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Juan E. Méndez
American University Washington College of Law

TRANSITIONAL JUSTICE, PEACE, AND PREVENTION UNIVERSITY OF BALTIMORE LAW SCHOOL OCTOBER 26, 2010

Juan E. Méndez†

I. INTRODUCTION

I am deeply honored to be invited to deliver this prestigious annual lecture, and very grateful for your presence here today.

The International Criminal Court (ICC) has issued an arrest warrant against a sitting head of state for crimes against an ethnic minority that, at least prima facie, the court characterizes as genocide, war crimes, and crimes against humanity. In defiance, President Omar Al Bashir of Sudan has expelled humanitarian aid organizations, gotten himself "re-elected", and continues to detain and torture Sudanese human rights activists on the pretext of their supposed cooperation with the ICC. President Al Bashir also threatens to refuse his country's consent for other actions of the international community designed to avoid crises in Darfur, Southern Sudan, and the oil-rich area of Abyei. In some quarters, the action of the ICC is seen as an example of the pursuit of justice at all costs and one that threatens to provoke further and more serious human rights violations than it attempts to resolve. Fortunately, the most dire predictions about the effect of the arrest warrant did not materialize, but the event illustrates the potential for a perceived conflict between two legitimate values and interests of the international community: accountability for international crimes and the prevention of similar, new abuses in an ongoing conflict.

Only a few years before the indictment of President Al Bashir, a similar debate seemed to call into question the idea of a permanent international court designed to provide justice to victims of human rights abuse when Joseph Kony demanded that the warrant for his arrest and that of other leaders of the Lord's Resistance Army be quashed as a condition for his participation in peace talks to bring the conflict in Northern Uganda to an end. Well-meaning conflict

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† Visiting Professor, Washington College of Law, The American University. The author acknowledges the invaluable research assistance of Ms. Kavita Kapur, JD candidate, 2011.

resolution specialists accused the ICC and its prosecutor of making peace impossible by refusing to accommodate Kony's demands. In Northern Uganda, the issue was characterized—in an over-simplification—as one of "Peace versus Justice." In Darfur, since there were no active peace talks at the time of the arrest warrant, the conflict—if any—was between Justice and Prevention. In both cases, however, the dilemmas are closely related, and they force us to reckon with whether and how we can pursue both justice and peace, and justice and prevention, when those values seem to be at odds with each other.

Of course, stating that justice, peace, and prevention are all equally valuable; that they are not in contradiction with each other; and that they are mutually reinforcing does not solve the problem. We need to find ways to honor all three in practice, not just as a matter of lofty principles. For that, we probably need to understand prevention in all its dimensions. We also need to consider peace as something beyond the immediate silencing of the guns and, particularly, what terms will ensure a lasting peace, rather than simply a lull in fighting. Moreover, we also need to approach justice with a comprehensive, balanced approach, one that includes, but is not limited to, punishment of those bearing the highest responsibility for the most serious crimes.

II. TRANSITIONAL JUSTICE

The set of mechanisms and practices that over the last quarter century have been used in widely different cultures to confront legacies of mass atrocities can offer solutions to the dilemmas of justice, peace, and prevention. Those practices have come to be designated under the label of "transitional justice," and their advantage lies in the fact that they consist of truly universal principles that must be applied in each case according to contextual and cultural conditions. This adaptation to circumstances does not diminish the universality of the values and objectives that the practices aim to realize; on the contrary, it enriches each experiment with the lessons learned from other applications and experiences.

"Transitional justice" alludes to the need to confront mass atrocities of the recent past while realizing the values of truth, justice, reparations for victims, and institutional reform. Truth must be sought and disclosed in an official way so that there can be no denial of the atrocities committed and so that the circumstances of each violation, and the fate and whereabouts of each victim, can be established through the best evidence available. Justice consists first and foremost of investigation, prosecution, and punishment of those abuses that constitute war crimes or crimes against humanity, and

targeting those most responsible for them. Reparations should consist of both moral gestures and monetary compensation that recognizes the plight of victims and their families and restores to them their worth as first–class citizens in the society that has recently allowed their victimization. State institutions that have been the vehicle for the perpetration of atrocities must be thoroughly reformed so that in the future, no leaders can abuse their authority in order to commit human rights violations. Each of these avenues must be pursued in good faith and to the best of the State's abilities. They should not be conditioned on each other because inability to make any progress in one of them does not relieve the State from its responsibility to pursue the other three. On the other hand, it is of course advisable to pursue all four in a balanced, comprehensive, "holistic" way.

