INTERNATIONALE AKADEMIE NÜRNBERGER PRINZIPIEN

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Federal Foreign Office

PREVENTING GENOCIDE AND OTHER ATROCITY CRIMES:

CHALLENGES IN TODAY'S WORLD

4 – 5 DECEMBER 2014

COURTROOM 600
MEMORIUM NUREMBERG TRIALS
NUREMBERG | GERMANY

International Nuremberg Principles Academy
Egidienplatz 23, 90403 Nuremberg, Germany

Front cover photo:
Father Bernard Kinvi from the Central African Republic addresses the conference „Preventing Genocide and Other Atrocity Crimes: Challenges in Today's World" in the historic Courtroom 600 in Nuremberg, Germany.

Back cover photo:
Attendees at the conference „Preventing Genocide and Other Atrocity Crimes: Challenges in Today's World" in the historic Courtroom 600 in Nuremberg, Germany.

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BETTINA AMBACH

Director, Wayamo Foundation

INTRODUCTION

TOPIC:
Introduction and Acknowledgements

On 4 and 5 December 2014, the International Nuremberg Principles Academy and the Wayamo Foundation organised the conference — "Preventing Genocide and Other Atrocity Crimes: Challenges in Today's World" — in Nuremberg, Germany. The conference was organised in partnership with Adama Dieng, the United Nation Special Adviser on the Prevention of Genocide and the proceedings took place in the Courtroom 600 at the Palace of Justice, the location of the historic Nuremberg Trials.

The speakers, and the conference explored topics including:

- Accountability, prevention and challenges in implementing the genocide convention
- Genocide and mass crimes in the courtroom
- Protecting populations from atrocity crimes
- Preventing and responding to incitement to violence
- Preventing impunity and promoting accountability in Syria.

Each topic was chosen due to its relevance to real time prevention efforts, and each was discussed by experts including journalists, international prosecutors, investigators and academics as well as representatives of international organisations, technology collectives, and civil society.

To add to both global and regional prevention efforts, the conference was preceded by a collaborative workshop for journalists who were trained to better understand the historical, cultural and legal dimensions of genocide and mass violence, and global efforts toward reducing the risk of genocide and related crimes. The journalists came from Cambodia, Germany, Kenya, Kosovo, Lebanon, Libya, Senegal, Serbia, Sri Lanka, Syria, Rwanda and Uganda — all societies with a history of addressing challenges related to atrocity crimes.

Journalists received training in responsible reporting before, during and after mass violence. This included:

- Categorising atrocities (perpetrators, victims, and the language and politics of atrocity crimes)
- The aftermath of mass violence and covering war crimes trials
- Information flows in times of crisis including crisis mapping and verification
- Safely using online tools in conflict and post-conflict zones
- Conflict prevention, peace building and reconciliation
- Freedom of speech versus hate speech.

The media workshop and the present publication of the proceedings of the conference were generously supported by the German Federal Foreign Office.

The present report contains summaries of the contributions from the invited scholars and practitioners, and highlights from some of the discussions that followed.

I would like to thank Kris Kotarski for his tireless efforts in preparing the report, as well as Michael Benedict and Diane Rossier for transcribing and editing the contributions.

ADAMA DIENG

Special Adviser of the UN Secretary General on the Prevention of Genocide

KEYNOTE SPEECH[1]

TOPIC:

The Prevention of Genocide — Achievements and Challenges

It is with great pleasure that I address this gathering of prominent experts, academics, religious leaders, practitioners and journalists dedicated to the cause of preventing atrocity crimes.

You will have noticed that, from the onset, I am using the phrase „atrocity crimes". I believe that it is extremely important that we look beyond genocide, to issues relating to crimes against humanity, war crimes and ethnic cleansing. Indeed, „atrocity crimes" is a general term that we use to cover those four categories, and my office has recently amended its framework of analysis to cover all the risk factors which relate to the four of them.

I am confident that your experience and wisdom will result in a fruitful discussion. I therefore invite all of you to help us to come up with practical recommendations on how to address the challenges we will be discussing, so that we can take a few more steps towards making the promise of „never again" a reality.

We have been saying „never again" since the end of the 2nd World War, since the Nuremberg Trials. Unfortunately, we have seen both Srebrenica and Rwanda. So, allow me to underline the significance of the location of this conference. Courtroom 600 is a very historical place and will forever be remembered for witnessing the ground breaking trials of some of the individuals who were most responsible for the terrible crimes committed by the Nazi regime.

I take this opportunity to congratulate the newly established International Nuremberg Principles Academy for this valuable initiative, and what I hope will be the beginning of our co-operation, a co-operation between your academy and the Office of the Special Advisers on the Prevention of Genocide and the Responsibility to Protect.

Unfortunately, we live in a world where the risk of genocide and other atrocity crimes remains very real. Every day, we witness serious violations of international human rights and humanitarian law in different regions of the world. In some cases, these constitute war crimes or crimes against humanity, and in the worst possible case even result in genocide. In the Central African Republic (CAR), Darfur, Iraq, North Korea, Syria or Ukraine, hundreds of thousands of people have perished and millions have been forced to leave their homes. Many have sought sanctuary in other countries. So, what are we doing wrong? What more can we do in order to prevent such a catastrophic loss of life?

We already have a strong legal framework. The Genocide Convention[2] was the first human rights treaty of the United Nations system, which in itself speaks to the significance of the convention. In addition to setting out the norms relating to the punishment of the crime of genocide, one of the most important contributions of the convention is that it establishes the responsibility to prevent. I insist on that — *the responsibility to prevent*. The convention not only provides for punishment, but insists on prevention. Yet, what does that mean exactly?

I am glad that Prof. Paola Gaeta is with us because she has written extensively on the issue of the responsibility to prevent, and clearly understanding what prevention means in practice is a very serious obligation that falls to all states. We have a strong political framework for prevention. At the World Summit in 2015, all heads of state and governments made a landmark commitment to prevention when they affirmed their individual and collective

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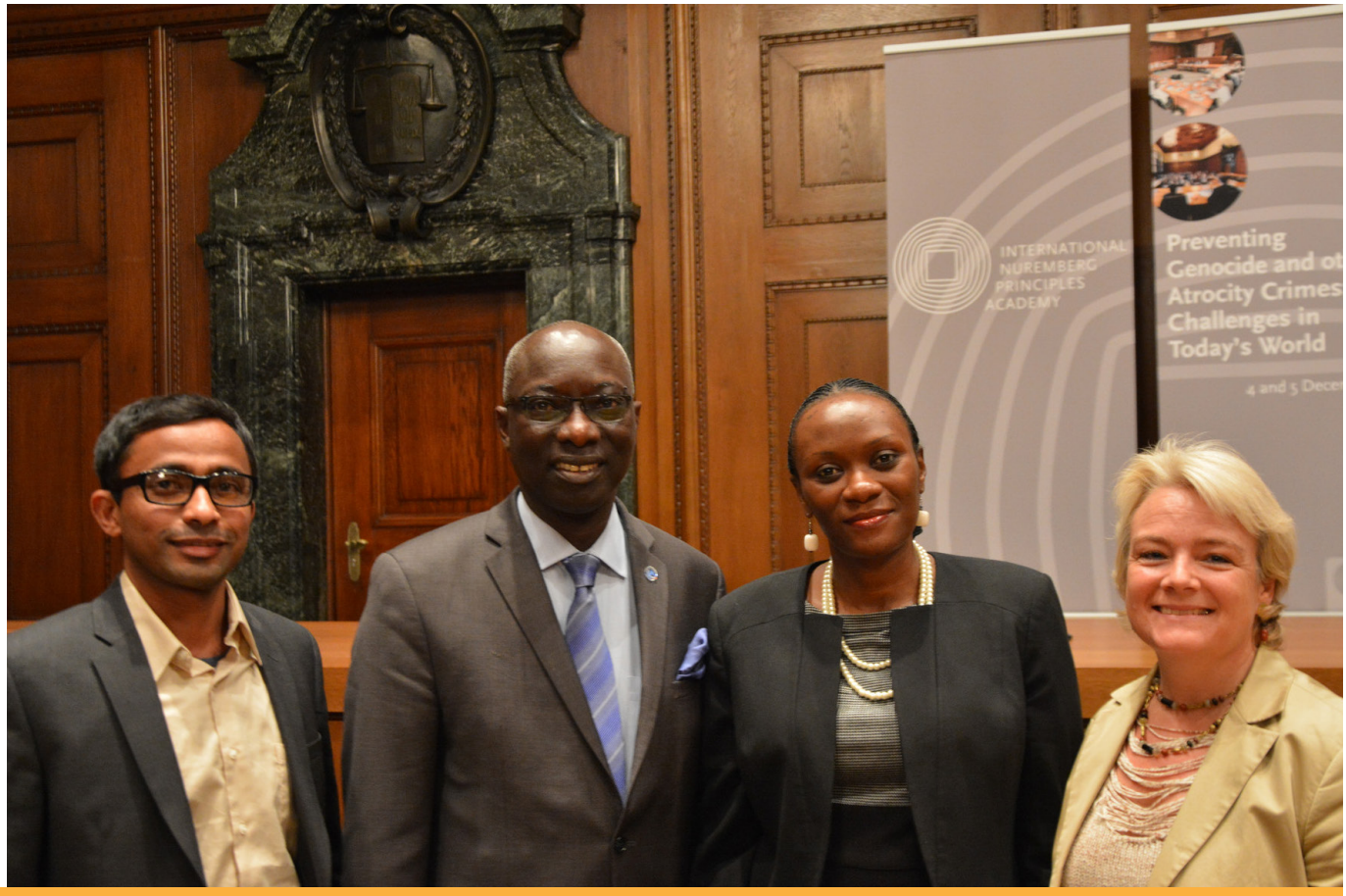
1 The text was adopted from spoken remarks made by Special Adviser Adama Dieng on 4 Dec. 2014 in Courtroom 600 in Nuremberg.
2 For the full text of the Convention on the Prevention and Punishment of the Crime of Genocide, see:
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx



Journalist Nirmanusan Balasundaram, Adama Dieng, High Court Judge Lydia Mugambe, and Bettina Ambach.

responsibility to protect populations, by preventing genocide, war crimes, ethnic cleansing, crimes against humanity and their incitement.[3] It is extremely important to underline the inclusion of incitement in the summit outcome document. However, as we all well know, political expediency and the strategic interest of states still block timely and decisive responses to save lives and protect populations. For example, the failure of the UN Security Council to take action in Syria where serious crimes have been committed for several years with total impunity, is evidence of that. We are approaching a figure of almost 200,000 victims in Syria. We have almost 7 million people displaced or in exile. So, what response can we offer when we talk about the responsibility to protect?

We need to act early. Preventing genocide does not mean waiting to respond until we can identify the crime unfolding as genocide. If we do so, we have already failed to respect our promise of „never again." We have failed in our responsibility to prevent. Instead, prevention is an ongoing process, one that requires sustained efforts over a long period of time and by multiple actors to build societies that are more resilient to genocide and other atrocity crimes: societies in which states provide full protection and guarantees to all their people without discrimination.

Several of the conference panels consider questions of accountability. I see accountability as a preventive measure. We know that states with a history of atrocity crimes are more likely to return to violence if there is no accountability, no sense of justice achieved. However, justice often falls victim to political compromise, particularly in states undergoing transitions. I am personally very frustrated by the campaign undertaken by some African leaders to withdraw from the Rome Statue of the International Criminal Court and to seek immunity from prosecution. What message does this send to the victims of atrocity crimes?

Although the immediate accomplishment of justice for genocide and atrocity crimes might be perceived as selective or limited, the critical importance of these efforts to those affected in places as far apart as Rwanda and Bosnia

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3 For details of the Outcome Document of the 2005 United Nations World Summit, see:
http://www.un.org/en/preventgenocide/adviser/responsibility.shtml

Bernd Borchardt, Founding Director, International Nuremberg Principles Academy with Adama Dieng.

Herzegovina must be recognised. If we want to prevent further violence and atrocities, we must continue to push for justice. It is unimaginable to conceive a peaceful world in which such violent acts go unimpeded and unpunished.

We need to tackle the spread of hatred based on ethnicity, religion or other forms of identity, and incitement to violence that is so prevalent in situations where communities are divided as a result of violence and conflict. We have among us a religious leader from the Central African Republic and I am sure he would agree that, while the crisis in CAR was not initially based on religious grounds, there has been a sectarian divide which has led to the catastrophe and chaos that we witness today. It is therefore extremely important that we be creative, that we use the same media and methods which those spreading this hatred are using, and call on those who have most influence over communities, such as religious leaders, politicians, and the media, to use that influence for good. We also need to reach out to the youth, who are not only most susceptible to but also most adept at using social media. We need to do all of this whilst still ensuring that we do not restrict freedom of opinion and freedom of expression.

I have touched on just some of the contemporary challenges that we face as we try to fulfil that promise of „never again" and do more to protect populations from genocide and other atrocity crimes. To be effective, we have to work together to find creative ways to tackle the obstacles that we face. The prevention of atrocity crimes is a responsibility that falls to us all. My mandate, and that of my colleague, the Special Adviser to the United Nations Secretary General on the Responsibility to Protect, Jennifer Welsh, are ones that we all share. I will not succeed in preventing genocide, unless all of you join in those efforts of prevention. It is here that the media play a key role, and that is why I am extremely grateful to the Wayamo Foundation for taking the initiative and bringing together journalists from so many countries around the globe because we need to continue to spread this message throughout the world. I should also say that Member States, regional and sub-regional organisations, international organisations, civil society and individuals …we all have a role to play. Each and every one of us can make a difference.

I look forward to listening to all of you, and I am extremely grateful once again to the Nuremberg Academy and to Wayamo Foundation for bringing together such high-level experts and academics who, through their exchanges of opinion, will definitely offer me the most beautiful Christmas gift.

PANEL I:

CHALLENGES IN IMPLEMENTING THE GENOCIDE CONVENTION:

PREVENTION AND ACCOUNTABILITY

MODERATOR
Davide Zaru Associate Political Affairs Officer at the UN Office on the Prevention of Genocide and the Responsibility to Protect

▸ **Paola Gaeta** Professor of International Criminal Law at the University of Geneva and Adjunct Professor of International Criminal Law at the Graduate Institute of International and Development Studies
TOPIC: ***Significance of the Genocide Convention today***

▸ **Margit Hellwig-Bötte** Head of Division (Conceptual Issues and R2P), UN Department, Federal Foreign Office, Germany
TOPIC: ***The Responsibility to Protect — Global challenges to the prevention of atrocity crimes***

▸ **Vahidin Omanovic** Co-Founder and Co-Director of the Centre for Peacebuilding, Bosnia
TOPIC: ***Challenges of community reconciliation and conflict transformation after the war in Bosnia-Herzegovina***

▸ **Timothy Mackin** Assistant Director for War Crimes and Genocide Sub-Directorate, INTERPOL
TOPIC: ***INTERPOL's contribution to preventing genocide, war crimes and crimes against humanity***

Professor Paola Gaeta addressing panel on prevention and accountability.

