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REMARKS ON INTERVENTION*

Juan E. Méndez[†]

TRANSCRIPT:

I am very grateful to the Case Western Reserve University School of Law for the invitation to speak at this important conference. It is a great pleasure to be here today in front of such a distinguished audience.

My presentation will concentrate on the importance of the prevention of mass violence and international crimes, including genocide, and I will do so mainly from the perspectives of International Center for Transitional Justice (ICTJ) programs in several countries, and from my experience as the Special Advisor to the Secretary-General on the Prevention of Genocide.

Breaking the cycle of 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. If perpetrators feel shielded from prosecution or investigation for the crimes they have already committed, they will have an incentive not only to commit them anew, but also to raise the stakes and perpetrate crimes that are even more serious. The failure to do justice to the victims usually leads to sentiments of revenge, and thus to the likelihood of more crimes. Accountability is essential to halt the vicious cycle of revenge, but also to enable the victims to make their own decisions as to their protection and well being, so that they are not merely passive recipients of the interna-

* The Frederick K. Cox International Law Center sponsored the symposium "To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Negotiation of the Genocide Convention," a conference drawing renowned international law scholars to Case Western Reserve University School of Law in Cleveland, Ohio on September 28, 2007 to share their expert analysis of the origins of the Genocide Convention and its future potential. A webcast of the Conference is available at <http://law.case.edu/centers/cox/webcast.asp?dt=20070928>. The foregoing is a transcript of Mr. Méndez's remarks from this conference.

† President of the International Center for Transitional Justice and Former Special Advisor to the Secretary-General on the Prevention of Genocide. The author gratefully acknowledges the contributions of his ICTJ colleagues, Marieke Wierda, Cecile Aptel, and Richard Bailey, and of his former colleagues at the United Nations, Ekkehard Strauss and Andres Salazar.

tional community's efforts. Finally, accountability for past crimes is also important so that the victims, their families, and their communities can distinguish between their victimizers and the communities the victimizers claimed to represent, so that the blame for the atrocities is not visited on innocent descendants of those perpetrators.

It must be understood, however, that prevention of genocide will require more and different measures; bringing the perpetrators to justice will not be enough. Prevention of genocide will require early warning and reasonable suggestions for early action. The office I held for thirty months at the request of United Nations Secretary-General Kofi Anan was the first attempt by the United Nations to apply lessons learned and correct the structural weaknesses that caused the United Nations to fail to prevent genocides in Rwanda and Srebrenica in the 1990s.

As a very preliminary observation, my experience demonstrates that early warning and early action can serve important purposes; still, the bottleneck is the political will to act that is almost never present from the start. In that sense, the role of the Special Advisor is—I think—primarily directed to contribute to, shape, and create that political will, in conjunction with public opinion, caring institutions, and willing democratic States. I am also glad to report that, following a strong report from the Advisory Committee on Prevention of Genocide (which I continue to be a member of), the new Secretary-General has created the position of full time Special Advisor and named the distinguished jurist Francis Deng to the post. In addition to his full-time duties, he will be assigned more resources and his job will be elevated to the rank of Under-Secretary-General. The latter is crucial to ensure direct contact with Secretary-General Ban and through him to the Security Council, since the latter is—through its Resolution 1366 of 2001—the source of the Special Advisor's mandate.¹

The task enjoys great legitimacy because of the Convention to Prevent and Punish the Crime of Genocide, of 1948, has become *jus cogens*. In addition, the Outcome Report of the 2005 Summit offered an additional source of legitimacy to prevention of genocide in the form of the adoption of the Responsibility to Protect doctrine.² Nevertheless, both sources of legal and moral support are, unfortunately, qualified. In the case of the Genocide Convention, disputes over the definition of genocide and about whether the facts on the ground constitute genocide have often become a substitute for serious action. In our activities, we had to frequently stress that our task was to *prevent*, not to adjudicate; it follows that my office was

¹ S.C. Res. 1366, U.N. Doc. S/RES/1366 (Aug. 30, 2001); *see also* Letter from Kofi A. Annan, Secretary-General to the Security Council Announcing Appointment of the Special Advisor on the Prevention of Genocide, July 12, 2004 (S/2004/567).

² G.A. Res. 60/1, para. 138–40, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

not called upon to make such a judgment, but rather to generate action *before* all the elements of the definition were in place. For that reason, it was imperative to act on situations of mass violence against vulnerable populations defined by their ethnicity, race, religion, or national origin, whether or not the attacks amounted to genocide, and to let a court of law eventually decide what the attacks were. With respect to Responsibility to Protect, regrettably there are now many revisionist theories about what the relevant documents meant to say.³ Some States express distrust, maintaining that Responsibility to Protect is just a new catchphrase for *humanitarian intervention* and, therefore, a rationalization for super-power non-consensual interventions. That this debate is hampering the creation of relevant offices in the Secretariat to operationalize the Responsibility to Protect doctrine is a clear indication that there is still a lot to be done in the battle of ideas.