The adjective "transitional" is not meant to qualify the value of justice to be sought, but rather alludes to the special obstacles to the realization of justice that characterize transitions from dictatorship to democracy or from justice to peace. Transitional justice is emphatically not some sort of "justice light." It is also not meant to offer a way out of, or be a substitute for, criminal prosecution of the main perpetrators but to supplement their indispensable punishment with other non-judicial measures that can offer a more comprehensive redress to the whole universe of mass atrocities. Undoubtedly, criminal prosecution will always be the most difficult of the tasks of transitional justice, not only because of the pressures in favor of impunity but also because it will have to be conducted with the most rigorous respect for the principles of fair trial and due process of law, and often in a context where the State's judiciary has been devastated by the conflict or by the dictatorship's actions. And yet, if transitional justice is to be meaningful, it must include at its core the determination to uphold the principle that some crimes are so egregious that they cannot be left unpunished.

Significantly, the experiences of the last twenty-five years have yielded not only a series of "best practices" but have also resulted in a series of "emerging norms" in international law with respect to what states owe to the victims—individual and collective—of mass atrocities. Indeed, "emerging" might not be the best way to characterize these norms because their existence and binding nature are now very widely recognized. In addition, they are not actually *new* norms but rather authoritative interpretations of existing human rights standards as applied to the realities of transitions. Providing

even a few examples of this evolution in the international law of human rights would exceed the limits of this presentation.[1] These precedents have been the source of comprehensive United Nations reports that both take stock of normative evolution and advance standards with a view to future adoption.[2] Contemporaneously with these societal practices in transitional states, the international community decided in the 1990s to incorporate accountability for grave crimes into the arsenal of measures available in the pursuit of peace and security among nations. The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda in 1994 borrowed a page from the efforts in newly democratic societies to settle scores with perpetrators of mass atrocities. They were followed in later years by international support for "mixed" courts (applying domestic law with a combination of local and international judges and court personnel) in Sierra Leone, Kosovo, Cambodia, and Lebanon. The United Nations has recognized that these principles are binding not only on

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1. *Velasquez-Rodriguez v. Honduras* is the early decision establishing obligations to confront crimes against humanity, in that case, disappearances. Velásquez-Rodríguez v. Honduras, Merits and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), *available at* http://www1.umn.edu/humanrts/iachr/b_11_12d.htm. It was followed by the Inter-American Commission on Human Rights Reports Nos. 28 and 29 dealing with impunity laws. Herrera v. Argentina, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Inter-Am. Comm'n H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 (1992-1993), *available at* http://www.cidh.oas.org/annualrep/92eng/Argentina 10.147.htm; Mendoze v. Uraguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 (1992-1993), *available at* http://www.cidh.oas.org/annualrep/92eng/Uruguay10.029.htm. Following these was a long list of decisions going in the same direction. *See, e.g.*, Kolk & Kislyiy v. Estonia, App. Nos. 23052/04, 24018/04, HUDOC (Jan. 17, 2006), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=24018/04&sessionid=68682247&skin=hudoc-en (discussing prosecution for Communist atrocities in the late 1940s).

2. Rep. on the Question of the Impunity of Perpetrators of Human Rights Violations, Comm'n on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, 49th Sess., Oct. 2, 1997, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) (by Louis Joinet), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.sub.2.1997.20.Rev.1.En; Rep. of the Indep. Expert to Update the Set of Principles to Combat Impunity, Comm'n on Human Rights, 61st Sess., U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (by Diane Orentlicher), *available at* http://www.derechos.org/nizkor/impu/principles.html. Together, these reports, both issued within a decade, are a powerful illustration of the rapid evolution of international law in this area, a phenomenon that has been called a "justice cascade." Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in latin America*, 2 Chi J. Int'l L. 1, 4 (2001).

states but also on the organization itself as it tries to intervene in conflicts while upholding international law.[3]

The tipping point in this evolution is the 1998 Statute of Rome for the Creation of an International Criminal Court. First, the ICC is a permanent instrument for the realization of justice where the domestic jurisdiction is unable or unwilling to honor these obligations. Second, the Rome Statute clarifies and makes certain what is meant by notions like "crimes against humanity," which have been with us at least since Nuremberg but that lacked certainty as to their contours, primarily because their source was custom and not treaty. Finally, the Rome Statute is a tipping point because more than 110 state parties and more than 160 signatories have pledged to cooperate with each other and with the ICC in breaking the cycle of impunity for international crimes. In an important way, it can be said that the effect of this evolution is to create a new paradigm in the manner in which conflicts of interest to the international community are to be resolved. If those conflicts involve genocide, war crimes, and crimes against humanity (and unfortunately they almost invariably do), the solution must reckon not only with the need to silence the guns but also to offer avenues of justice to the victims.