PAOLA GAETA

Professor of International Criminal Law at the University of Geneva and Adjunct Professor of International Criminal Law at the Graduate Institute of International and Development Studies

TOPIC:

Significance of the Genocide Convention today

We cannot understand the significance of the Convention on the Prevention and Punishment of the Crime of Genocide today, if we do not understand the significance of the genocide convention when it was adopted in 1948.[4]

FILLING THE GAP

The Convention was adopted in 1948, mainly to fill a gap produced in this historical courtroom when the persons most responsible for the atrocities committed during the Second World War were tried in Nuremberg.

The definition of crimes against humanity that was adopted for the Nuremberg Tribunal had to cover the atrocities committed by German Nazis against any civilian population.[5] Unfortunately, this definition was limited because the Nuremberg Tribunal could punish crimes against humanity only if those crimes were committed in relation to the war of aggression committed by the Nazis. This meant that, although the Tribunal could, in principle, adjudicate on acts committed against the Jews or any other political opponents of the Nazis in Germany before 1939, it could not find any link between those acts committed before 1939 and the act of aggression. Therefore, the Tribunal decided to limit its judgement on crimes against humanity to acts committed after 1 September 1939.

ACTS AGAINST OWN POPULATION

The possibility of trying the people responsible for serious offences against their own population was limited for a very specific reason: the drafters of the Tribunal's charter wished to keep control over how they themselves were treating their own nationals at that time.

We must remember: the drafters included two colonial powers (United Kingdom and France), the Soviet Union which was not very respectful of human rights, and the United States which still had still racial laws.[6] They did not wish to have the notion of crimes against humanity used against themselves for the atrocities that they were committing against their own populations. So, crimes against humanity were to be punished only to the extent that they were linked to the war of aggression led by the Germans.

Regardless of the limitations, it was a tremendous moment. For the first time in history the principle whereby members of a government would be responsible for crimes committed against their own population was accepted, regardless of whether those crimes were committed in time of peace or in time of war.

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4 There are presently 146 parties to the Convention on the Prevention and Punishment of the Crime of Genocide. For a full list as well as the treaty text, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx**

5 Crimes Against Humanity were defined in Article 6(c) of the Charter of the International Military Tribunal as being, „murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
For the full text of the Charter, see: **http://avalon.law.yale.edu/imt/imtconst.asp**

6 The Charter of the International Military Tribunal set down the laws and procedures whereby the Nuremberg trials were to be conducted, and was formally signed by France, the Soviet Union, United Kingdom and United States on 8 August 1945. It was subsequently ratified by another 19 allied states.

NEW PROTECTIONS

The Genocide Convention finally afforded protection to members of specific groups (racial, national, ethnic and religious) from abusive conduct by members of a government or by other individuals, regardless of whether such acts took place during peacetime or during wartime. The price paid for such incredible momentum was the fact that the tools established in the Genocide Convention to make it enforceable were rather limited.

For example, while the obligations of the contracting parties were limited because they had merely to pass national criminal legislation to punish genocide, they nevertheless included the incredible principle that being an officeholder was no defence against criminal responsibility.[7] The obligation to punish people responsible for genocide was only placed upon on the territorial state in which the genocide was occurring, something that was rather naïve, inasmuch as it was akin to asking the court of a state where genocide was occurring to judge its own leaders. Yet, we also have the obligation not to deem genocide a political offence for the purposes of extradition.[8]

GENOCIDE PREVENTION

The very important obligation to prevent genocide is also there but very little is said about the means through which states can do so. The only specific obligation that contracting parties have is mentioned in Article VIII, which states that contracting states may call on the United Nations to take action, a power that they already possess under the United Nations Charter.[9]

When we come to the definition of the crime of genocide in the Convention, however, a very important aspect is that the destruction of a group is not a necessary prerequisite for the threshold to be met. Punishing someone only after such a result had already been achieved would be nonsense. Hence, the definition of genocide very much relies upon the legal notion which lawyers call *dolus specialis*, specific intent. In order for a murder charge to become genocide, it is necessary to prove that the person wanted to pursue an objective which is beyond the commission of the act, namely, the destruction of the group. So, the famous intent to destroy a group „in whole or in part" which characterises genocide, does not have to be accomplished but must instead be proven to exist in the mind of the perpetrator.

From the criminal law point of view, killings can be called acts of genocide if such acts endanger the existence of the group. A group does not have to be destroyed for there to be genocide. The position is similar to theft in criminal law: theft is defined in some criminal codes as the fact of taking someone else's property for personal benefit. If one steals a bottle of water, one will not necessarily benefit: the water could be spilt. Nonetheless, this amounts to theft because the intention is to gain from the action. The mechanism is the same for genocide.

THE SIGNIFICANCE OF THE CONVENTION

Although the Convention does not cover other instruments at the disposal of states and contained within treaties

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7 Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide states that, „Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." For the full text of the Convention, see: **http://www.un.org/ga/search/view_doc.asp?symbol=a/res/260%28III%29**

8 Article 7 of the Convention on the Prevention and Punishment of the Crime of Genocide states that, „Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition."

9 Article 8 of the Convention on the Prevention and Punishment of the Crime of Genocide states that, „Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

10 For example, the ability to prosecute on the basis of the aut dedere aut judicare principle, which is the legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition. For the full text of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where this mechanism is outlined in Article 5 paragraph 2, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx**

Uganda's International Crimes Division Prosecutor Joan Kagezi and High Court Judge Lydia Mugambe.

such as the United Nations Convention against Torture,[10] the Genocide Convention continues to be an old lady with a lot of charm. Many politicians, diplomats and lawyers continue to label some atrocities as „genocide", as if calling them „crimes against humanity", „ethnic cleansing" or „war crimes" undermined the importance or the gravity of such atrocities.

The genocide label continues to appeal because it captures an idea which is not in the definition of genocide in the Genocide Convention, i.e., that genocide must be perpetrated with the help of the state or some powerful organisation controlling the territory and the population. This element is not present in the definition of genocide as a crime: no state policy is required for a crime of genocide to be punished under the Convention. A prosecutor can win a case, irrespective of whether an individual has acted in pursuit of a genocidal policy.

REDEFINING GENOCIDE FOR STATE RESPONSIBILITY

The international community should take an important step forward. Regardless of the fact that the International Court of Justice in the Bosnia case[11] stated that the definition of genocide in the Genocide Convention does not apply to states as such for the purpose of state responsibility, we should be ready to accept another definition of genocide that takes state responsibility into account.

The international community could open the discussion regarding the extent to which the definition of genocide as a wrongful act of a state should be something different from the crime of genocide committed by individuals under the Genocide Convention.

We need to face the fact that, if a state's conduct risks bringing about the destruction of a group, this amounts to genocide, regardless of the specific goals behind a particular policy. It is only in this way that we can call genocide something that comes from a state, regardless of the specific intent behind its conduct.

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11 For the judgment of 26 February 2007 in the Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), see: **http://www.icj-cij.org/docket/files/91/13685.pdf**

MARGIT HELLWIG-BÖTTE

Head of Division (Conceptual Issues and R2P), UN Department, Federal Foreign Office, Germany

TOPIC:

The Responsibility to Protect — Global challenges to the prevention of atrocity crimes

In recent months and years, we have found ourselves confronted with a number of human rights violations, e.g., in Iraq, Syria and the Central African Republic. In all these situations, public opinion has reminded the international community of the responsibility to protect (R2P).[12] And whenever grave human rights violations occur and the risk of genocide is observed and the international community fails to respond quickly, the UN system — equally quickly — has to take the blame and is accused of being incapable of protecting victims of atrocities.

In these situations we have a problem in the clash between moral obligations and political interests.

It is always best to be a bit careful with the word „we" because, actually, who is „we"? Is „we" the United Nations system? Is it the Member States of the UN? Is it all of us? Is it the international community together with the states, the human rights organisations? When we talk about „we," we should be a little bit more precise.

KOFI ANNAN AND R2P

To be precise, the principle of R2P would not be there without Kofi Annan, who suffered a lot during his stint as head of the United Nations Department of Peacekeeping Operations (DPKO),[13] when the genocide in Rwanda occurred and also when he faced the genocide in Srebrenica. In 2005, when he was the UN Secretary General, Annan argued during the world summit, „As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?"[14]

This was the trigger for the concept of R2P. The idea has since been developed in a number of UN Security Council resolutions, a number of resolutions in the United Nations Human Rights Council in Geneva, and reports of the UN Secretary General. But the concept is still not agreed upon by everyone. There is still a difficult problem in reconciling the idea of the responsibility to protect with the way sovereignty is conceived under the United Nations Charter.[15]

In order to protect the Charter, every new norm and regulation must be established through broad international consensus. The application of R2P must follow international law and must retain legitimacy. Today R2P is an emerging norm but it has not yet become state practice. And despite the shortcomings of the UN Security Council, the Council must remain in the driver's seat and that is what Kofi Annan hinted at in 2005.

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12 On 12 January 2009, UN Secretary General Ban Ki-moon issued a report entitled, „Implementing the Responsibility to Protect", on operationalising the responsibility to protect. For the full report, see: **http://responsibilitytoprotect.org/SGRtoPEng%20%284%29.pdf**

13 Kofi Annan served as the United Nations Under-Secretary General for Peacekeeping between March 1993 and December 1996. The Rwandan genocide began in April 1994, and the Srebrenica genocide occurred in 1995.

14 See paragraph 126 of the Report of the Secretary General of 26 May 2005 entitled, „In larger freedom: towards development, security and human rights for all." For the full text, see: **http://www.un.org/ga/search/view_doc.asp?symbol=A/59/2005**

15 For the full text of the UN charter, see: **http://www.un.org/en/documents/charter/index.shtml/**

Journalist Blerim Xhemajli from Kosovo.

THREE PILLARS OF R2P

To be precise, R2P is built on three pillars: the first is the state's responsibility to protect; the second is international assistance and capacity building, in the event that states cannot fulfil their responsibility to protect, and need assistance; and the third is timely and decisive response by the international community to atrocity situations.

Generally, we only talk about R2P as the third pillar because it is not only the most visible but also the most contested one. But when we look at it from a prevention angle and consider the responsibility to prevent, then the second pillar of R2P may be even more important for genocide prevention, though, unfortunately, it is less prominent, and activities under this pillar are less visible. However, when we look at all the UN Security Council resolutions that have been passed on Libya or Syria, it is always the first and second pillars that are referred to, highlighting each state's responsibility to protect its citizens.

GERMAN FOCUS ON PREVENTION

Journalists are often very quick to jump to the third pillar, without looking at the whole concept of R2P. For Germany, the prevention aspect is very important because when Germans said „never again" in the early 195Os and 196Os, they also felt the strong obligation to help states fulfil this obligation. Accordingly, capacity-building and prevention projects are very important for German foreign policy, and we try to assist states on a number of different levels, through mediation projects, projects on conflict resolution and peace building, promotion of women's participation in peace negotiations, or strengthening national judiciaries. Such projects may be small but we try to ensure that we conduct them in conflict-prone countries, and we try to make certain that they really address the need.

PROTECTION AND REGIME CHANGE

Why is the R2P concept still contested? The aim is to protect civilians from violence and not to topple regimes, but the discussions we had about the intervention in Libya in 2011 made many critics believe that R2P is equal to regime change. Of course this is not the case. Even so, it is also true that the number of reporting mechanisms in the UN Security Council leave room for improvement and that there is a need for greater accountability. When Brazil developed its concept of „responsibility while protecting," it addressed the need to achieve greater accountability and, in particular, to make the UN Security Council more accountable through a comprehensive monitoring system.[16]

THE WAY FORWARD

A broad international consensus is needed for any successful implementation of R2P. Cases such as Syria, Iraq and South Sudan have been widely discussed but, in order to establish a common understanding of R2P, there needs to be room for an open and honest dialogue on a level playing field. Firstly, dialogue needs to be developed with different regional organisations. Regional organisations are very important actors because they have considerable influence in their respective regions. Risk assessments and co-ordination between regional organisations and the UN might thus be enhanced.

Secondly, R2P is *not* a political weapon but rather a humanitarian instrument. And in order to make it more effective, the veto right of the P5, the five permanent Security Council Members, might be worth considering in cases of massive human rights violations. Should it be limited? There is a suggestion on the table, made earlier by the so-called „Small Five"[17] and recently repeated by France, and though one could debate whether this initiative could be successful, at least awareness to the problem has been raised.

STREAMLINING EARLY WARNING AND PROTECTION

An interesting initiative at the United Nations is Human Rights Upfront which seeks to streamline human rights protection into the UN system and make it an overall concern of all organisations within the United Nations.[18] Deputy Secretary General of the United Nations Jan Eliasson[19] developed this initiative and is very keen to put it into practice.

We must also do more research into and establish more early warning initiatives covering crisis situations. We have a number of possibilities to ensure that we know when crisis situations arise but we can do more to sharpen the instruments. Generally speaking, there is no lack of analysis regarding R2P, but there is definitely a lack of will to put it into practice.

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16 For an outline of Brazil's proposals, see letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary General on, „Responsibility while protecting: elements for the development and promotion of a concept." For the full text, see: **http://www.un.org/ga/search/view_doc.asp?symbol=A/66/551**

17 The „Small Five" consists of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland. On 15 May 2012, these states put forward a revised UN General Assembly draft resolution on, „Enhancing the accountability, transparency and effectiveness of the Security Council." For the full text, see:
http://www.securitycouncilreport.org/att/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a%2066%2041%2Orev2.pdf

18 For more details, see: **http://www.un.org/sg/rightsupfront/**

19 Swedish national Jan Eliasson took office as Deputy Secretary General on 1 July 2012. For more details, see:
http://www.un.org/sg/dsg/index.shtml

VAHIDIN OMANOVIC

Co-Founder and Co-Director of the Centre for Peacebuilding, Bosnia

TOPIC:

Challenges of community reconciliation and conflict transformation after the war in Bosnia-Herzegovina

I come from a small town in north-west Bosnia that I believe could be an example of how we can work on building peace and reconstructing, not only houses and buildings, but also relationships of people living together.