In terms of early action, the challenge is to come up with suggestions that are practical and not just token gestures. In that sense, non-consensual military intervention should never be absolutely ruled out because in some cases it will be the only way to save lives. Nevertheless, before advocating the use of force we must be certain that we are not going to do more harm than good; this is always contingent on the facts on the ground and their context. Between doing nothing and invading, there is a wide spectrum of actions that can and should be taken on a timely basis. In my experience, primarily relating to Darfur, but extrapolating it to other situations as well, I have learned that effective prevention must rely on acting simultaneously and in a concerted way in four areas: (1) physical protection of the population at risk, (2) humanitarian relief, (3) promoting peace talks to end the underlying conflict, and (4) breaking the cycle of impunity for the crimes already committed. I stress that in each of these areas the actions must change and be adapted to evolving circumstances. More importantly, they should be implemented simultaneously and in coordination, and we should not allow them to become a vicious circle, like in Darfur, where each one of these actions are so dependent on obtaining consent for the other that they are never fully implemented. In keeping with the theme of this conference, I would like to concentrate on preventive action.

Accountability for war crimes and crimes against humanity 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 reforms in the institutions through which State power is exercised. In cases where the violence has clear ethnic dimensions, like in Darfur, practices must be accompanied by reconciliation initiatives aimed at fostering serious inter-communal conversation, without outside interference, about return to

³ *Id.*

homes and villages, property restitution, water, grazing, and passage rights. While criminal prosecutions should not be the sole response to impunity, there is no doubt that prosecutions must play a central, indispensable role in any policy of accountability.

Prosecutions also represent the State's 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. In relation to war crimes, the Geneva Conventions of 1949 and Additional Protocol I establish a duty for States to prosecute and punish those responsible for "grave breaches" of international humanitarian law. Although it was once understood that the category of "grave breaches" applied to international conflicts only, a customary international law norm is emerging that also applies it to conflicts that are not international.⁴ If a State Party is unwilling or unable to prosecute war criminals, it must hand them over to be prosecuted by another State Party (under the *aut dedere aut judicare* principle). In the post World War II era, therefore, international humanitarian law created a new set of obligations, which paved the way for the enforcement of these norms.

To 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 (ICC) and other international or hybrid criminal jurisdictions must be oriented towards supplementing the absence of will or capacity to produce fair trials domestically, but also to help generate that capacity in the near future.

This year we celebrate the one hundredth anniversary of the 1907 Hague Rules,⁵ as well as the thirtieth anniversary of the 1977 Additional Protocols to the Geneva Conventions.⁶ In the seventy years that elapsed between these two documents (from 1907 to 1977), the world suffered 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 ratifi-

⁴ ANTONIO CASSESE, INTERNATIONAL LAW 247 (2001).

⁵ THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907 I (James Brown Scott ed., 1915).

⁶ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 4.

cation of the Geneva Convention bears witness to this reinforcement of international law, particularly international humanitarian law.

If we only look back 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. Since 1993, we have notably witnessed the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and other hybrid mechanisms in East Timor, Bosnia-Herzegovina, Kosovo, and, most recently, Lebanon and Guatemala. Important too are efforts to prosecute these crimes on the domestic level in Argentina, Peru, Colombia, Rwanda, and Ethiopia. The creation of the ICC in 1998 was the high point of this evolution, signaling that accountability for war crimes, crimes against humanity, and genocide is now paramount. 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 when the national domestic jurisdictions are unable or unwilling to afford it. 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.⁷

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 would be more settled by now. To those who have followed the evolution of human rights in the last twenty-five 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 in academic circles and among practitioners. Recently, the International Center for Transitional Justice co-organized a conference in Nuremberg to discuss this tension and to explore possible ways in which peace and justice indeed can be mutually reinforcing.⁸

⁷ See, e.g., Civil Society Organisations for Peace in Northern Uganda, *Point of No Return: Taking Stock of One Year of Cessation of Hostilities in Northern Uganda*, Press Release, THE NEW VISION, Sept. 5, 2007, available at <http://www.newvision.co.ug/D/526/532/584977>.

⁸ Building a Future on Peace and Justice, http://www.peace-justice-conference.info/conference_process.asp (last visited Nov. 6, 2007) (the conference which took place in Nuremberg between June 25–27, 2007, was organized by the Federal Republic of Germany, represented by the Foreign Office (in cooperation with the Ministry for Economic Cooperation and Development), the Republic of Finland, represented by the Ministry of Foreign

In Northern Uganda, while there is broad recognition that the ICC arrest warrants have assisted in bringing the Lord's Resistance Army (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 June 29, 2007.⁹ 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 to implement it, and what is effectively done, we believe this course of action 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 preliminary 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 of the ICC if either side reneges 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 potential for ICC prosecution of those who used hate speech to instigate and incite others 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.¹⁰

In Colombia, alternative sentencing and demobilization of the paramilitary groups under the Justice and Peace Law as originally drafted would have left victims with no prospect of justice for the harms they suffered. The need to offer a semblance of compliance with the international standards set forth in the Rome Statute produced important amendments during the legislative process, then further strengthened by a Constitutional Court ruling based precisely on the need to bring the law in line with the

Affairs, Hashemite Kingdom of Jordan, represented by the Foreign Ministry, Crisis Management Initiative (CMI), and the International Center for Transitional Justice (ICTJ)).