III. PEACE AND JUSTICE

Perhaps the first step is to recognize when a dilemma exists. On occasions, the dilemmas are artificially invoked by those who simply want to impose impunity.[4] Frequently, however, the dilemma is very real, especially when the fighting and its accompanying brutality are still ongoing. In those situations, a firm insistence on accountability through the punishment of individuals who violate human rights

3. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN. Doc. S/2004/616 (Aug. 5, 2004), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement. This report provides that States have an obligation to investigate, prosecute, and punish the perpetrators of such atrocities; that amnesties are contrary to international law; and that international tribunals can be used when the concerned state is not able or willing to carry out its obligations. *Id.* In 1999, the Secretary-General adopted Guidelines for UN Mediators (revised and reaffirmed in 2005), which stated that the UN would not support peace arrangements that by their terms violate international law. Press Release, U.N. Secretary-General, Secretary-General Comments on Guidelines Given to Envoys SG/SM/7257 (Dec. 10, 1999).

4. For example, in the early and mid-80s in Latin America, a favorite argument of pro-impunity actors was to say that justice demands, however legitimate they might be, would have the effect of destabilizing fledgling democratic regimes or of delaying the return to democracy in neighboring countries.

complicates a negotiation process meant to end the conflict that is the enabling environment for human rights abuses.[5] Recognition of the dilemma should not automatically lead to the conclusion that peace trumps justice even in those cases. Instead, the very real complication that justice presents must be seen in a constructive light: it may make peace more difficult, but it also forces all participants in the peace process to strive for better deals rather than acquiesce to the demands of the perpetrators. Instead of settling for that easy peace, which leaves behind open wounds that can later cause renewed fighting, the obligation to reckon with justice can lead to a substantive peace that has a better chance of being durable.

It is also not always the case that an insistence on justice will make peace impossible. Quite the contrary, it is possible that the stigma and political isolation brought about by prosecution can act to separate those actors who, in addition to being international criminals, are also the real spoilers of any serious agreement. The refusal to lift ICTY arrest warrants against Karadzic and Mladic not only did not impede the Dayton talks: it actually made it possible to reach an agreement to end the wars in the Former Yugoslavia. Conversely, a bad agreement can lead to further fighting and further atrocities, as was the case with the 1999 Lome Peace Agreement on the conflict in Sierra Leone. It included a blanket amnesty for perpetrators of atrocious crimes, and six months later, those same signers of the peace accord were fighting again, and again committing crimes by recruiting children and cutting off limbs of children, women, and innocent civilians.[6] Denial of justice in that accord was not only an insult added to the many injuries suffered by innocent Sierra Leoneans it was also the wrong way to pursue peace, as it could only result in emboldening and encouraging the enemies of peace. Like in the Balkans, lasting peace in Liberia was obtained only after President Charles Taylor, a notorious perpetrator of atrocities in his own country and a prime instigator of the conflict in Sierra Leone, was sidelined and eventually forced out of office after being indicted by the Special Court for Sierra Leone.

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5. Juan E. Méndez, *Peace, Justice and Prevention: Dilemmas and False Dilemmas*, *in* DEALING WITH THE PAST AND TRANSITIONAL JUSTICE: CREATING CONDITIONS FOR PEACE, HUMAN RIGHTS AND THE RULE OF LAW 15 (Mô Bleeker, ed., 2006), *available at* http://biblioteca.hegoa.ehu.es/system/ebooks/16374/original/Dealing_with_the_past_and_transitional_justice.pdf.

6. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. IX, July 7, 1999, *available at* http://www.sierra-leone.org/lomeaccord.html.