DISBELIEF

I did not wake up one bright morning with the idea of becoming involved in peacebuilding work. When I was 16, war started in Bosnia and one day I lost everything. Many members of my family were killed and, as a victim of ethnic cleansing, I ended up in a refugee camp in Slovenia where I believed I would stay for two weeks.

In fact, I stayed there for more than four years.

We did not believe that war could happen. We heard on news broadcasts that the war in Croatia was going on and that the war in Slovenia was already over but we believed that, because of Bosnian diversity and the impossibility of drawing a line between where Serbs, Bosniaks and Croats lived, war simply could not happen. We were very naïve to believe that war might happen in Switzerland, a symbol of peace for us, before it happened in Bosnia.

DAMAGE

I was caught up in a very painful cycle of hate, anger and the desire for revenge. And the desire for revenge was the motivation for me to continue living because, not only did I love everything I had, I also lost my faith and faith in humanity. I did not see the world which, as a 16-year-old boy, I had really expected to see. I was living in a state of very deep hatred towards Serbs and towards everyone else, and I was constantly planning how I could give meaning to my life by killing at least one Serb, so that this one individual might feel what it meant to be a victim.

PEACEBUILDING

I was lucky to gain knowledge and skills in conflict resolution and conflict transformation. I founded the Centre for Peacebuilding together with a friend, once we realised that, if this transformation from hatred to understanding and from hatred to acceptance was possible for us, it was possible for everyone else too. At the time, we believed we were the most damaged victims of the conflict.

We started our NGO in 2004, and it was very difficult to have an NGO that talked about reconciliation. We spent three years working without using the word „reconciliation" because it was very dangerous to mention „reconciliation" to people who did not want to be reconciled, and it was dangerous to talk about reconciliation to our governments because of the political scene in Bosnia, where it seems that it is so much easier to control people when they are separated and divided rather than when they are together.

Journalists Sana el Mansouri and Robert Wanjala from Libya and Kenya.

FOCUS ON YOUTH

When we started, we focused on working with youth because we understood that our educational system was producing young fascists who were totally segregated from their fellow Bosnians, no matter which ethnicity or religious background they represented.

Our main focus for the seven years has been to organise fun or educational activities for youth, e.g., foreign language classes. But even when they study English, we give them texts to translate which discuss reconciliation, genocide prevention or conflict resolution. So they study the language but they also study topics that are important to us.

DIVIDED SOCIETY

Bosnian society is extremely divided at the moment. We have a federal government. Under this comes the Federation of Bosnia and Herzegovina, which has ten cantons. In addition, there is also the government of Republika Srpska, as well as the district of Brčko. Each of these levels creates even deeper divisions among people.

Relationships have been totally destroyed, and it takes a long time to bring young people together so that they can sit down and talk. Having coffee is one thing but talking about what happened is quite another. Some politicians in power still deny that genocide took place in Bosnia, saying that it was not genocide but ethnic cleansing, as if ethnic cleansing was really nothing. We still have thousands of missing people, and all this hinders our work of bringing communities together.

BEGINNING THE DIALOGUE

We try to be creative. For example, we try to organise meetings around coffee, which is very important in our culture. So we just invite people to come and have a coffee; and once they start drinking coffee, they become more relaxed, and we can ask them to share their personal stories. We know that, once we allow people to talk and give them a safe space to share their own stories, and they see that the other side is prepared to listen to them, it immediately opens the door to reconciliation.

We have many challenges, both political and economic. The unemployment rate for youth is over 60 per cent, and very often there is apathy. Some young people start using drugs or, what is more dangerous still, become radicalised in their faith. We have many who are going through radicalisation because they need something on which to build their self-confidence, and this is their way of doing it. They believe that they are the only ones who will go to paradise, that they are the only ones who are on the right path. Of course, they use the memory of the war to prove that the others are bad people.

RELIGIOUS LEADERS

We understood that religion had been misused during the war in Bosnia and also that people had trusted their religious leaders the most. So, we try to influence religious leaders in our town, though it took us five years just to bring them together to have coffee around one table. Once we achieved that, and showed in the media and in the public space that it was possible, people started to react, and most supported the effort to come together and talk. After years of working with them, we were even able to start an interfaith school in our town where all Muslims, Christians and atheists had a place to learn about others.

GENOCIDE PREVENTION

I am grateful that genocide prevention is becoming more of a topic in Bosnia. From conversations heard over the last decade, I can say that there is not a single person who believes that war could not happen in Bosnia again.

I want to make a special appeal to journalists to be careful. Although I feel embarrassed to even talk about Bosnia with everything that is going on in the Middle East, I know that the media can do so much towards preventing genocide and protecting human rights. I ask journalists to keep their eyes open and react as soon as something begins to develop.

I know that in Bosnia it would have been difficult to stop the war, genocide and ethnic cleansing in 1995, but I strongly believe that we could have stopped it back in 1989 and 1990.

TIMOTHY MACKIN

Assistant Director for War Crimes and Genocide Sub-Directorate, INTERPOL

TOPIC:

INTERPOL's contribution to preventing genocide, war crimes and crimes against humanity

While genocide prevention cannot be achieved through enforcement alone, there is an enforcement component to resolving genocide and INTERPOL plays a role in that. INTERPOL's raison d'être was to allow police forces to share information across borders to enable the enforcement of laws. We face the same struggles today, as nations continue to pursue their own interests. As police officers in a global organisation, we try to bridge those gaps, to get them to work and share information. But it is common in police fields to withhold and share information based on one's own state's interests.

ATROCITY CRIMES AND FUGITIVES

INTERPOL's role in serious international crimes or crimes where atrocities happened began in 1994 with the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia and agreements to assist and collaborate. The role that we undertook at first was tracking fugitives.

Out of the total of 30,000 or so red notices that INTERPOL has circulated for wanted criminals world-wide,[20] there are about a 1,000 war criminals. We focus on that by building relationships with countries such as Rwanda, and others seeking to bring these people to justice.

INFORMATION GAP

During an expert meeting on tracking Rwandan fugitives which took place in my first two weeks at INTERPOL, I realised that, looking at criminals from some 20 years ago, we had no information: no fingerprints, no photographs and no travel information for a 20-year period, which makes it very difficult to locate these people.

INTERPOL red notices are used to track people as they cross borders but, according to the INTERPOL databases, for every one person tracked there are another six world-wide that have committed war crimes who are not being tracked. The real figure is far greater than that, but these people are not being tracked and this is an important area to explore because, through different courts that have collected information through different investigative bodies, there is sufficient documentation to justify notices being put onto more people so that we can track them. If these suspects were to land in the appropriate jurisdiction, then action could perhaps be taken. It is not being taken today because of prioritisation of work or just because of where they are located.

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20 INTERPOL notices are international requests for co-operation or alerts allowing police in member countries to share critical crime-related information. In the case of red notices, the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision. Notices are used by the United Nations, international criminal tribunals and the International Criminal Court to seek persons wanted for committing crimes within their jurisdiction, notably genocide, war crimes and crimes against humanity. For a list of INTERPOL notices, see: **http://www.interpol.int/notice/search/wanted**

VETTING

An international organisation with 190 member countries does not want to be used as a political tool. For that reason, all war crime matters are immediately referred to our legal affairs department to ensure that none of the requests are political in nature, that it is not just one state naming a foe as a war criminal. The request has to be reviewed.

Establishing collaborative relationships beyond fugitive tracking and building trust with different policing agencies can broker the information necessary to make investigations more effective.

EXPERT MEETINGS

The war crimes fugitive portion accounts for about three percent of the overall INTERPOL red notice system which led our team to focus on those people and to organise expert meetings of investigators to try to assist the countries that were seeking these same people and to share best practices.

A biannual conference was created along with training modules because we recognised that there were gaps in training. We recognise that, as we prosecute war criminals, the hierarchy in their structures is often very similar to the hierarchy that is seen in organised crime structures. And that information is very difficult to gather after a conflict.

This spring, at an expert meeting in Kigali, the then INTERPOL Secretary General decided that he would create a specialised unit to focus solely on the investigative function of tracking down war criminals, looking beyond fugitive tracking where there was already a team in place.[21]

SHARING INFORMATION

Since 1 October 2014, when I arrived in Lyon, I have been working on building a strategy, building a network that is required to establish — and not duplicate — the work that is being done by other agencies to bring justice to those that committed genocide. Moving forward, we will build capacity, maintain our specialist network and support the International Criminal Court. But the ultimate goal is to develop some kind of a platform to have international information and co-ordination during ongoing conflicts, so that information is available when states require it.

We must collect all the information that is available to us today, analyse it and distribute it so that collectively we can take appropriate measures in whatever field of expertise is to be most effective in combating mass atrocities/genocide.

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21 The current INTERPOL Secretary General is Jürgen Stock, elected in November 2014. For a list of past leaders, see: **http://www.interpol.int/About-INTERPOL/Structure-and-governance/Secretary-General**

Discussion on prosecutorial strategy in historic Courtroom 600 in Nuremberg.

DISCUSSION:

THE COSTS AND EFFICIENCY OF INTERNATIONAL JUSTICE

GEORG ESCHER
Editor and Foreign Policy Commentator at Nürnberger Nachrichten, Nuremberg Germany:

Miss Hellwig-Bötte, you mentioned that responsibility to protect means protecting people and not toppling governments. Would you go as far as to say that in Syria there was a serious mistake made in that respect?

MARGIT HELLWIG-BÖTTE
Head of Division (Conceptual Issues and R2P), UN Department, Federal Foreign Office, Germany:

Of course, in a way these questions are the one-million dollar questions. I think that Syria is the most difficult case that the UN Security Council has to deal with at the moment. I am still perfectly convinced that the idea behind R2P is not to topple governments but to protect people. Equally, however, I cannot deny that the Security Council is composed of different members with different political interests. Maybe the situation in Syria would be easier to deal with, had the problems in Libya not been the way they were.

Sometimes, because of the situation, the Security Council is not able to act. That is a fact, and not something we can change from one day to the other. We can have lengthy discussions about the composition of the Security Council but we are always faced with this dilemma between a moral obligation to protect people or prevent atrocities, and the political interests of a number of states that are not able to get their act together.

PAOLA GAETA

Professor of International Criminal Law at the University of Geneva and Adjunct Professor of International Criminal Law at the Graduate Institute for International and Development Studies:

Within the United Nations, could we not have a link between the obligation, the insistence upon the need, and the obligation for Member States to co-operate, to put an end to genocide? That could perhaps be a start. I know that it is difficult at a political and diplomatic level but we have some legal consequences for situations such as the one occurring in Libya and elsewhere in the world.

MARK KERSTEN

Researcher at the London School of Economics and SOAS, author of Justice in Conflict:

R2P is a contested concept. Some people call it an emerging norm and some people possibly see potential international law. Yet it seems to me that states actually view it as a vocabulary with which to justify their actions. So when Russia went into Crimea, it used the responsibility-to-protect language in order to justify it; and it did so in Georgia as well. The United States and the United Kingdom justified Iraq *ex post facto* with R2P-type language.

In Libya, both resolutions mentioned responsibility to protect, though only the responsibility that Libya had to protect its citizens and not the responsibility of the international community. So if you have all these different states claiming that what they're doing, their coercive action, is justified by their responsibility to protect, then how could you ever get beyond R2P being a contested concept if there is no single authority to judge or decide that in one instance it counts, and in another instance it does not?

MARGIT HELLWIG-BÖTTE

To Ms. Gaeta's question, there is a mechanism – not in the United Nations in New York but in Geneva, in the Human Rights Council – to hold states more accountable at the UN. There are discussions about the situations in different countries relating to their human rights situations and these discussions are always very controversial because no state wants to be accused of misdeeds. And that makes such discussions very awkward …but at least they take place.

Whenever the Security Council comes into play, it is much more difficult to discuss because we should not forget that all states are equal in the United Nations. There is the UN Charter which outlines the sovereignty of states. I am not a lawyer, but on what grounds does one state tell another what to do if there is no agreement on a norm, on a common behaviour?

Of course, words can be used as weapons for different purposes. NATO and Western language on Libya may be the same as Russia's language on Crimea. But this is also a part or a feature of the UN system, whereby whoever uses words has the power to act if they are able to justify their actions. This makes it so difficult to reach the point where we can really act and help.

Perhaps a more practical way of discussing new developments in the United Nations is through informal groups of friends. There is such a group of friends in New York. I do not think there is a group of friends against atrocity prevention in Geneva but having more informal groups, having broad participation in these groups and discussions on emerging norms, can make them relevant. I think this is how the UN works, and this is something that needs time, which we very often do not have. However, this is the only way to move things.

NIRMANUSAN BALASUNDARAM

Journalist and Researcher, Sri Lanka:

September 2008, just before the final stage of the war in Sri Lanka, all humanitarian agencies including UN agencies were ordered to leave the war zone by the Sri Lankan government. During the war, the government declared a no-fire zone; once the people entered the no-fire zone, the government fired on the no-fire zone. After the war, the UN Secretary General appointed a panel to advise him on Sri Lankan affairs and the panel's report said that up to 40,000 people were killed.[22] From the victims' side, there is a serious allegation that the international community failed to apply R2P. I would like to know the perspective from the experts and the academics.

MARGIT HELLWIG-BÖTTE

Head of Division (Conceptual Issues and R2P), UN Department, Federal Foreign Office, Germany:

The situation in Sri Lanka actually triggered the Human Rights Upfront initiative at the UN because it was after the failure, which the UN system itself admitted, that Jan Eliasson developed this initiative in order to make sure that these situations do not happen again. Another example which luckily enough went very differently was the situation in South Sudan where the United Nations Mission in South Sudan (UNMISS)[23] opened the gates to make civilians come into the compound to prevent them from being killed. So there is, in a way, a lesson learnt already in the UN system, but Sri Lanka triggered this development.

ADAMA DIENG

Special Adviser of the UN Secretary General on the Prevention of Genocide:

Ms. Hellwig-Bötte is right: the principle of R2P as such is not contested but some aspects of the operationalisation of this principle are contested. That is where the problem lies.

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22 The Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka was published on 31 March 2011. The report noted that, „Two years after the end of the war, there is still no reliable figure for civilian deaths, but multiple sources of information indicate that a range of up to 40,000 civilian deaths cannot be ruled out at this stage." For the full report, see:
http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf

23 For more on UNMISS, see: **http://www.un.org/en/peacekeeping/missions/unmiss/**

Journalist Georg Escher from the Nürnberger Nachrichten.

In the case of Sri Lanka, Secretary General Ban Ki-moon had the moral courage to acknowledge that the United Nations had failed the people of Sri Lanka who were killed, particularly during the last months of the civil war. But then, the Member States of the United Nations, including neighbouring countries also failed the people of Sri Lanka starting with India, for instance. Neither they nor the international community as a whole took a single action to protect Sri Lankan civilians.