⁹ See Agreement on Accountability and Reconciliation, Uganda-Sudan, June 29, 2007, available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/67E010EE747704AAC125730D002BF1E7/\\$file/Reconciliation.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/67E010EE747704AAC125730D002BF1E7/$file/Reconciliation.pdf).

¹⁰ Press Release, Statement by the Special Adviser on the Prevention of Genocide (Nov. 15, 2005), available at <http://www.un.org/News/dh/infocus/westafrica/mendez-15nov2004.htm>.

State's international law obligations.¹¹ While the Justice and Peace Law as amended 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 the law 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 200,000 lives, has been for too long a factor of instability and a hindrance to the prevention of future crimes. That is why I quickly 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, 2005.¹²

Unfortunately, I come away with the impression that we were not always strategic or sufficiently persistent in pursuing a multi-pronged approach to protection, humanitarian assistance, promoting a peaceful settlement of the conflict, and criminal accountability. It has now been over two-and-a-half years since the Security Council referral 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 ICC Office of the Prosecutor's investigations or the arrest warrants issued this year against Ahmad Harun and Ali Kushayb.¹³ In that long period, the Security Council has made no effort to remind Sudan's government that this was a decision adopted under Chapter VII of the Charter, and is 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 have raised this point from time to time. The result is not only that we do not offer the ICC the support it needs, but also that we have given away cards that we could have used in negotiating with Khartoum to better protect and assist the three million Darfuri people who are now totally dependent on international assistance, and to reach a serious peace agreement.

Furthermore, in the Democratic Republic of the Congo (DRC) reports of crimes are still surfacing. Many crimes are still being committed, particularly against women and girls, in a widespread manner, notably in the Kivus. The fight against impunity has barely started in this huge country.

¹¹ Ley 975, de 25 de Julio de 2005, Corte Constitucional de Colombia, Sentencia No. C-370/2006 (in response to a challenge to Law 975 by several civil society organizations).

¹² See SAPG's Note to the Secretary-General, "The Situation in Darfur/Sudan," Dec. 12, 2004; Juan E. Mendez, *Action is Needed to Respond the Darfur Crisis*, FINANCIAL TIMES, Mar. 6, 2005; S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

¹³ International Criminal Court, *Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed*, THE HAGUE, May 2, 2007.

We hope that the ICC trial of Thomas Lubanga Dyilo¹⁴ will be followed by other cases, so as to give an account of the many horrific crimes committed in this country since 2002. 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 are enabled and empowered to try those responsible, including those bearing the highest level of responsibility. The ICTJ is currently co-undertaking a survey 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 U.N. Office of the High Commissioner for Human Rights with the U.N. Mission in the Democratic Republic of Congo; the project involves the mapping of the 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 will also provide a new impetus to advocacy for the need to bring those responsible to justice. The long-term stability of this vast country situated in 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 of 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. Justice and enforcement of the law are the only ways to build long-term respect for the rule of law.

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, to build their own relevance in the lives of those most affected. Most importantly, these jurisdictions are judged based on their impartiality and professionalism. Any perception of selective prosecution not based on rational choices should be avoided or at least carefully explained in order to be seen as legitimate and respectful of universal standards.

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 the 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, which are being prompted to "complete" their work in the coming years. It is time to assess their work, but we must do it

¹⁴ Mike Corder, *Congo Militia Leader Ordered to Stand Trial*, BOSTON GLOBE, Jan. 30, 2007; Emma Thomasson, *Global Court Ready for First Trial of Congo Suspect*, WASH. POST (Jan. 29, 2007).

under a long-term view and not based on their immediate political effect on the ground. It is important to review their legacy and what remains to be done, with a view to help generate incorporation and ownership of that legacy by the national legal culture, and domestic capacity to further their work.

Bringing justice to the leaders, those who bear the greatest responsibility in the commission of international crimes, is of paramount importance. Even heads of States are not beyond the reach of the law. These principles are reflected throughout international humanitarian law and the rule on command responsibility, and in 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 the spotlight of international attention or through the medium of the U.N. In this respect, I want to mention again important efforts in places such as Peru and Argentina, as well as the groundbreaking precedent established by the Supreme Court of Chile in ruling in favor of the extradition of former Peruvian President Alberto Fujimori.¹⁵

The conduct of modern wars affects greater numbers of innocent victims than ever before, and so greater than ever is the importance of condemning breaches of international humanitarian law and crimes against humanity, and finding ways to enforce these norms. Nevertheless, one must recognize that preventing violations of international humanitarian law is an ideal that may never be fully 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. The fear that individuals have of possibly being punished may have a deterrent effect if it is correlated with the *likelihood* of being punished. This correlation 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.

Thank you very much for your attention.

¹⁵ CNN, *Chile: Fujimori Can Be Extradited*, CNN ONLINE, Sept. 22, 2007, available at <http://www.cnn.com/2007/WORLD/americas/09/21/chile.fujimori/index.html>.