The key to solving the dilemma is to recognize that peace and justice are not simply policy objectives; they are also fundamental human values that should be fulfilled in their own right and for their own worth. It follows that it is a mistake to consider either peace or justice as an instrument to achieve the other. In this sense, prosecutions often have the effect of pushing reluctant parties to the bargaining table, perhaps with the belief that they can obtain amnesty through peace negotiations. All observers agree that that is exactly what prompted Joseph Kony to join the Juba talks, which, even if they ultimately did not result in peace in Northern Uganda, have certainly achieved a large measure of improvement in the situation. Instead, if the threat of arrest and prosecution is turned on and off to please a party to the conflict, such actions will only undermine the independence and impartiality of the courts and will encourage blackmailers to hold on for impunity.

It is not necessarily true that even a bad peace agreement will automatically create the conditions for justice down the road. A myopic process that pursues peace at all costs and sacrifices accountability to peace, in fact, creates obstacles for redress for the victims and communities who have suffered systematic atrocities. In this sense, it is always advisable to build a process by which the victims of atrocities are heard in the context of the peace process so that they play a role in shaping the accord that will affect them and their community and thereby acquire some stake in making the agreement work. At Juba, parallel proceedings allowed the affected communities precisely such a role, and it resulted in a richer and more accurate understanding of their priorities and wishes. Kony manipulated the eagerness of the international community to appease criminals and repeatedly took advantage of the peace talks to regroup and rearm his forces. When he failed to obtain assurances of impunity, he ultimately sabotaged the process and went back to fighting and terrorizing the civilian population in neighboring countries, amply demonstrating that he was never serious about peace, which in turn greatly diminished his ability to gather support among his own people of Northern Uganda.

Like Kony, other perpetrators of mass atrocities will always demand amnesty, though not necessarily as a precondition for talks. More often, amnesty will be proposed as part of the final settlement, that is to say, as part of the "package" of measures that will put an end to the fighting. In those cases, proposals for blanket amnesties will be presented as necessary for "national reconciliation." Such demands are a form of blackmail because the perpetrator demands to be allowed to get away with having committed crimes, or else he will

continue to commit them. In those situations, the choice between peace and justice is artificial: if you choose one, you may get neither. Blanket amnesties are illegal in international law because they cover international crimes and because they are unconditional. They are a coercive means of compelling victims to reconcile with perpetrators, while denying those victims their internationally-required right to a remedy for the abuses they have suffered. They force the victims into a false "reconciliation" without allowing them the means by which to seek and obtain the basic elements of a genuine reconciliation. Parties that seek a blanket amnesty as a condition to peace are unlikely to be genuinely and seriously concerned with peace or in a position to guarantee it if agreed to.

This is not to say that all amnesties are contrary to international law. In fact, Protocol II Additional to the Geneva Conventions—a separate instrument approved in 1977 to apply specifically to conflicts not of an international character—contains a clause by which, at the end of hostilities, parties "shall endeavor" to grant each other a broad and generous amnesty. Numerous authorities clarify that such a clause is meant to immunize from prosecution those who have risen up in arms against the State, thereby committing the domestic crime of sedition, rebellion, or treason. It is for those offenses that amnesty is prescribed in Protocol II as a condition for the rebels to give up the fight and join the democratic political process. Clearly, it does not and should not benefit those in either camp that have fought their war in violation of fundamental principles of the laws of war. Nevertheless, it is amply evident that a limited amnesty is not only permissible but is also to be encouraged and included in peace processes.

Amnesty for war crimes and crimes against humanity, especially for those bearing the highest responsibility for them, is not permissible, and, as seen above, it is also a bad idea. Should the peace agreement then contain specific norms delineating how and when those perpetrators will be brought to justice? That, of course, is a more difficult question because you cannot expect a signer of a peace accord to agree to a clause that will lead him straight to prison. In the Bonn Agreement of 2002, to bring peace between factions in Afghanistan after the temporary defeat of the Taliban, amnesty was discussed, and, since it was acknowledged that it would be contrary to international law, the final agreement was silent on the matter. Years later, this silence lent itself to widely differing interpretations: civil society organizations insisted on investigations and eventual prosecutions, while militia leaders (by then with seats in the legislative body) felt that the amnesty was implied in the accord. Impunity for the abuses of all factions reigns today in Afghanistan,

although certainly not all the blame for it can be attributed to a faulty peace accord.