But I am glad that at least action was taken by the Secretary General who has launched what is now called the Human Rights Up Front initiative, which emphasises the central importance of protecting populations to the work of all sectors of the United Nations. I can say that the Secretary General and his deputy have made it very clear that we have to ensure that such atrocities do not occur.

Finally, I would simply say that R2P is not a norm of international law. It is not a convention, like the 1948 Genocide Convention. It is a statement of political commitment, which was made by all world leaders to uphold their legal obligations under international law, as set out in the Genocide Convention, the Rome Statute of the ICC and the main body of human rights law.

PANEL II:

GENOCIDE AND MASS CRIMES IN THE COURTROOM:

JUDICIAL INVESTIGATIONS AND PROSECUTIONS

MODERATOR
Mark Kersten Researcher at the London School of Economics and SOAS, author of Justice in Conflict

- **Thierry Cruvellier** Veteran international journalist and author of The Master of Confessions: The Making of a Khmer Rouge Torturer
TOPIC: ***Global trends at international tribunals and the concerns they raise***

- **Michelle Jarvis** Principal Legal Counsel, Office of the Prosecutor, ICTY
TOPIC: ***Prosecuting genocide charges at the ICTY***

- **Joan Kagezi** Prosecutor, International Crimes Division Uganda
TOPIC: ***National prosecutions at Uganda's International Crimes Division***

- **Alex Whiting** Professor, Harvard Law School
TOPIC: ***Genocide as international core crime — The challenges of prosecuting genocide and other international crimes***

Professor Alex Whiting addressing panel on investigations and prosecutions.

THIERRY CRUVELLIER

Veteran international journalist and author of The Master of Confessions: The Making of a Khmer Rouge Torturer

TOPIC:

Global trends at international tribunals and the concerns they raise

Here are four observations on global trends on war crimes tribunals today or how they have evolved.

SYMBOLIC DIMENSION

The first trend is the increased symbolic dimension of international war crimes tribunals.

We began with the Yugoslavia and Rwanda courts. The International Criminal Tribunal for the former Yugoslavia[24] (ICTY) indicted 161 individuals and the International Criminal Tribunal for Rwanda[25] (ICTR) indicted 90 individuals. Eventually, they actually prosecuted fewer people, totalling slightly over 110 at the ICTY and about 75 at the Rwanda court.

These figures are considerably higher than those of any of the currently active tribunals. The Extraordinary Chambers in the Courts of Cambodia[26] (ECCC) have basically dealt with five, if we are generous: at least they had five indictees. If we look at the Special Tribunal for Lebanon[27] (STL), it is dealing with five individuals, at least theoretically. And if we look at the International Criminal Court[28] (ICC) on a situation-by-situation basis, it deals with between one and five individuals as well. So, over 20 years, we see an extraordinary phenomenon, whereby we are down to five individuals per court, or situation, for international prosecutions.

Between 1996 and 1998, when the Rwanda court was struggling to get numbers and barely reaching 20, it was under heavy — and I mean, heavy — pressure because that figure was considered almost indecent, or certainly impossible to accept. The ICTY faced the same kind of pressure, and yet here we are today where all war crimes tribunals are comfortable with five indictees, and the pressure on them to prosecute more is not nearly comparable to what the first two war crimes tribunals had faced.

This raises at least a couple of issues. Firstly, it seems that the shift of responsibility towards national jurisdictions to prosecute war crimes is ever more important. So national courts are becoming much more important. Secondly, the possibility for international courts to maintain some of the claims they have made, such as the fight against impunity, maintaining peace, contributing to reconciliation or bringing some closure to victims, has become much harder to sustain.

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24 The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990s. It was established in 1993 and is located in The Hague, Netherlands.
25 The United Nations Security Council established the International Criminal Tribunal for Rwanda to prosecute persons responsible for genocide and other serious violations of International Humanitarian Law in Rwanda in 1994. It was established in 1994 and is located in Arusha, Tanzania.
26 In 1997, Cambodia's government requested the United Nations to assist in establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC) to prosecute the senior leaders of the Khmer Rouge. The court is more commonly referred to by the more informal name the Khmer Rouge Tribunal or the Cambodia Tribunal and is located in Chaom Chau, 16 kilometres from downtown Phnom Penh.
27 The Special Tribunal for Lebanon (STL) was established in 2007 by the UN Security Council under Resolution 1757 and opened on 1 March 2009. It is located in Leidchendam, near The Hague, Netherlands.
28 The International Criminal Court (ICC) is the first permanent, treaty-based, international criminal court and is governed by the Rome Statute, which was adopted on 17 July 1998 and entered into force on 1 July 2002 after ratification by 60 countries.

EFFICIENCY

The second trend is the issue of efficiency. It is a fact that over the last 20 years the efficiency of all international tribunals has systematically and steadily worsened. I am well aware that it is not a very popular theme, especially amongst court staff or organisations that support tribunals but it would probably be a mistake to ignore it or play it down.

Why? Firstly, because it is a real source of trouble in terms of how populations perceive the courts, which is obvious if you are in the field in the countries that are affected by the crimes and where the courts are working directly or indirectly. The source of that trouble is the cost. The cost of international tribunals has increased incredibly. For those who worked for the courts in the early years, it is obvious that there is a significant difference between the budgets then and the ones enjoyed by current tribunals; and, since we should keep in mind that the number of people being tried or actually prosecuted is so much smaller, we have a real problem with cost efficiency.

There is a very imperfect figure that can be used to make a rough assessment or become fully aware of how things have deteriorated: it has to be used cautiously but is worth keeping in mind as an indicator. It is useful because we can apply it fairly evenly to all tribunals by taking two sets of figures that we have, namely, their cost, their budget, and the number of people they have prosecuted.

COST PER ACCUSED

The ICTY figure today stands at about $23 million per accused, which is the best outcome. But it is not very good. The Rwanda tribunal spent about $26 million per accused. The Special Court for Sierra Leone[29] (SCSL) spent about $28 million per accused. These are rather similar in terms of cost. They are also the oldest courts.

Let's take the more recent ones. It is going to be scary. The Cambodian court today spends about US$ 62 million per accused. The ICC cost is about $120 million per accused. The Lebanon court is a bit complicated, so it would vary from $86 to $430 million per accused, depending on which criteria we apply. We can see the enormous degradation of the process.

The problem is very relevant today, because it affects every single court. There is no exception. The Šešelj case at the ICTY is interesting in that he was arrested 11 years ago and a judgement has still not been handed down. Believe me, 15 or 20 years ago it would have been completely unacceptable to have that kind of length of time between arrest and judgement. Yet, it has become a rather regular feature. One wonders how long we can go on sustaining this.

MODELS FOR INTERNATIONAL JUSTICE

The third trend is the dwindling range of models for international justice. At the end of the 1990s we had a variety of models that could be applied to a given situation. These were flexible, and were also designed to be closer to the societies where the crimes were committed. This led to the creation of hybrid courts. Today, it seems that two systems are dominating the world of war crimes justice: the ICC or the national model. There is less and less likelihood of having hybrid models, and the creativity that we used to see in the past seems to be on the retreat.

The most recent hybrid court, the Lebanon court, could be considered a sign of creativity but it is also the most problematic and strangest sort of judicial enterprise. It deals with a different crime — terrorism — and has been set

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29 The Special Court for Sierra Leone (SCSL) was set up in 2002 as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for „a special court" to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war. It was located in Freetown, Sierra Leone and completed its mandate in 2013.

Journalist and researcher Jovana Spremo from Serbia.

up for 22–50 victims. This raises questions about its relevance as a model.

An argument against this remark is to consider the experiment of the Extraordinary African Chambers in Senegal, and plans for new courts in Central African Republic and in Kosovo, as evidence that hybrid tribunals have, in fact, not yet been abandoned.

PARADOX OF UNIVERSALITY

The final trend is what I call the paradox of universality. In a way, judicial diplomacy has never been so active. There have never been as many countries that are members of the ICC as there are today, and it is hard to imagine a single peace negotiation that does not include a provision for justice. There is hardly a conflict without the threat of prosecutions being raised, and the principle of accountability for mass violence that was the premise of the creation of the first tribunals has spread and has indeed become a somewhat permanent feature of international affairs.

And yet, at the same time, international justice is increasingly being challenged in Africa as justice of the powerful, and most, if not all, of the members of what are called the BRICS countries[30] show lukewarm support for the ICC, if not outright hostility. This includes the democracies among them, such as India, Brazil and, to a lesser extent, South Africa. This means that international justice is also being seen as a creation of the dominating Western ideology and, as Western domination decreases, the whole criminal justice system is also being weakened. This could include threats in terms of funding, since emerging economies may not support the system as it is.

[30] BRICS is the acronym for five major emerging national economies, namely, Brazil, Russia, India, China and South Africa.

MICHELLE JARVIS

Principal Legal Counsel, Office of the Prosecutor, ICTY

TOPIC:

Prosecuting genocide charges at the ICTY

It probably would be an understatement to say that genocide cases at the ICTY have thrown up quite a few legal challenges, questions that have really required us to think very hard about the legal definition of genocide and the framework that we can apply in genocide cases.

THE ESSENCE OF GENOCIDE

The factual patterns that we have been dealing with at ICTY[31] do not fit the historical paradigm that we often assume applies to genocide cases. So we are not dealing with a scenario where all members of the group, men, women and children alike, are targeted with killings or overwhelming numbers of killings. It is not like the Holocaust or the 1994 genocide in Rwanda. Inevitably, therefore, our cases have challenged the legal boundaries of genocide in a way that we have not seen at some of the other courts and tribunals.

I wish to highlight some of the issues that we have confronted, and stress the idea that the core of our challenge has been a search for a deeper articulation of what the essence of the crime of genocide may be. We are searching for a more nuanced understanding of what it really means to destroy a group.

Our cases at ICTY on genocide have really fallen into three main categories.

THE „SERBIAN ADOLF“ AND THE COMMON PLAN

Firstly, we had the Jelisić case from the very early years of the ICTY. We sometimes refer to this as the case of the lone genocidaire. Jelisić was not a high-level military or political figure during the war. He was a 23-year-old man with a diagnosed personality disorder, and during the war he committed atrocities in Luka camp, in Brčko, in north-eastern Bosnia and Herzegovina. Some of the things he did included killing 13 people by shooting them point blank in the back of the head. There was evidence of a refrigerator truck arriving at Luka camp removing up to 20 bodies per day. So it was really horrendous evidence about what this one individual was capable of doing. His crimes certainly were not proved to be part of an overarching plan or strategy to destroy the Bosnian Muslim population in general, but there was evidence that Jelisić himself intended to destroy the Muslim group. He referred to himself as a „Serbian Adolf“ and said that he had come to Brčko to kill Muslims. Professor Paola Gaeta has highlighted the fact that a plan or a policy is not a legal element of the crime of genocide; our cases have certainly confirmed that as a matter of customary international law.

SREBRENICA AND GENOCIDAL INTENT

The second category of cases at the ICTY arose out of the July 1995 events in Srebrenica. Following the Bosnian-Serb takeover, up to 8,000 men were killed in mass executions and simultaneously up to 30,000 women, children and elderly were forcibly transferred out of the Srebrenica area into Bosnian-Muslim-held territory. So, this

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31 Goran Jelisić was sentenced to 40 years' imprisonment for crimes against humanity and war crimes on 5 July 2001.

was a case where we asked the court to look at the combined impact of the killings and the forcible transfer and indeed succeeded in getting the court to accept that this combined impact reflected a genocidal intent, an intent to bring about the physical demise of the community.

This was a novel case. It was really the first time a court had to consider what genocide of a part of group looks like, because it was clear that it was not the whole Bosnian Muslim group that could be said to have been targeted. It was confined to the Bosnian Muslim community in eastern Bosnia.

In the Krstić case,[32] the first in these series of Srebrenica cases, the appeals chamber indeed confirmed that the label genocide was appropriate in the case of Srebrenica.[33] The controversy surrounding this decision confirmed how wedded we had become to our view of what a genocide had historically looked like. And at Srebrenica, it looked quite different from that.

DESTRUCTIVE ACTS

The third category of cases concerned a campaign of destructive acts, unleashed in municipalities in Bosnia and Herzegovina in 1992. During attacks on towns and villages, the Bosnian-Serb forces carried out large summary executions involving hundreds and sometimes even thousands of people. Thousands of others were condemned to life-threatening conditions in detention camps, suffering serious bodily and mental harm. They were tortured, beaten, raped, sometimes over long periods. Some people in the camps were also killed. The majority that were not killed were violently expelled from their territory, scattered to different parts of the country and indeed different parts of the world. The group's cultural and religious symbols, their livelihoods and personal property were also targeted for destruction.

We charged genocide in relation to these events in a series of cases, including Stakić,[34] Brđanin[35] and Krajišnik[36] and Slobodan Milošović.[37] But we failed to secure a genocide conviction, and did not manage to convince the fact-finders that what had happened in the municipalities met the legal definition of genocide. We still have this question pending in our last few cases, the one against Ratko Mladić[38] and the other against Radovan Karadžić.[39]

CRIMES THAT DESERVE THE „GENOCIDE" LABEL

So, where are we now? We still have more to do in terms of articulating the essence of the crime of genocide and what is really the essential feature of the crime that justifies the application of the „genocide" label. We know that it is the intent to destroy the group that is the essential feature, but what does this really mean? What does it mean in practice to seek to bring about the physical demise of a community?

Our analysis in the Srebrenica cases certainly suggests that the physical demise of a community is a broader concept than killing many individual members of the group. In Srebrenica, the key was the combination of killings *and* expulsions which lead to the community's inability to reconstitute itself. So, arguably, we are looking for destruc-

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32 On 19 April 2004, Radislav Krstić was sentenced to 35 years' imprisonment for crimes against humanity and war crimes.
33 For more details, see: ICTY Appeals Chamber Judgement in the case of The Prosecutor v. Radislav Krstić: **http://www.icty.org/x/cases/krstic/press/en/PR839e%20appeals%20judgement%20Krstic.pdf**
34 On 22 March 2006, Milomir Stakić was sentenced to 40 years' imprisonment for crimes against humanity.
35 On 3 April 2007, Radoslav Brđanin was sentenced to 30 years' imprisonment for crimes against humanity and war crimes.
36 On 17 March 2009, Momčilo Krajišnik was sentenced to 20 years' imprisonment for crimes against humanity.
37 Proceedings against Slobodan Milošević were terminated when he died in detention on 11 March 2006. He was indicted for: genocide, complicity in genocide, deportation, murder, persecutions on political, racial or religious grounds, inhumane acts/forcible transfer, extermination, imprisonment, torture, wilful killing, unlawful confinement, wilfully causing great suffering, unlawful deportation or transfer, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, cruel treatment, plunder of public or private property, attacks on civilians, destruction or wilful damage done to historic monuments and institutions dedicated to education or religion, unlawful attacks on civilian objects.
38 For up to date information on the Mladić trial, see: **http://www.icty.org/cases/party/704/4**
39 For up to date information on the Karadžić trial, see: **http://www.icty.org/cases/party/703/4**

Journalist Ephrem Rugiririza from Rwanda.

tive acts that are designed to shatter the essential foundations of life of the targeted group.

