolution of human rights in the last 25 years, the debate rings of earlier discussions as to whether fragile democracies could really afford to investigate and disclose – let alone prosecute – the major crimes of the preceding era. The alleged antinomy between justice and democracy, often rephrased today as the tension between peace and justice, is debated among academic circles and also among practitioners. A major conference was recently co-organized in Nuremberg by ICTJ to discuss this tension and to explore possible ways in which peace and justice indeed can be mutually reinforcing.

In Northern Uganda, while there is a broad recognition that the ICC arrest warrants have assisted in bringing the LRA to the negotiating table, some have portrayed these warrants as obstacles to progressing further with the peace process. We believe, however, that the warrants act as an incentive to keeping the LRA involved in the peace talks. We also welcome the signature of an Agreement on Accountability and Reconciliation by the LRA and the Government of Uganda on 29 June. The Agreement proposes that Uganda should implement its international obligations to prosecute senior leaders of the LRA under national law. Depending on what is proposed and implemented, we

believe this may be consistent with the Rome Statute. A thorough national accountability process, respecting international standards, could have a wide-reaching impact in Ugandan society. We believe the robust approach taken in this peace agreement to accountability is an important improvement over past peace accords, and that the pressure brought to bear by the ICC has assisted to achieve this. At the same time, the international community must stand ready to continue its support to the ICC if either side renege on the agreement.

There are many examples of the impact that prosecutions – or even the threat of prosecutions – have in preventing crimes, including war crimes.

In Cote d'Ivoire, the prospect of an ICC prosecution of those who use hate speech to instigate and incite to commit international crimes has arguably kept those actors under some level of control. It is also an important example of the possible preventive role of the ICC.

In Colombia, the provisions on alternative sentencing and demobilization of the paramilitary groups under the Peace and Justice Law, even as strengthened by Colombia's Constitutional Court, would have left victims with even less prospect of justice for the harms they have suffered if it were not for the need to offer a semblance of compliance with the international standards set forth in the Rome Statute. At the same time, while the peace and justice law shows important innovations, it also shows some of the tremendous

challenges in dealing with large numbers of perpetrators and victims through a system that encourages cooperation with law enforcement and disclosure as an alternative to full-fledged trials.

In Darfur, which I visited in 2004 and 2005 in my role as Special Advisor to the Secretary General on the Prevention of Genocide, impunity for earlier crimes, notably the massacres of 2003 that cost at least 200,000 lives, has been for too long a factor of instability and a hindrance to prevention of future crimes. That is why early on I joined those who called for a referral of the case to the ICC by the Security Council, a measure of historic significance that was adopted on April 1, 2005. What continues to be essential to the international community's strategy is a multi-pronged approach of protection, humanitarian assistance, promoting a peaceful settlement of the conflict, and criminal accountability.

Unfortunately I come away with the impression that we were not always strategic or sufficiently persistent in pursuing those goals. It has now been over two years since the Security Council resolution referring the case to the ICC, and the Government of Sudan has repeatedly stated that it does not recognize it and that it will not cooperate with the OTP's investigations or the arrest warrants issued against Harun and Kushayb. In that long period, the Security Council made no effort to remind the Government of Sudan that this was a decision adopted under Chapter VII of the Charter, and therefore binding on all States. Instead, we have let the regime get

away with defiance of a resolution adopted in furtherance of international peace and security. As far as I can see, only the High Commissioner for Human Rights and my office of Prevention of Genocide have raised this point from time to time. The result is not only that we do not offer the ICC the support it needs; it is also that we have given away cards that we could have used in negotiating with Khartoum to better protect and assist the 4 million Darfuris who are now totally dependent on international assistance.

In the DRC, reports of crimes are also still surfacing, as for instance the massacre of Kasika. Many crimes are still being committed, particularly against women and girls, in a widespread manner, notably in the Kivus. Thus, the fight against impunity has barely started in this huge country. We hope that the trial of Thomas Lubanga Dyilo will soon be followed by other cases, so as to give an account of the many horrific crimes committed in this country since 2002. But there is also an acute need in the DRC to foster accountability for the many crimes committed before 2002. It is critical that domestic courts be enabled and empowered to try those responsible, including those bearing the highest level of responsibility. ICTJ is currently co-undertaking a survey so as to better understand the extent to which people have been victimized in the DRC. Another project that will pave the way to fostering accountability in the DRC has been developed by the UN Office of the High Commissioner for Human Rights with the United Nations Mission in the Democratic Republic of the Congo: it concerns the mapping of serious violations of international humanitarian law and of massive human

rights violations that have taken place in the DRC over the last few years. Such mapping will not only gather and preserve crucial evidence, but also undoubtedly generate a new impetus to advocacy on the need to bring those responsible to justice. The long-term stability of this vast country situated at the heart of Africa is at stake and much more needs to be done to ensure that the plight of the Congolese is addressed in accountability terms.

What all these cases demonstrate is that, ultimately, the interests of justice and the interests of peace cannot and should not be divorced. Justice is an important component of the prevention of future crimes. It is only through justice and through enforcement of the law that long-term respect for the rule of law can be built.

This provides us with an important lesson for all international and hybrid jurisdictions: they must seek more pro-actively to build their legitimacy in affected regions, so as to build their own relevance in the lives of those most affected. Most importantly, these jurisdictions are judged on the basis of their impartiality and professionalism. To be seen as legitimate and respectful of universal standards, there should be no perceptions of selective justice in the prosecutions.

Those of us who support these jurisdictions should learn to identify their impact and successes in ways that go beyond the strict confines of the judicial process. In cases such as Cambodia, this will depend on the legitimacy and transparency of the Extraordinary Chambers in the eyes of both Cambodians who suffered

under the Khmer Rouge and the international community. This broader impact is all the more important for those international or hybrid jurisdictions that are being prompted to "complete" their work in the coming years. Now is the time to assess their work, and also to review their legacy and what remains to be done, with a view to help generate domestic capacity to further their work.

Of paramount importance is to bring to justice the leaders, those who bear the greatest responsibility in the commission of international crimes. Even heads of States are not beyond the reach of the law. These principles are reflected throughout international humanitarian law, on the one hand, the principle of command responsibility, and, on the other hand, the fact that the official position of individuals does not relieve them of criminal responsibility.

Of essential importance too is the need to continue to support domestic actors as they seek to bring justice outside of the spotlight of international attention or through the medium of the UN. In this respect I want to mention again important efforts in places such as Chile, Peru and Argentina.

To conclude, the conduct of modern wars affects greater numbers of innocent victims than ever before, and the importance of condemning breaches of international humanitarian law, and finding ways to enforce these norms, is greater than ever. But one must recognize that preventing violations of international humanitarian law is an ideal that may never be attained.

Justice, accountability and punishment play important preventive functions, but they should not be overestimated. The fact that murders have been prosecuted domestically for centuries has not resulted in the cessation of murders. But the fear individuals have of being possibly punished may have a strong psychological impact, correlated with the likelihood of being punished. And this may be one of the fundamental problems of international justice: it is not yet systematic, and there are still too many ways to escape it. This in turn shows the importance of the complementarity approach: the need to foster accountability at both the domestic and the international levels, so that they ultimately reinforce each other. Situations such as Uganda and Colombia are showing us new ways in which this may be done.

Thank you very much for your attention.