Silence may be better than an explicit amnesty in violation of international law, but, as far as possible, peace accords should leave no doubt as to their intention regarding impunity and accountability. Some argue for "sequencing," meaning that an accord can specify that the actual investigation, prosecution, and criminal trials will take place at a later date or only after some other mileposts have been achieved. In principle, there is nothing wrong with that approach, as long as it may seem necessary to obtain peace and particularly because it brings up justice as an essential objective of the negotiations. It should be recognized, however, that sequencing requires victims to postpone their legitimate demands in a way that may not be required of other stakeholders. This inherent inequality, therefore, must be balanced with strong assurances and by other, more immediate and tangible results for the victims. In any event, sequencing in the domestic jurisdiction is almost a natural occurrence since by and large the national courts will not readily be equipped to deal with complex criminal prosecutions with necessary guarantees of fair trial and due process. In fact, even where courts are more or less in good shape at the end of the conflict, it is better to allow a truth-telling process to compile and organize the evidence that will make it easier to later establish prosecutorial priorities and ensure an orderly and stable program of trials to be held within a reasonable time frame.

If sequencing in the domestic jurisdiction is fraught with complications but is otherwise a legitimate way to approach our dilemma, it is much more problematic if the measure of justice to be accomplished relies primarily, if not exclusively, on the ICC. It is already very difficult to ensure compliance with ICC warrants and other orders, and a political decision to suspend investigations and judicial actions will mostly undermine the credibility of the ICC as an independent and impartial body and will tend to encourage defendants and potential defendants to challenge the ICC's jurisdiction through political decisions arrived at in negotiations. There are at least three ways in which the Rome Statute contemplates suspension of ICC activities, but each one of them should be considered carefully and as a last resort rather than as an expedient way to get rid of a problem.[7] It must be borne in mind that, in an

7. Article 16 allows the Security Council to suspend an investigation or prosecution through a resolution adopted under Chapter VII of the UN Charter for one year and

international context, a suspension may well in practice become definitive and final, given the practical difficulties of resuming activities after a long pause.

At the very least, clauses in peace agreements that limit or condition access to justice by the victims should never be adopted without meaningful consultation with all stakeholders and particularly with the victims. Indeed, as stated above, victims and their communities should have a say on all aspects of the peace process and on the substantive agreements being considered; but their participation is especially essential in all matters affecting impunity and accountability since it affects their fundamental right to see justice done. In this manner, the pursuit of justice allows victims to become players in a peace process that typically excludes them, focusing instead only on the parties to the conflict. Needless to say, the parties to the conflict will almost invariably have more of an interest in impunity than in justice. The inclusion of victims in a peace process through consultations or parallel discussions does not detract from the fundamental role that mediators and warring parties must have. In fact, it leads to a much more inclusive and sustainable peace precisely because it more assuredly achieves a pact that is consistent with international law.

IV. PREVENTION

Justice serves not only the retroactive purposes of accountability for acts committed but may also contribute to the prevention of future atrocities. That is why most international instruments, starting with the Genocide Convention of 1948,[8] assume that we prevent future crimes by punishing those that have already taken place. According to the Rome Statute, a central object and purpose of the International Criminal Court is to contribute to the prevention of crimes of concern to the international community.[9] There is, of course, scant empirical

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also allows that resolution to be renewed. Rome Statute of the International Criminal Court, art. 16, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf [hereinafter "Rome Statute"]. Article 19 provides that a State with domestic jurisdiction over a case may challenge the admissibility of a case to the ICC on the grounds that it is willing and able to afford justice. Rome Statute, art. 19(2)(b). Article 53 provides that the Prosecutor may make the decision to suspend activities "in the interests of justice," among other considerations. Rome Statute, art. 53(1)(c), (2)(c).

8. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

9. Rome Statute, Preamble.

evidence to show for this assumption, and yet the idea still carries considerable weight. If the deterrent effect of punishment is hard to show in the domestic jurisdiction and in relation to common crime, it is even harder when it comes to mass atrocities. The problem is compounded when we try to apply empirical evidence to the effect of international criminal justice since the latter is so recent in practice, and there are so few cases to analyze for their long term effects beyond the justice done in the relevant episode.