In our cases we have been focussing on things like an intention to destroy the capacity of the group members to function normally as productive members of society. This includes the destruction of the family structures of the group and the relationships among the group members. And, of course, the ability of the group to reconstitute itself and their relationships with the land and with other groups.

KILLING ALL GROUP MEMBERS

We have made some progress but we have yet to fully articulate what this essential essence is. However, we can increasingly articulate what the legal framework of genocide does not require. And we've seen these issues play out in our cases in misconceptions.

I will mention two examples. The first is the „intent to kill all the group members" misconception. It is a mistake to think that the intent to destroy can only be inferred from an intent to kill all or most of the group members. For example, we have seen defence arguments at the ICTY that try to say that what happened in the former Yugoslavia cannot be genocide because it does not look like what happened in Rwanda or during the Holocaust. It is obvious though that this is not legally required for the definition of genocide. We know that genocide extends to the destruction of a part of a group, so by definition there could be a large number of people who were not targeted for killing or even targeted at all.

We also know that genocidal acts include not only killing, but also a whole series of other acts that do not amount to killing, such as serious bodily and mental harm or imposing measures intended to prevent births within the group. So, this brings us to the question: what would a genocide based on these underlying acts look like if we removed our focus on killings from the picture? And in helping to expose these misconceptions, I wish to take you back to the words of Rafael Lemkin, who said:

„Generally speaking genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a co-ordinated plan of different actions, aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves."[40]

So here, in Lemkin's original words, we see the notion that intent to kill all the members of a group is not the *sine qua non* of genocide. It is rather one fact pattern that could give rise to genocide.

DISPLACEMENT VERSUS GENOCIDE

The second misconception is the „displacement versus genocide" dichotomy. This is the mistaken idea that the destructive campaign of crimes in the municipalities in Bosnia and Herzegovina in 1992 was only about displacing the Bosnian Muslim population and therefore incompatible with the label of „genocide." It is a trap, because it suggests that genocide and displacement are mutually exclusive crimes, which is not correct.

This misconception characterised a lot of the earlier discussion on the relationship between the so-called „ethnic cleansing" patterns in Bosnia, and it is certainly reflected in some of the early ICTY jurisprudence. Obviously, displacement per se does not necessarily equal genocide but, as the Srebrenica precedents confirm, the intent to destroy is not undone because some or even a significant number of people are targeted with displacement rather than with death. On the contrary, the combination of physically destructive acts and displacement can very effectively lead to the physical destruction of the group, as it did in Srebrenica and as we argue it did in the municipalities in 1992.

As Judge Mohamed Shahabuddeen said in his opinion in the Krstić appeal judgement regarding the Srebrenica genocide, „standing alone, forcible transfer did not constitute genocide. But in this case the transfer did not stand alone. It was part, an integral part, of one single scheme to commit genocide, involving killings, forcible transfer and destruction of homes."[41]

ASKING THE RIGHT QUESTIONS

When we are trying to distil the essence of the crime of genocide the definitive question is not whether the accused intended to kill large numbers of people. That might be one way of proving intent, but it is not the only one. Nor is the right question whether the intent was to destroy or rather whether it was to expel, as if those two things were mutually exclusive.

The right question is, whether looking at the combined effects of the acts that the accused intends to inflict on a community, is it possible to infer intent to bring about the physical demise of the community, to destroy the foundations of life? In our cases at the ICTY we are still waiting for a final answer to that question, when it comes to the municipalities in 1992. It remains one of the most significant legal questions still pending from the conflicts in the former Yugoslavia before the ICTY.

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40 Raphael Lemkin Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (Washington: Carnegie Endowment for International Peace, 1944), pp. 79–95.
41 For Judge Mohamed Shahabuddeen's partial dissenting opinion to the Judgement in Prosecutor v. Radislav Krstić, see: **http://www.icty.org/x/cases/krstic/acjug/en/krs-ajO4O419e.pdf**

JOAN KAGEZI

Prosecutor, International Crimes Division Uganda

On 30 March 2015, at around 7.30pm, Joan Kagezi, was murdered by unidentified assailants, who opened fire on her while she was driving home from work in Kampala.

TOPIC:

National prosecutions at Uganda's International Crimes Division

The International Crimes Division of the High Court of Uganda was created in 2008 after the failed Juba peace talks[42] and is one of the most recent creations within Uganda's judiciary.

After 25 years of protracted warfare in Uganda's northern region, the Lord's Resistance Army[43] (LRA) and the Ugandan government entered the Juba peace talks. The war was characterised by abductions of young children who were conscripted into the army, the maiming of civilians, and constant attacks on civilians.

The talks failed because the final agreement was not signed. But there were addenda to the agreement that were signed, and one of them was on reconciliation and accountability, where the two parties agreed that the Government of Uganda would set up a special court to deal with those who are most responsible for the atrocities committed in the northern region. So it was against that backdrop that the judiciary was called upon to set up this division.
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INTERNATIONAL CRIMES DIVISION

Was it really necessary to set up the International Crimes Division given the fact there were already five indicted LRA commanders at the International Criminal Court?[44] Absolutely! We can see that the ICC only indicted five leaders, and that was in 2004/2005. We set up the International Crimes Division in 2008. Over time, there had been changes within the leadership structures of the LRA and many people had joined the rebellion and continued committing atrocities. The ICC could only deal with a few indictees, so in order to close the impunity gap, it was very important for a national court to be set up to deal with the others, the mid-level commanders, as well as the foot soldiers who had committed international crimes.

When we set up the new division, it was known as the War Crimes Division and its mandate was to deal with the core international crimes, i.e., genocide, crimes against humanity and war crimes. In 2009, its mandate was broadened to deal with human trafficking, terrorism, piracy and other transnational crimes.

MANDATE EXPANDS

This expansion of the division's mandate happened for a number of reasons. The first was the fact that the intention of the Government of Uganda and the judiciary was, not only to deal with the northern situation, but also to deal with all international crimes as they developed in the country. In addition, the five judges who were assigned to deal with these crimes wondered what they would be doing if the country was at peace. Assigning judges to deal only

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42 The talks, held in Juba, South Sudan, began in July 2006 and were mediated by Riek Machar, the Vice President of Southern Sudan.
43 The LRA is a Ugandan rebel group that originated in 1987 in northern Uganda among ethnic Acholi communities.
44 In 2005, the International Criminal Court issued arrest warrants against Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya for war crimes and crimes against humanity committed in northern Uganda. Lukwiya has since died, while Kony, Otti and Odhiambo remain at large. Ongwen surrendered to ICC custody on 16 January 2015.

with international crimes and paying them when there were no trials taking place was not prudent. So, it was important that their mandate was broadened because a lot of capacity had been built with the judges, prosecutors and investigators assigned to work in the International Crimes Division. We wanted to tap into this capacity, so as to also address other crimes, especially terrorism and human trafficking, which are connected to international crimes. For instance, the LRA had crossed borders into the Democratic Republic of the Congo, South Sudan and Central African Republic and was abducting and trafficking young children. The LRA could be seen as a terrorist organisation so it made sense for the judges to address such crimes so that if there were no core international crimes being committed, they would then deal with these issues.

Despite the initial impetus to set it up, the division does not only deal with the LRA conflict; it is also looking at another rebel group, the Allied Democratic Forces, Islamic extremists who also terrorise the country. They are now mainly based in the DRC, and two weeks back they killed around 60 civilians in the DRC, so they continue causing havoc, mainly on the borders of Uganda and the DRC. We are also looking at other emerging international crimes as they develop.

CHALLENGES

The first challenge since setting up the division is the fact that it was set up 23 years after a number of these atrocities had been committed. Evidence was not collected in real time. We had to figure out how to investigate cases where the crimes had occurred long ago. Of course we relied a lot on contemporaneous evidence, using the press. We also had to do a lot of benchmarking to see how other tribunals had dealt with these crimes. The ICC had come in earlier to investigate, and we requested their co-operation and asked whether we could share evidence.

The other greatest challenge we faced was the peace and justice dilemma. We have a law on amnesty in Uganda which was enacted in 2000 as a way of trying to bring an end to the rebellion. The communities from the northern region lobbied for a blanket amnesty, which forgives people for all crimes committed in the course of the war, regardless of whether they were committed against civilians. There are also challenges with other stakeholders, like the military. As investigators and prosecutors, we also do not have arresting capacity. It is the army which is in the DRC, that can arrest and bring in suspects. Of course, its interests are different from ours. Its interests lie in ending a war and not necessarily bringing people to justice.

There is also lack of a legal framework for co-operating with other jurisdictions. Most of the LRA suspects are now in the DRC, Central African Republic or South Sudan, and there are no treaties for the purpose of co-operation, so investigations are quite difficult. There are no laws obligating these countries to cooperate with us in the process of investigations.

VICTIMS, WITNESSES AND AMNESTY

We lack also a proper reparations programme, and at times witnesses and victims do not see why they should co-operate with prosecutors and investigators. We are trying to partner with civil society groups, so that civil society can offer psycho-social support to the victims, and we are also coming up with a number of innovations to see how reparations can be meted out to the victims.

There is also the issue of who really speaks for the victims. The victims themselves do not have a voice, and it is clan leaders and religious leaders who lobby the government. These leaders have indicated to the government that all the victims are interested in forgiveness, so forgiveness is imposed on the victims. Due to this, in 2012, we tried to lobby for the amnesty law to be allowed to lapse, and were successful. However, it was re-enacted in 2013 because the religious and the clan leaders again indicated that the victims were really interested in forgiving. Unfortunately, neither did civil society help much; they were mainly lobbying for the blanket amnesty law.

THOMAS KWOYELO CASE

We also have had problems being on the same page with other parts of the judiciary. For instance, there was the case of Thomas Kwoyelo, one of the mid-level LRA commanders who was charged with war crimes under the Geneva Conventions and with crimes under national law. He challenged the trial on grounds that he was entitled to amnesty under Uganda's Amnesty Act, while the prosecution argued that there could be no amnesty for war crimes. The Constitutional Court ruled that he had been discriminated against, and the trial failed to take off.

GENDER-BASED VIOLENCE

We are also not doing well in the area of sexual and gender-based violence. One reason lies in cultural barriers. There is a lot of stigmatisation. Some victims are also suffering from the Stockholm syndrome, and are traumatised. They are often overburdened with looking after their children, with whom they came from the bush after being abducted. If victims come to talk about what happened to them and co-operate with the prosecution, we must have a robust outreach strategy and be able to offer support.

DOMESTIC VICTOR´S JUSTICE

The International Crimes Division is intended to prosecute the most responsible for the war in northern Uganda and neighbouring areas, and is not limited to the LRA or the Allied Democratic Forces (ADF). We are also open to investigating the state actors, the Uganda People's Defence Force (UPDF), and we have actually gone out to investigate alleged crimes. The problem is that we have not presented anybody in court or indicted anybody because by the time we came in, a number of cases had been court-martialed. Some cases from the northern region are even tried in the civilian courts and perpetrators can be sentenced to death for crimes committed against civilians. So nothing stops us from trying state actors.

PEACE VERSUS JUSTICE DEBATE

To finish, I would like to stress that you cannot have peace without justice, but you also cannot have peace without reconciliation.

Our amnesty law did not require reconciliation between the victims and the perpetrators. A person who renounces the rebellion is given an amnesty certificate and then goes back to the community. When we go out to hold a dialogue with our communities, they have always asked why we have not presented the culprits to court. And when we tell them that they have been amnestied, they say, „But I have not forgiven, how can you forgive?" We then realise that we are sitting on a time bomb. Over time, I think there are going to be uprisings again within the communities.

In Uganda, we are now trying to come up with a transitional justice policy where we look at issues of amnesty but also truth telling and reconciliation, which will at least require that people reconcile before amnesty is granted. We are also looking at the formal justice process. We have to determine carefully whom to take to the formal justice process, whom to send to truth telling and reconciliation, and who is to be amnestied? We are also looking at young abducted children who were forced to commit horrendous atrocities against family members. Some of them should be subjected to the traditional justice mechanisms as a way of reconciling the different families.

ALEX WHITING

Professor, Harvard Law School

TOPIC:

Genocide as international core crime — The challenges of prosecuting genocide and other international crimes

The question I want to ask is: should prosecutors ever charge the crime of genocide? And I do not mean to ask whether they should charge or not charge, but whether, instead of charging genocide, should they charge other crimes, such as crimes against humanity and war crimes?

Before I try to address the question, let me say a few things about that question. The first is, I do not know the answer to the question. When I teach, I often pose questions, fake questions that I know the answer to, but that is not the case here. I do not know the answer. The second thing I want to say about the question is that I am not just trying to be a little bit provocative. I pose the question because I want to try to tease out something about the role of the prosecutor in combating and prosecuting these crimes.

CHARGING GENOCIDE

The question is: what kind of prosecutor do we want?

Why would I even pose this question? Why not charge genocide if there is a plausible claim of genocide? The reason perhaps for not doing so is that it's a really hard crime to prove.

It is a charge that is easily thrown out in the media and in public discussion, but in court it is actually quite difficult to prove because of the specific legal requirements. And even in cases that have been prosecuted successfully, like Srebrenica, it has required enormous costs and focus to do so, and there has been considerable controversy.

In every modern case where genocide has been alleged, perhaps with the exception of Rwanda, there has been controversy about whether it really occurred. Cambodia, which for many would be the archetypal genocide, is actually being debated. In Bosnia, the charge has been enormously controversial, and one of the cases the ICTY brought has never been successful in terms of alleging genocide. In Darfur, it is controversial. In Kosovo, it is controversial. So the reason to pause, to think about this question, is that it is hard to prove these cases.

But, so what? So what if it's hard? We are not here to do easy work. But this raises the question that I referred to earlier about what kind of prosecutor do we want at the international courts or even as domestic prosecutors doing these cases. And there are two kinds of prosecutors that you can imagine.