Nevertheless, one can point to some anecdotal evidence of such a deterrent effect of international justice and perhaps even stronger evidence that pursuing justice for mass atrocity in the domestic scene yields benefits in the stability and quality of the democracy installed to replace dictatorship and conflict.[10] Prevention, however, is a complex and dynamic process that is never achieved through justice alone, much less once and for all through prosecution and punishment of some perpetrators. It is therefore important to think *under what conditions* justice can have a preventive effect.[11]

In the first place, the preventive and deterrent effect of justice is greatly enhanced if it is integrated into a more comprehensive plan of prevention of mass atrocities. In my role as Special Advisor to the UN Secretary-General on Prevention of Genocide (which I exercised between 2004 and 2007), I learned that effective prevention depends on acting simultaneously and with adaptability to circumstances in four areas: protection of populations at risk, humanitarian assistance to them, pursuit of peace on the underlying conflict, and justice and accountability for the crimes already committed. A second condition of effectiveness in prevention through justice is to pursue justice under its own rules and its legitimizing principles. In other words, justice will not deter future violations if it is perceived as an exercise in political manipulation, scapegoating, or show trials. Central to this goal is the preservation of the integrity, independence, and impartiality of the judicial organs. They should be allowed to do their work free of interference and actively supported in their

10. *See also* Hunjoon Kim & Kathryn Sikkink, *Do Human Rights Trials Make a Difference?*, American Political Science Association Annual Meeting, 35 (Aug. 2007) ("[T]rials deter future human rights violations by increasing the perception of the possibility of costs of repression for individual state officials."), *available at* http://pfdc.pgr.mpf.gov.br/atuacao-e-conteudos-de-apoio/publicacoes/direito-a-memoria-e-a-verdade/Artigo_Kathryn_Sikkink.pdf.

11. Juan E. Mendez, *Justice and Prevention* (Aug. 2010) (presented to the Kampala Review Conference of the Assembly of State Parties of the ICC, June 2010) (on file with author).

decisions and orders. Third, prosecutions in the international arena will have a better chance to succeed in prevention if they are accompanied by efforts in the domestic jurisdiction under the principle of complementarity, not in competition over jurisdiction but in a harmonious division of labor. Fourth, the preventive effect of justice should not be considered only in relation to successful prosecutions and eventual penalties effectively imposed. Prevention can happen by the mere *availability* of the justice system in place, by the announcement of initial investigations or analysis of a situation, and even by reason of the entry into force of the Rome Statute for the country in question. Finally, it should be realized that even in the best of circumstances, prosecutions will proceed only with regard to a small number of the universe of cases and potential defendants. This is true of domestic as well as international prosecutions, even when both are combined. For that reason, it will be necessary to complement prosecutions with comprehensive and balanced initiatives of a non-judicial character that can reach a broader coverage of the complex and massive atrocities.

It follows that the application of transitional justice mechanisms, in consultation with, and with full participation of, all stakeholders, will enhance the possibility that the indispensable criminal prosecutions will have a lasting, preventive effect over future violations.

A. Prosecutions

The presence of a justice mechanism in the domestic jurisdiction can serve to discourage the commission of atrocities. Human rights violations are enabled by a perception on the part of the perpetrators that they are unlikely to be held accountable for their actions. The existence of a justice mechanism that takes these violations seriously disrupts this calculus. The opposite is clearly documentable: potential perpetrators who are biding their time go into a frenzy of abuses as soon as they receive a clear signal that they will not be investigated.

The commission of human rights abuses is often enabled by an environment of exception: a situation of conflict or emergency. An established and predictable set of laws and a system of justice provide regularity and normalcy even in the midst of the exceptional situation. The pursuit of accountability by strong and independent institutions creates a framework for justice, the existence of which informs potential perpetrators that even though there may be a conflict or some other emergency, justice will still be served even in extreme circumstances.

On the other hand, the threat of prosecution will be taken less seriously by the perpetrators if they figure out that it is wielded

against them only for the purpose of persuading them to negotiate. Conspiring against the preventive effect of justice will be the perception of prolonged and ineffective bureaucratic inquiries with no prospects of real progress, and particularly of a judicial system that does not treat all persons equally.

The courts must be open and accessible to all sectors of society, including the most vulnerable. Even those accused of committing atrocities should be afforded legal protection in order to entrench a culture of fairness by justice institutions. The accused must be effectively defended against the charges brought against them by counsel of their own choosing and be otherwise assured of the presumption of innocence and all other attributes of a fair trial. Institutions must build credibility and must therefore be willing to take on the most difficult issues in a society, including especially the investigation, prosecution, and eventual punishment of perpetrators of recent mass atrocities.