STRATEGIC AND EXPRESSIVE PROSECUTORS

I will call the first the strategic prosecutor. The aim of the strategic prosecutor is to prosecute as many people who are responsible for the crimes as efficiently and quickly as possible. That is the strategic, practical prosecutor. The mindset is that it does not matter what the crimes are — I want to put the bad person in jail for as long as I can, as quickly and efficiently as possible, and then put as many other bad people in jail as I can.

The other conception of a prosecutor is what I will call the expressive prosecutor. And that is the prosecutor who sees his or her role as a more expressive function, as defining for the international community what occurred and

what the crime is. So, prosecution is not just for the purposes of putting that person in jail but for history, for larger accountability, for the victims.

The strategic prosecutor sees his or her role as representing the international community, as representing peace, as countering impunity, as acting as a deterrent. The expressive prosecutor may want to further those objectives as well, but sees his or her role as well as more directly representing the interests of the victims. Sometimes, those two conceptions of the prosecutor can merge and there is no tension between them, but oftentimes tension exists.

GENOCIDE IS DIFFICULT

So, let's come back to the question of genocide. Genocide is hard to prosecute. The alternative is to prosecute the same crimes as crimes against humanity. Originally, the crime of genocide was developed because crimes against humanity were limited to crimes occurring in connection with aggression or war crimes, but today that has changed. Ever since the Tadić decision at the ICTY[45] and at all the modern tribunals, and certainly in the Rome Statute of the ICC, it is clear that crimes against humanity can be prosecuted in peace time. It requires showing that crimes were committed in the context of widespread or systematic attack on the civilian population. There is almost no case that could plausibly be prosecuted as a genocide that cannot be prosecuted as crimes against humanity.

STRATEGIC CHOICE

What's the advantage or disadvantage of charging one or the other if you have both arguable in a case? If you are the strategic prosecutor, then it is hard to see any advantage to charging genocide if you are going to have to fight for it. It is hard to justify that battle. Why? Because the scope of the evidence at the trial will be the same, you will be able to prove the same things. And, I would submit that the deterrent value of the two crimes is largely the same. The third thing is the anticipated sentence. I think that with significant crimes against humanity convictions, you can get a significant sentence that will justify the prosecution.

Is there any advantage to charging genocide? For the strategic prosecutor perhaps the only advantage is that the Genocide Convention is signed by more countries than the Rome Statute[46] and perhaps you would have a greater chance of getting a surrender or arrest of a target who is living in a non-Rome Statute country if you charge genocide instead of crimes against humanity. I think that is a pretty speculative advantage but that is the only one I could think of for the strategic prosecutor.

EXPRESSIVE CHOICE

For the expressive prosecutor, there is an important reason —the stigma value of the genocide conviction. It is important to the victims, it is important for history, and it is important for the international community. But it comes at a cost.

If we could do both that would be great. But there are advantages perhaps to thinking about just charging crimes against humanity. Think about the resource questions. If you had the choice of charging one person with genocide or five people or ten people with crimes against humanity, what would be the better choice?

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45 On 26 January 2000, Duško Tadić sentenced to 20 years' imprisonment for war crimes and crimes against humanity. For the judgement, see: **http://www.icty.org/x/cases/tadic/tjug/en/tad-sj970714e.pdf**

46 There are presently 146 parties to the Genocide Convention. For a full list as well as the treaty text, see: **https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en**
Presently, 123 countries are States Parties to the Rome Statute of the International Criminal Court. For a full list as well as the treaty text, see: **https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en**

Prosecutor Joan Kagezi and Professor Alex Whiting.

If you could prosecute more genocidaires using crimes against humanity than genocide, would that not lead to more accountability and more deterrence? Accountability is an important preventive measure, and if you can achieve more accountability, do you achieve more prevention?

The question is, can you achieve more prevention of genocide by not using the genocide as a crime in prosecutions?

Adama Dieng, Bernd Borchard and Bettina Ambach.

DISCUSSION:

THE COSTS AND EFFICIENCY OF INTERNATIONAL JUSTICE

MARK KERSTEN
Researcher at the London School of Economics and SOAS, author of Justice in Conflict:

Regarding the rather gloomy trajectories and trends in international criminal justice regarding costs and efficiency, are we seeing growing pains that require some problem solving, some moving of the dials of the project of international criminal justice, or whether these are structural problems that need some kind of more dramatic rethinking?

GREGORY GORDON
Associate Professor and Director/Assistant Dean for the PhD-MPhil Programme at the Chinese University of Hong Kong Faculty of Law:

One of the reasons why we have fewer defendants in front of international tribunals is because we know that we need to look at the people who are at the top, who are most responsible, and we now focus on them. Perhaps we should not be looking at the number of defendants, but because those people are at the top and because they planned things, we are looking at the entire situation that occurred and we have to reconstruct the entire crime scene, the participants, and an entire network. That is why it is more expensive.

ALEX WHITING
Professor, Harvard Law School:

I think the concerns about efficiency and about the number of cases and about the models raised by Thierry Cru-

vellier are important. I have a little quibble with the statistics, and I think those are perhaps a little misleading, since the ICC is a different model because it has to operate all over the world in lots of different countries at once. The ad-hoc tribunals get a marginal benefit advantage for each additional defendant. So when you invest in a country and you charge ten people, the eleventh person is cheaper to charge than the first one was. So that is going to completely distort the costs and the numbers and so forth. But, having said that, I think your points were important.

THIERRY CRUVELLIER

Veteran journalist and author of The Master of Confessions: The Making of a Khmer Rouge Torturer:

Obviously the underlying message of what I was saying in a sort of quick and provocative way is perhaps to bring more attention to the internal functioning of the courts. It is a very serious issue, one of their credibility in the long run, and I do not think, as far as I can tell, that this functioning has improved. To the contrary. And it is not only my assessment: you can actually talk to many former staff members of all these courts and they will all agree on this.

The main message that I am trying to convey is that we should be concerned about how the courts work. We regularly focus on the external factors that prevent these courts from working properly. But there are many internal factors that receive much less attention.

Obviously, and I said it before, my figures of the costs per accused must be approached cautiously –it is not as simple as this. However, I think they are useful as an indicator of the way the courts have evolved because we can absolutely look at it over time …and it has changed over time. These are useful figures, even though we should use them carefully.

Alex, I wish I could agree with your argument. I wish! I mean, if the efficiency of the courts were only going down because in the bad old days we needed some „opportunity prosecutions" which we no longer conduct, it would be less alarming. I wish that were the case but I really do not think that is the reality. Unfortunately, that is wishful thinking. Just take, for example, the DRC situation at the ICC.[47] Look at the Lubanga trial.[48] This was a really long trial, a very slow, long process for the most modest charge ever brought before a court, the conscription of children. This was a very limited charge compared to what the ICTY or the ICTR or the Sierra Leone court or the Cambodian court have dealt with. It is incredibly modest, and yet it took years.

Again, this indicates a huge problem inside the court rather then a change of strategy that could be legitimate.

BERND BORCHARDT

Founding Director, International Nuremberg Principles Academy:

I was Head of Mission at the European Union Rule of Law Mission in Kosovo[49] (EULEX), and over almost six years we spent roughly EUR 800 million and had 400 verdicts. Some 10% of cases dealt with war crimes but we had a lot of other tasks as well, including a huge training component. So, some EUR 2 million is a very high figure per case and we carried out an audit of our biggest war crimes case and it was below EUR 6 million.

Of course, $100 million per case is incredible, even with all the mitigating factors which were mentioned in favour of the big spenders. But, the other question for me is: what is the alternative? Can we build a society without justice being done? Is that possible? I grew up in a very frozen society when I was a kid. The real debate about German war crimes started only in 1968. There where a few prosecutions before that, very few, but the real debate started

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47 For details on the International Criminal Court's prosecutions in the Democratic Republic of the Congo, see: **http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx**

48 On 14 March 2012, Thomas Lubanga Dyilo was found guilty of the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate actively in hostilities. He was sentenced to a 14-year term of imprisonment. Lubanga had been in ICC custody since 16 March 2006.

49 The European Union Rule of Law Mission in Kosovo (EULEX) was established with the general aim of supporting Kosovo institutions, judicial authorities, and law enforcement agencies in developing an effective judiciary based on the rule of law and free from political interference. It operates within the general framework of the UN Security Council Resolution 1244, was approved in February 2008 and became operational in December 2008. For more on the mission, see: **http://www.eulex-kosovo.eu/?page=2,44,197**

with the student revolt which took place in 1968; and here in Germany the students asked their parents, „What have you done?"

So this showed me that it is difficult for a society to live in artificial denial of the past. That again leads to the question: what is another alternative between an ICC and local courts? With local courts we end up with the question of the inability and unwillingness to prosecute and to adjudicate, so there must be something in between. The way forward we chose at EULEX was to go for mixed investigations, mixed prosecutions and mixed panels, and I think this could be a better way forward. It is more comparable to the hybrid courts and can enable courts to meet people in the situation countries at eye level, and not to go there as the good, white Western Europeans doing good things in the world.

THIERRY CRUVELLIER

The reason why I put the efficiency figures for all the courts together is because I believe that it would actually be less controversial if the costs were high and were matched by high efficiency. The problem is the gap. Can we build a society without justice? I guess none of us would believe this, though we always bear in mind in our field that there are countries that have decided go through their transition without justice, at least for a period of time. We always use Spain as an example. What is interesting there is that now, about 40 years later, we see that the demands for some sort of justice have actually increased over the last 10 years and a number of things have been done. However, Spain is always considered as an example of a successful transition with complete amnesty and some forgetting.

The reason why I also raised the issue of the reduction in our options of available models for justice is because I have the same concern. I think that one of the lessons of the late 199Os was that the more options we have, the better. And it seems that we have narrowed our horizons, that there are fewer chances to have hybrid models today, even though they have proven to be very flexible and could be adapted to a particular situation.

ALEX WHITING

I am very optimistic on the question of whether these courts are effective. I think the modern courts have been operating for only 20 years, which is not a long time. And I think they have accomplished an enormous amount in those 20 years, not just in terms of the numbers of people who have been convicted of crimes, but in terms of the way it has changed the dialogue. It has changed the discussion, so there is no atrocity that occurs today and no conflict that occurs today without a discussion of individual accountability, individual justice. That is an enormous, important development.

On the question of costs, I want to say one thing about cost and one thing about efficiency. Yes, the courts are expensive, but it is a lot cheaper than the cost of atrocity and the cost of war. I will just give you one statistic here: if you take the entire budget of the ICTY from 1993 until today, the entire budget combined of every year would fund eight hours of the war in Afghanistan. Eight hours.

If you think that the courts play a role in prevention, if they have even a tiny effect on preventing atrocities or preventing conflict, then they are a bargain. An absolute bargain. I think that efficiency is difficult, but again it is the early stages for international tribunals; we are just beginning this experiment and it is going to take generations before we get this right. It is two steps forward, one step back, but one day we will get there.

Journalist and author Thierry Cruvellier.

DISCUSSION:

PROSECUTION RESOURCES AND CHARGING INDICTEES WITH CRIMES AGAINST HUMANITY RATHER THAN GENOCIDE

GREGORY GORDON
Associate Professor and Director/Assistant Dean for the PhD-MPhil Programme at the Chinese University of Hong Kong Faculty of Law:

I am wondering if there are certain cases where there is no question about charging defendants with genocide rather than crimes against humanity. Rwanda would be a classic example. You are going to charge genocide in the case of Rwanda; there are certain cases that absolutely call for it.

PETER BOUCKAERT
Emergencies Director, Human Rights Watch:

When you are in my business of trying to prevent killings while they are still going on, we face the same challenges. Except for a few situations like Rwanda, it is even more difficult to determine that we are in a situation of genocide when we are in the middle of the killings, because it is very confusing, it is difficult to figure out what is going on, it is difficult to figure out the command structure behind the scenes and it is difficult to figure out the intent. So, I think we need to avoid situations where we will only step in to stop the atrocities, once we have determined that a genocide is taking place because then it may be very much too late.

ALEX WHITING

Professor, Harvard Law School:

I agree on Rwanda and the genocide charge. Of course, in cases were it is clear, perpetrators should absolutely be charged. I was trying to focus on cases where there is a dispute. And even there I am not certain what the answer is because I do think that there is an important expressive value, and I was just trying to pose the fact that there can be costs to that, and we have been reminded about what the costs mean here. With respect to Peter Bouckaert's, point, I am trying to think about whether we can change the hierarchy of these crimes and change the dialogue a little bit. Often, part of the challenge is that in the public discussion if it is not a genocide, if it is not found to be a genocide, if it is not considered to be a genocide, then that is a failure. It is hard to imagine that we have to do this, but I think that raising the stigma status of crimes against humanity is perhaps something that needs to be achieved, and there I am speaking to the journalists.

MICHELLE JARVIS

Principal Legal Counsel, Office of the Prosecutor, ICTY:

The first thing I wanted to flag is whether it is really true that prosecuting a genocide case is necessarily more resource-intensive than prosecuting a case of crimes against humanity. We have had this exact question come up in our Karadžić and Mladić cases, where we are of course prosecuting persecution as a crime against humanity in relation to the same conduct in the municipalities in 1992 which is used as the basis for the genocide charge.

I think on the whole, with a few small exceptions, the evidence is identical. So I do not think that for us the genocide charge has really added anything in terms of resources and time beyond what we would have already had to do to prove crimes against humanity. I also wanted to ponder where these kinds of questions might lead us because it strikes me that it is, not only the choice between genocide and crimes against humanity, but really a choice between any kind of more complex international criminal law charging framework and a simpler one.

I was thinking as you were talking, about, for example, in our cases where we prosecuted sexual violence in the Foča municipality. In our office, we initially had a question of how we would frame those charges: would we prosecute rape as a war crime or even rape as a crime against humanity, or would we do something more progressive perhaps and charge enslavement based on sexual violence as a crime against humanity.[50] That of course did have resource implications; we did have to adduce a lot more evidence for the enslavement charge than we would have for a simpler rape as a crime against humanity charge. But, had we not done that, I really think we would have failed to reflect the reality of the victims' experiences, and it would have left us with a much less rich body of jurisprudence. So, I guess I am clearly an expressive prosecutor rather than a strategic one.

I also see the same issue come up in some national systems. From what I know, one of the criticisms around what is being done at the national level in Bosnia on sexual violence crimes is that they are being prosecuted as one-off war crimes, to the extent that they are being prosecuted. That is the simplest way, the least complicated way to do it.

What we want to encourage is for prosecutors at the national level to use some of the more complex charging strategies, like charging defendants with crimes against humanity, which more accurately reflect the context in which

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50 The ICTY was the first international criminal tribunal to enter convictions for rape as a form of torture and for sexual enslavement as a crime against humanity.
One of the landmark cases was the case against Kunarac et al. The three accused Bosnian Serb army officers Dragoljub Kunarac, Zoran Vuković and Radomir Kovač, played a prominent role in organising and maintaining the system of infamous rape camps in the eastern Bosnian town of Foča. In 2002, all three accused were found guilty of sexual enslavement as crime against humanity, and also found guilty of rape as a crime against humanity. Prior to the verdict, international law had associated enslavement with forced labour and servitude, so the definition of the crime was therefore widened to include sexual servitude. Kunarac, Kovač and Vuković were sentenced to 28, 20, and 12 years' imprisonment respectively.
For more on the Kunarac et al. case, see: **http://www.icty.org/case/kunarac/4**
For more on the ICTY and crimes of sexual violence, see: **http://www.icty.org/sid/10312**
For an overview of landmark cases at the ICTY, see: **http://www.icty.org/sid/10314**

the crimes actually took place. Having said that, I do agree very much about the difficult line that a prosecutor has to walk between trying to push the boundaries of genocide and therefore placing an emphasis on that in terms of a hierarchy of crimes, and not unwittingly devaluating crimes against humanity. This is certainly something that we had to pay close attention to with our communications with victims' groups in relation to the Karadžić and Mladić cases because, given the history of this charge at ICTY, we know that we are pushing the envelope – we believe in an appropriate way – but nevertheless we do not want victims to come away feeling somehow that their harm is less recognised because we failed to prove the genocide charge.

THIERRY CRUVELLIER

Veteran journalist and author of The Master of Confessions: The Making of a Khmer Rouge Torturer:

We will find food for thought on crimes against humanity versus genocide at the Cambodia court because the charging of genocide in the second trial is, I think, a recipe for big trouble in many respects and was not necessary.[51] The court now takes the risk of upsetting the enormous majority of Cambodian people, the Khmer, who are not deemed to be victims under a genocide charge, as only the Vietnamese and the Muslim Chams will have this status. You cannot imagine what it will mean if the court comes to a verdict that says there was a genocide against the Vietnamese in Cambodia but not against Khmer people in general. I do not want to see how this would unfold.

AGNES CALLAMARD

Director, Global Freedom of Expression & Information, Special Adviser to the President, Columbia University, New York:

I think it is correct to discuss the efficiency of international courts. At the end of the day, victims and communities want justice because that is the way to reconciliation. They want to see these courts being efficient and people who have committed atrocities being put behind bars. Regardless of whether they are charged with genocide or crimes against humanity, it is important that justice be done in reasonable time. Yet on the other hand, I believe that crimes have to be called by their name, and that's the reason why Lemkin put a name to this crime without a name, „genocide". The way the justice system is built is based on the legal definition of offences, so the prosecutor has to put the right name to the issue brought before a court. Otherwise, a court cannot address all the issues.

ALEX WHITING

Responding to Michelle Jarvis, I think even where the evidence is the same in the crimes against humanity and the genocide charges, there can be increased costs in terms of litigation. And that has been true in the Karadžić case and true in the Srebrenica case. There have been appeals and there has been litigation on the issue. It is also true in the Darfur case at the ICC. Also, there can be costs in terms of raising expectations or how it is received in the community. But I have to say your second point about the benefits of charging the more complex crimes is a powerful point and powerful argument in favour of doing it and taking the stance of the expressive prosecutor.

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51 Case 002 at the Extraordinary Chambers in the Courts of Cambodia involves: Nuon Chea, former Chairman of the Democratic Kampuchea National Assembly and Deputy Secretary of the Communist Party of Kampuchea, and Khieu Samphan, former Head of State of Democratic Kampuchea. The accused are charged with crimes against humanity, grave breaches of the Geneva Conventions of 1949, and genocide against the Muslim Cham and the Vietnamese. For more on the case, see: **http://www.eccc.gov.kh/en/case/topic/2**

PANEL III:

PROTECTING POPULATIONS FROM ATROCITY CRIMES

MODERATOR
Krzysztof Kotarski Chief Project Co-ordinator, Wayamo Foundation

- **Rainer Huhle** Political Scientist, Member of the UN Committee on Enforced Disappearances

TOPIC: ***Opportunities and challenges of the UN Human Rights Mechanisms in increasing protection of populations***

- **Peter Bouckaert** Emergencies Director, Human Rights Watch

TOPIC: ***Responding to mass atrocities in the Central African Republic***

- **Jamie A. Williamson** Head of Unit, Relations with Arms Carriers, International Committee of the Red Cross, Geneva

TOPIC: ***Preventing Mass Atrocities — the role of the military, from doctrine to practice***

Rainer Huhle, Krzysztof Kotarski and Peter Bouckaert during panel on protecting populations from atrocity crimes.

RAINER HUHLE

Political Scientist, Member of the UN Committee on Enforced Disappearances

TOPIC:

Global trends at international tribunals and the concerns they raise

The term, „atrocity", is probably the most venerable and most antique of our denominations for mass violence. It goes back to the Balkans in the 187Os, when the famous Bulgarian or Ottoman crimes were described as atrocities, especially by British politicians, including William Gladstone.[52] The Moscow declaration of 1943,[53] the very foundation of the Nuremberg trials, also included a statement on atrocities. It covered all the crimes that would later be prosecuted at Nuremberg under the headings of Crimes against Humanity and War Crimes. Hence, the concept of atrocities goes directly to the Nuremberg trials and we find it again in the Allied Control Council Law Nr. 1O,[54] which was the legal basis for the subsequent trials. The Tokyo tribunal is also full of references to atrocities, so I appreciate that we are recovering this overall concept for the different types of international crimes against mass populations and I deeply appreciate that the Special Adviser of the UN Secretary General on the Prevention of Genocide Adama Dieng is expanding the definition of his mandate from genocide alone to atrocity crimes.

HUMAN RIGHTS MECHANISMS

Taking a very broad view of what human rights mechanisms are, we can include the UN General Assembly, the UN Secretary General and, of course, the UN Special Advisor on the Prevention of Genocide. We could also include some special agencies, such as the United Nations High Commissioner for Refugees (UNHCR), which does a lot of work — and perhaps more than anybody else — on the prevention and protection of populations against mass crimes. We also have the UN Office for the Co-ordination of Humanitarian Affairs (UN OCHA) and of course the High Commissioner for Human Rights, who sometimes issues early warnings through declarations and public statements, which are hopefully taken into account.

The field offices of the High Commissioner are very important sensors for early warnings of situations that might develop into mass atrocities, and we have the whole system of the UN Human Rights Council that works through resolutions and the universal periodic review; and, beginning in 1963 with Vietnam, we have the UN Human Rights Council commissions of inquiry.

Right now, we have the latest on Gaza, and we will shortly be having inquiries on Sri Lanka, Syria, North Korea and Eritrea. In the past, we had inquiries on Cote d'Ivoire, East Timor and other countries, and such inquiries are an instrument that should be developed even further. Then, of course we have the Special Rapporteurs and working groups. It is worth mentioning that one of these, the Special Rapporteur on extrajudicial, summary or arbitrary executions, issued a strong public warning in 1993 on what was going on in Rwanda. Unfortunately, the warning went unheeded.

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52 For example, see: „Bulgarian horrors and the question of the East." For full text, see: **https://www.archive.org/stream/bulgarianhorrorsOOgladrich/bulgarianhorrorsOOgladrich_djvu.txt**

53 For full text, see: „Declaration of the Four Nations on General Security" at **http://avalon.law.yale.edu/wwii/moscow.asp**

54 For full text, see: Control Council Law No. 1O at **http://avalon.law.yale.edu/imt/imt1O.asp**

TREATY BODIES

Treaty bodies are normally not considered very important or very strong parts of the prevention system but some have so-called inquiry or examination competencies. For example, the Committee Against Torture (CAT)[55] monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[56] brought into effect in 1987. We have such competencies in the Optional Protocol to the Convention against Torture (OPCAT),[57] the optional protocol of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[58] the optional protocol of the Committee on the Rights of Persons with Disabilities (CRPD)[59] and in the very recent draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (CESCR).[60] So, some treaty bodies have the faculty to conduct investigations, inquiries or examinations.

Here I should briefly like to highlight the Committee on the Elimination of Racial Discrimination (CERD)[61] which does not have an inquiry clause in its convention but has developed a very interesting practice on its own.

CERD has put in place a very elaborate early warning system, specifically on genocide. They have assigned themselves the task of denouncing situations that they perceive as potentially dangerous and, in that sense, have changed the whole structure, the whole philosophy of what a treaty body is. For instance, they even make suggestions to the Security Council to address certain situations. While I doubt that the Security Council heeds these early warnings from CERD, they nevertheless provide them.

They have set up a working group on early warning and urgent actions, and have even adopted a declaration on the prevention of genocide and incorporated it into their own rules of procedure, in order to communicate with the office of Adama Dieng and report their findings on certain difficult, delicate issues in cases where they perceive a danger of possible genocide or other mass crimes. They have established a list of indicators of potential signs of possible danger. In terms of treaty bodies, I regard CERD as really unique, and consider that they have been very creative and daring in interpreting their convention and rules of procedure. Other treaty bodies might well be inspired by some of their procedures.

USING ALL AVAILABLE INSTRUMENTS FOR PREVENTION

The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED)[62] is more progressive and more advanced in some respects than are other conventions. While we have no optional protocol, we do have some direct powers under the convention, such as country visits which can be requested when we realise that a state party might be seriously violating the provisions of the convention.

As with all treaty bodies, these visits have to be undertaken in mutual agreement with the state party. However, even if the state does not accept a country visit, it is a signal and an opportunity to raise awareness. For example, in our last annual report presented to the UN Secretary General we noted that we had asked the Mexican government for a country visit, and that the country visit had not taken place. We published this in our annual report, and the Mexican press took up the matter.

Furthermore, if the committee receives well-founded indications that enforced disappearances are being imple-

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55 For overview, see: **http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx**
56 For full text, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx**
57 For a list of ratifications, see: **http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx**
For full text, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx**
58 For full text, see: **http://www.un.org/womenwatch/daw/cedaw/**
59 For overview, see: **http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx**
60 For full text, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx**
61 For full text, see: **http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx**
62 For full text, see: **http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx**

Journalist and researcher Nirmanusan Balasundaram.

mented on a widespread or systematic basis, it has the power to bring the matter to the attention of the General Assembly of the United Nations and request it to deal with the situation.

Thus, even if prevention and early warning are not the foremost task of treaty bodies, they can use their competences in creative ways for these purposes. After all, they are part of the whole United Nations system to protect human rights, and treaty bodies can and should look for their specific role in the system and the best ways to link up with the other mechanisms.

PETER BOUCKAERT

Emergencies Director, Human Rights Watch

TOPIC:

Responding to mass atrocities in the Central African Republic

We are in a very historic courtroom, and I want to state that prosecuting genocide is very important. Even so, it also represents a failure by the international community because it means that we have failed, once again, to prevent genocide or mass atrocities.

Consider the Central African Republic mired in a conflict that is not a religious war between Muslims and Christians but has its roots in the absolute corruption of the country and the subsequent fight for power and control of resources.

MASS DISPLACEMENT

Over the last year and a half, my colleague and I have been to the Central African Republic fifteen times on missions that have lasted from two to three weeks. We have travelled tens of thousands of kilometres in this very difficult country in an attempt to stop the killings.

It all began in March-April 2013, when a group of Muslim rebels, known as the Seleka, overthrew the corrupt government of President François Bozizé Yangouvonda. When the Seleka took control of the country, they were mostly Arabic speakers who did not speak the national language Sangho or French, and who had a very difficult time communicating with the population. They only knew how to rule through the gun, and so they plunged the country into an absolute crisis of what in French we call „exaction", where they would arrive in villages and just open fire on the population or burn down buildings.

By September 2013, a great part of the population had become displaced, living a life of pure hell in the bush without any assistance from the humanitarian community, except for the International Committee of the Red Cross (ICRC) and Médecins Sans Frontières (MSF). In November 2013, I went to Bossangoa, the capital of the north located about 300 km north of the national capital Bangui, and I met with Muslim leaders who told me that just a month before, in September, more than 300 Muslims had been slaughtered in a series of massacres that happened on the same morning of the same day in five different towns. At first, I did not believe them. I thought they were just throwing out some numbers but they brought us witness after witness, mothers who told us how their children had their throats slit in front of them, and entire families who only had one survivor.

We realised then that a new rebel group had been founded, the Anti-balaka, and that they were intent on killing the whole Muslim population of the Central African Republic in response to what the Seleka had been doing since the beginning of the conflict.

REPRISALS AND CIVILIAN TERROR

The Anti-balaka movement arose out of the terror of the Seleka, with the aim of cleansing the country of its Muslim population. We realised that it was an organised movement, not just popular anger. It was a movement directed by army officers who had gone into the bush and who used the same kind of traditional means that had been used to organise the Mau Mau in Kenya and the Mai Mai in the Democratic Republic of the Congo. Through traditional animist initiation rites, they mobilised the population to fight with machetes and rudimentary guns, and

targeted not only the Seleka, but the entire Muslim population.

The Muslim population in the CAR consists of two very distinct communities, both very vulnerable. The first are the Muslim traders, the so-called Arabs, who live in towns and control the markets, who buy diamonds and gold, and who are resented because they speak another language and because of their relative wealth. The second are the Peuhl, the nomadic cattle herders who move constantly with their cattle, which can stray into the fields, and destroy crops. They are in perpetual conflict with local farmers.

PUBLICISING MASS ATROCITIES AS THEY HAPPEN

Having worked in the CAR since 2007, we knew that we were on the brink of an extremely bloody conflict. The problem was that nobody knew where the CAR was, and very few people were paying attention. There was a UN mission, BINUCA[63], from the UN office of political affairs, but they were all in Bangui instead of monitoring the terrain. So, information was not really coming out.

We had to find a way to get the message out, so we started using social media and brought one of the world's best photographers along because we wanted to draw the attention of the international community and the media to this conflict. Just a month later, in December 2013, the issue was on the international agenda, the French very suddenly decided to intervene with a force of 2,000 peacekeepers, and the Americans gave $100 million to the African Union's International Support Mission to the Central African Republic (MISCA) to try and shore them up. But in a country which is bigger than France, Belgium and Luxembourg combined, the presence of 2,000 French troops and 6,000 AU troops was very small when the country dissolved into the kind of bloodshed that we last saw in Rwanda.

FRENCH PEACEKEEPERS ARRIVE

When the French peacekeeping force arrived, it interpreted their mandate as being that of disarming the Seleka. But the problem was that, once you disarmed the Seleka, you left the Muslim population which remained behind to face the fury of the Anti-balaka. This is something that the French had not anticipated.