B. Truth-Telling

The opportunity to build a record of what happened within a given society is integral to empowering marginalized groups and creating a sense of shared history amongst all members of the community. By empowering those groups that are otherwise disenfranchised, truth-telling provides them with an increased sense of social inclusion that minimizes other tensions. The effectiveness of a specific truth commission or commission of inquiry depends on many factors: the composition of its membership, the clarity of its mandate, the openness and transparency of its proceedings, the degree to which it affords the victims a forum to be heard, and the guarantees of due process it gives to persons identified as perpetrators. Fundamentally, its success depends on the quality, accuracy, and credibility of the report it produces and its impact on the society's awareness of the legacy of abuses it must confront.

C. Reparations

In 2005, the United Nations General Assembly adopted GA Res. 60/147,[12] which laid out basic principles on reparations to victims of gross human rights violations originally proposed by Special Rapporteurs Theo van Boven and M. Cherif Bassiouni.

12. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), *available at* http://www1.umn.edu/humanrts/instree/res60-147.html.

Reparations must be seen as an act of justice as well as a symbolic act of atonement, rather than an attempt to restore the *status quo ante*. Moreover, reparations are not paid by an individual to another but rather by the State held accountable for the past abuse to the community as a whole, even in instances where the beneficiaries may in fact be certain identifiable persons. The offer of reparations represents recognition by the government and a coming to terms with the history that is itself a promise not to repeat.

D. Institutional Reform

The vetting component of transitional justice consists of a process by which officials known to have used their institutions as vehicles for human rights violations are prevented from continuing to serve in newly democratized police, military, or other forces and State institutions. It promotes the prevention of crimes by clearly demonstrating that positions of authority or prestige cannot be reached through the commission of human rights abuses. Creating strong and fair institutions under citizen control and with accountable leaders is a way of reinforcing civic trust and promoting the use of non-violent, institutional processes to resolve disputes and conflicts.

E. Reconciliation

Reconciliation is ordinarily not a fifth mechanism of transitional justice. Rather, when well understood, it is the objective and guiding principle of the whole enterprise of transitional justice. It especially should not be conceived of as an excuse to circumvent the obligation to provide for justice, truth, reparations, and institutional reform on the pretext that the society has to reconcile itself. In this sense, it is important to distinguish the concept of reconciliation as the ultimate resolution of the violent aspect of a conflict between warring factions from the discredited effort to impose a false reconciliation between perpetrator and victim without any effort on the part of the former and the whole burden placed on the latter.

An exception to this is when the atrocities have had a clear ethnic, religious, or racial dimension because, in that case, the abuses are likely to be blamed not so much on the perpetrators but on the communities they claimed to represent. If so, the lack of an effort to distinguish between the guilty and their communities could lead in the future to revenge and renewed conflict, as descendants of the abusers are blamed for what their ancestors did to members of other communities. In places like Darfur, it will be important not only to have justice, truth, reparations, and institutional reform but also to complement them with inter-communal conversations between the Fur, Masaalit, Zhagawa and the leaders of the so-called Arab tribes

over issues like restoration of property, return to villages, water, passage, grazing rights for cattle, and ultimately the means to share equitably in political power in the region.

F. Rise of International Criminal Justice

The proliferation of international tribunals to serve justice for atrocities serves an important preventative role by filling a gap in accountability that exists when the territorial state is unable or unwilling to prosecute international crimes. With many of the worst human rights violations taking place in countries and regions ravaged with other forms of instability, perpetrators of human rights abuses had little reason to expect that they would be held to account for their actions. To the extent that the promise of impunity enables the commission of atrocities, a more complete system of accountability serves to deter the commission of international crimes, even if we are still witnessing the birth and infancy, not the maturity, of the system of international criminal justice.

The rise of the internationalized courts, of mixed or hybrid courts, the ICC in particular, and the application by some domestic courts of universal jurisdiction helps to build a more complete system of accountability wherein perpetrators can be on notice that they will almost certainly be held to account for the atrocities they commit. In particular, the emergence of the ICC represents the potential for the international community, with its network of inter-governmental and civil society organizations, and state authorities to give voice to the experiences of many victims, whose stories may previously have gone untold in a national system if they came from a minority race or religion or were otherwise marginalized in a particular society.

The promotion of domestic capacity by international tribunals through "legacy" initiatives, the outreach efforts of hybrid courts, and the "positive complementarity" applied by the ICC all promote a sense of local ownership and participation in justice.[13] As communities feel more connected to processes of justice, this helps to entrench a recognition of injustice amongst members of the society, which in turn results in a normative understanding that atrocious acts

13. *See* Paul van Zyl, *The Challenge of Criminal Justice: Lessons Learned from International, Hybrid and Domestic Trials*, *in* DEALING WITH THE PAST AND TRANSITIONAL JUSTICE: CREATING CONDITIONS FOR PEACE, HUMAN RIGHTS AND THE RULE OF LAW 23 (Mô Bleeker, ed., 2006), *available at* http://biblioteca.hegoa.ehu.es/system/ebooks/16374/original/Dealing_with_the_past_and_transitional_justice.pdf.

should not be committed against others. The closer relationship between communities and criminal proceedings may also foster prevention by creating a society of informed witnesses. If community members feel connected to judicial processes, they may be more inclined to engage in community policing and monitoring of activities within their environment. The potential of a country full of witnesses, who could report these acts to national or international authorities, would likely be another deterrent to the commission of international crimes.

I have had the privilege to serve as Special Adviser to the Prosecutor of the ICC on Crime Prevention, and in that capacity I have documented numerous circumstances that indicate an effective role of justice initiatives in the prevention of atrocities.

- Radhika Coomaraswamy, the Special Representative of the Secretary General for Children in Armed Conflict, testified before the ICC in early 2010 at the trial against Thomas Lubanga. In addition to describing the need for a legal framework that effectively protects vulnerable children, Coomaraswamy highlighted that the decision by the ICC to prosecute the conscription of child soldiers had led several armed groups worldwide to approach the UN in hopes of negotiating the release of child soldiers.[14] She acknowledged that "[t]he Lubanga trial represents a crucial precedent in the fight against impunity and will have a decisive deterrent effect against perpetrators of such crimes."
- Human Rights Watch (HRW) also confirmed that the prosecutions in the Democratic Republic of Congo are having a preventive effect. HRW found that ICC prosecutions have resulted in an increased awareness of what constitutes criminal behavior, noting as an example the demobilization of child soldiers by a Central African Republic rebel commander after learning about the ICC's prosecution of Thomas Lubanga Dyilo for conscription of child soldiers.
- According to Samantha Power, the late Alison Des Forges of Human Rights Watch documented this most ably with respect to the Rwandan genocide, showing how

14. The Office of the Prosecutor, *Weekly Briefing: 22 December 2009 – 11 January 2010*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/NR/rdonlyres/C44612E2-6A90-4389-A2DD-AEA31EAAA2E4/281444/OTPWBENG.pdf (last visited Mar. 31, 2011).

> every day—every single hour of every day—individuals who have never killed before are deciding how far they are going to go. Often, as they make those decisions, they are looking left, and looking right, and gauging likely consequences. Most possess normal moral compasses before they strike. One does not need to make extravagant claims for the International Criminal Court to note that the existence of a court that proves its staying power and its preparedness to make arrests would influence a first-time war criminal's behavior.[15]

- In November 2004 in Cote d'Ivoire, the head of the national radio and television system was replaced at a time of heightened tensions between ethnic communities, with armed militias in the countryside and gangs of "Young Patriots" menacingly roving the streets of Abidjan. The newly appointed head unleashed a barrage of hate speech through the air waves that was eerily reminiscent of the days preceding the Rwandan genocide. SG Kofi Annan and the Security Council issued stern warnings. In my capacity as Special Advisor on the Prevention of Genocide, I issued a statement to the effect that instigation to commit genocide is a crime under the Rome Statute and, since Cote d'Ivoire had accepted the jurisdiction of the ICC, those responsible for hate speech that amounted to instigation could see themselves brought to The Hague to answer for their actions. We later learned that that prospect was actively considered by the legal advisors to the government, and the hate speech messages subsided after a hectic and tense weekend.

IV. CONCLUSION

Transitional justice may be critical to ensuring peace and advancing prevention in relation to mass human rights violations. But, as I have recognized above, neither peace nor prevention can happen through justice alone. Prevention requires coordinated,

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15. Samantha Power, *Stopping Genocide and Securing "Justice": Learning by Doing*, 69 SOC. RES. 1093, 1100–01 (2002), *available at* http://commons.wvc.edu/jminharo/pols203/Articles%20to%20Choose%20From/POWER%5B1%5D.pdf.

simultaneous, dynamic action in four different areas: protection, relief, accountability, and peace talks to solve the underlying conflict. None of these actions can take primacy over the others, so justice alone will be insufficient to prevent crimes. Nonetheless, justice serves an important role in the process of transition and cannot be seen as subordinate, or even in opposition, to other efforts to promote peace.