In January 2014 – just to give you one example – the Anti-balaka attacked a neighbourhood on the outskirts of Bangui, and in just one day cleansed it of its entire Muslim population, except for 36 people who were stuck in one house. I went to the French peacekeepers who were only a kilometre away and asked them to evacuate these 36 people who faced certain death if they remained the night. The French captain told me, „We are not here to choose sides."

I told him he did not really understand why he was there if that was his response because they were there to protect the civilian population. I only managed to convince him to save the people by saying that the French Foreign Minister, Laurent Fabius, was due to arrive the next day for the inauguration of President Catherine Samba-Panza, and that it would be rather embarrassing if a massacre occurred just a kilometre away from the French peacekeepers.

However, the violence continued for months, and I can only describe my feeling of being utterly alone, being on the ground and seeing UN personnel staying in Bangui the entire time, witnessing all the massacres happening all around us in the countryside. Entire Muslim communities just fleeing, several hundred thousand people leaving the country between the months of January and March 2014, and almost no international response on the ground. Many of the peacekeepers tried, especially the Rwandans and the Burundians who understood what was taking place. What was happening in CAR reminded them a lot of what had happened twenty years previously in Rwan-

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63 For details, see: **http://binuca.unmissions.org/Default.aspx?alias=binuca.unmissions.org/binuca-eng&language=en-US**

da and, even though Human Rights Watch has many differences with Paul Kagame's government and its repression in Rwanda, we have to acknowledge the very important role that they played in trying to stop the killings.

Just to give you an idea of how powerless the peacekeepers were in the face of this absolute violence, in March 2014 I returned to Bangui and was confronted by a man parading in front of the French peacekeepers, with the severed leg of a Muslim that had just been killed. Ironically, he was wearing a Central African Republic t-shirt and we watched as he cut the body to pieces and threw human flesh at the French peacekeepers whose orders were only to shoot if their lives were threatened or if there were lives to save. Since the man was already dead, this was not the case at this time. And this is how powerless the international community was in the face of this bloodshed.

ROLE OF NGOs

I think that the most important role HRW played was in documenting the massacres and drawing attention to what was happening, and in engaging directly with the killers on the ground.

The most profound failure on the part of the international community was that diplomats or peacekeepers did not go out in the country to sit down with the Seleka and Anti-balaka leaders to explain to them the consequences of their actions, and try and stop the killings. When we engaged them, we were never threatened, and they respected us for trying to protect the civilian population from the killings, and listened to us with great care. They were often able to see that a potential consequence of their actions might be international justice but they also wanted to explain their motivations and grievances and why all the killings were taking place.

One Anti-balaka leader told me, „You have come here to ask me to protect the Muslims, but it is the Seleka who burned our houses and we are living out in the bush. Our children are dying from malaria and other diseases because of the rainy season. So tell me, why should we not go and burn them out of their houses, or just chase them away and go and live in their houses."

When we understand the local dimension of this conflict, we can respond. We can tell him, „We can come and bring reconstruction materials, so that you can live in your houses again, so that you can resume your normal life."

I think that there was a very profound failure by the United Nations in its political mission to engage with the actors on the ground and meet the humanitarian needs of the population. Even a small presence in some of these towns would have made all the difference when the killings were going on, yet despite the best efforts of some of the peacekeepers, the mission was not aggressive enough.

IMPACT OF PROSECUTIONS

In 2007 I was in the CAR during the previous wave of violence and I met a rebel commander. I asked him if he had any child soldiers and he responded very proudly, „Of course, I am a former teacher, all of my kids are with me!"

I explained to him that just across the border in the DRC, Thomas Lubanga had been indicted for the recruitment of child soldiers by the International Criminal Court. He had never heard about the case, or the laws on child soldiers. We drove away and the next morning we passed the same road again with the UNICEF goodwill ambassador. All of a sudden, the commander came into the middle of the road, frantically waving us down and asking us to stop the car.

„I have not slept all night," he said. „I did not know I was a war criminal and I don't want to go to jail. Please help me get rid of these children."

We contacted UNICEF, and this was the first movement to demobilise child soldiers in the Central African Republic. I can tell many more stories like this, and the threat of justice does have an impact on the behaviour of these people,

Journalists at the Documentation Center Nazi Party Rally Grounds in Nuremberg.

but only if we engage them personally. Confronting them with the impact of their actions — and it is the same in preventing genocide and similar crimes — requires action on the ground.

It is all very well to issue statements about the Secretary General being deeply alarmed or gravely concerned about these situations but this has to translate into action on the ground. We have to be willing to go out there and try to stop the killers, so that we do not have to prosecute them later at the cost of, what is it now, $500 million per case? There are cheaper ways to stop genocide.

JAMIE A. WILLIAMSON

Head of Unit, Relations with Arms Carriers, International Committee of the Red Cross, Geneva

TOPIC:

Preventing Mass Atrocities — the role of the military, from doctrine to practice

Whilst judicial accountability can have a deterrent effect in certain circumstances, considering the number of alleged violations occurring in contemporary armed conflicts, there are arguably limits to its overall impact. The issue then, is how to ensure the prevention of violations before they occur. First and foremost, the prevention of mass atrocities is very much a question of dialogue with those engaged in the hostilities.

ENGAGING MILITARIES

The ICRC operates in countless contexts globally, many of which are active conflict zones, e.g., the Ukraine, Libya, CAR, the DRC and Iraq. The aim in all of these contexts is to have the armed actors, state and non-state alike, meet their obligations under the Geneva Conventions.

By signing the Geneva Conventions, all states have assumed responsibilities to ensure that their militaries are effectively trained in International Humanitarian Law. There are clear obligations under the Geneva Conventions with regard to training and ensuring effective leadership within the military, to have leaders who will take the responsibility of ensuring that their subordinates do not commit violations. Influencing the 'good' behaviour of subordinates presumes that there are commanders who fit the mould of being able to lead by example. Thus reaching those leaders, identifying the individuals who, within a hierarchy, can influence their subordinates, is particularly important if we are to see International Humanitarian Law respected.

It goes without saying, that it should be easier to have a substantive dialogue on education programmes and training, or to address questions of doctrine development with state militaries than with non-state actors. Having the right doctrine and the right education can be a preventive measure, which can lead to better behaviour by militaries where chaos reigns. However, even amongst the various militaries the world over, there are varying standards of sophistication, capacity and professionalism. Speaking at a granular level about the Geneva Conventions with, for instance, the US, the UK or the French, is less problematic than with other militaries, some of which may not necessarily have the same sense of respecting International Humanitarian Law and human rights, or who may be heavily influenced by the political apparatus in their respective countries, where the rule of law is an empty shell.

Thus, in some extreme situations, absent political buy in, training programmes and IHL dissemination sessions will have little effect in encouraging good behaviour, the protection of civilians and preventing the commission of atrocities by the armed forces.

Another area of focus in the prevention of mass atrocities relates to pre-deployment briefings and preparation. As we have seen over the years, it is crucial for instance that any pre-deployment briefings for peacekeepers must allow them to understand the nature of the context and the dynamics of the conflict within which they will operate, ensuring that they appreciate the reality of the situations to which they are deployed.

Likewise, are they adequately prepared to handle some of the atrocities that they will witness and possibly be subjected to?

Journalist Wiebke Schönherr from Berlin.

SOLDIERS UNPREPARED

What is frightening about the recent stories we have heard today about events in the CAR is that they are very similar to those that we saw in Rwanda. I remember sitting at the Rwanda tribunal, listening to Belgian peacekeepers recounting exactly the same harrowing stories. For many of these peacekeepers, by following orders decreed by 'New York' and leaving civilians to the fate of extremist militias is something that they struggle with every day. However they were simply following orders. And because they were duty bound to follow them, no single individual was prepared to actually break with the mandate, to break with the rules of engagement which had been given to them, to actually enforce the protection of civilians, and to tell UN headquarters in New York that, „no, we have a responsibility because there are civilians dying, and through the Geneva Conventions we have a responsibility to ensure their protection".

To that end, pre-deployment briefings are essential. Rules of engagement and standing operating procedures are likewise very important because individuals need to know how they are meant to operate when deployed as peacekeepers, and that they are meant to understand under what circumstances they can use force. There is also a need to reconcile the need to ensure effective protection of civilians, with what can be at times narrowly defined mandates with limited room to manoeuvre beyond their rigidity.

Understanding the legal framework which governs their operations is also a key element of pre deployment briefings. It has been reported that soldiers can often be unprepared for the kind of law enforcement mandate that is attributed to many peacekeeping operations. For example, are the foreign troops equipped with a capacity to detain perpetrators of violence? Do they have detention facilities, and if so, for how long can they hold on to prisoners? Because at some point, you may have certain human rights groups come out and say, „you cannot detain individuals without having them appear before a competent body". There will be questions and there will be allegations of misdeeds. But if the peacekeeping troops are not fully equipped to detain, then what choices do they have?

NON-STATE ACTORS

The Geneva Conventions require a dialogue with all parties to the armed conflict and the ICRC endeavours to do so. However, it is immensely difficult to get the rubber stamp from the international community to have that dialogue with non-state actors. A number of states still feel that to speak with non-state actors is to give them some form of legitimacy -and that is counterproductive. Common Article 3 to the Geneva Conventions makes it clear that dialogue with non-state actors does not give them any form of status but that they nonetheless have obligations as parties to the armed conflict to respect International Humanitarian Law. We need to overcome the 'legitimacy stigma'.

Over the past few years, we have seen that a tightening of the rules governing the manner in which NGOs and other groups can engage in dialogue with non-state actors. Questions of material support to terrorism have been raised, but the dialogue with non-state actors is vital. Non-state actors, in the same way as regular armed forces, need to understand that they have certain minimum obligations with regard to humane treatment, with regard to the conduct of their hostilities and with regard to care for detainees. Without such a dialogue, we will see a continuation of atrocities being committed.

INSTRUMENTALISATION OF HUMANITARIAN ACTORS

In the past few years, we have seen major questions raised about the instrumentalisation of humanitarian actors by state actors in conflicts. We have seen major debates with regard to counterinsurgency doctrine in Afghanistan and elsewhere, looking to humanitarian actors as part of the government apparatus or part of the international community's response.

Over the past few years, we have also seen an increase in attacks against healthcare facilities, doctors and healthcare personnel. Of course, such attacks create issues directly for those individuals and those facilities under fire, but the knock-on effects are quite important as well. One such effect is that there will be no long-term medical care for individuals in regions where medial personnel are targeted. Communities affected by malaria or HIV/AIDS, or individuals suffering the consequences of sexual violence will not have access to primary medical care. That is something that the ICRC and a number of partner organisations are trying to address as a matter of importance because, without medical care in conflict situations, the entire substructure and basic foundations of any society are going to be undone.

COMPLIANCE

The last question is compliance. Prevention of atrocities also means finding the mechanisms to ensure that violations are brought to an end as and when they occur. Ultimately, if we look at the genocide convention and the Geneva Conventions, the responsibility lies first and foremost with States. As humanitarian organisations, there is only so much we can do, and until states fully assume their responsibility to ensure respect for these conventions, we are likely to see again mass atrocities being perpetrated.

Father Bernard Kinvi, from the Roman Catholic Mission in Bossemptele, CAR and Dianne Rossier.

DISCUSSION:

PEACEKEEPERS, ACCOUNTABILITY, AND TRAINING TROOPS TO PREVENT AND RESPOND TO MASS ATROCITIES

JOSEPH ROBERTS-MENSAH
Africa Director, Wayamo Foundation:

When we talk about training peacekeepers we seem to lump everybody together and the term „peacekeepers" is used interchangeably when discussing soldiers, whether they come from the United Nations or from former colonial powers intervening in their previous dominions. I want to be clear on this distinction because the mandate that applies to UN peacekeepers is often being enforced by the least sophisticated troops.

The largest troop-contributing countries are Nigeria, India and the rest who send conscripts and other people to enforce peacekeeping. So the kind of sophistication that is required to intervene in an atrocity or genocide situation may not be as apparent as we would like it to be. How do we propose to be able to get the kind of troops on the ground who understand clearly what is going on, and who are able to do that job? And how do we ensure that everybody is going to operate under the same kind of mandate? Not a colonial mandate, whereby I'm going in to save the day because I'm French or English or American, but rather because I'm a UN peacekeeper under a Chapter 7 mandate?

PETER BOUCKAERT
Emergencies Director, Human Rights Watch:

The question about UN peacekeepers and the standards that they adhere to in contrast to post-colonial interventions is an important one. I think that we have seen some very positive interventions by the former colonial masters

(if we want to call them that), e.g., in Sierra Leone more than a decade ago, in 2000, where disaster was averted with the help of British troops.[64] But these are very complicated interventions. To put it simply, France has many more interests at stake in francophone Africa than just the interest of the people of the Central African Republic.

There are also big problems with UN peacekeeping operations. I worked for the UN in Darfur in 2005, and part of my job was to teach UN peacekeepers about human rights standards. Soldiers in the Nigerian contingent asked, „Why shouldn't we torture? I mean how are you going to get anybody to confess? You think those bad guys just tell you they committed a crime? No, you got to torture them a little bit."

Meanwhile, a Nepali liaison officer told us that he had left Nepal and joined the UN because he had two war crimes investigations against him.

Ultimately, what we need from the UN is better vetting, better pre-mission preparation and better monitoring. Once, in the CAR, troops from the Republic of Congo took twelve people from a house after one of their peacekeepers was killed. They took those people to their base and executed them in front of their commander. Four women were among those killed and those people are buried today on a UN peacekeeping base in the Central African Republic without any accountability.

I think we also need to avoid generalisation of the perception that all African, Asian or Middle Eastern or non-Western troops are badly trained. There are many countries that provide high-quality troops to the UN. The problem is that the UN is struggling to man a lot of these missions, especially in francophone countries. They simply cannot find enough troops to man the missions, so they allow non-qualified troops in.

There is also the problem of properly supplying peacekeeping troops. Many African countries do not have enough money to provide their troops with proper weapons and flack jackets, as well as other life-saving or medical equipment. It does prevent a lot of those incidents where troops go on a rampage after one of them gets killed, if they have proper equipment to conduct crowd control and personal protection.

JAMIE A. WILLIAMSON

Head of Unit, Relations with Arms Carriers, International Committee of the Red Cross, Geneva:

It is true that the vast majority of peacekeepers come from countries with potentially less sophisticated forces. However, it is also true that many have peacekeeping institutes, military manuals and training programmes. There is the potential to be trained, and that needs to be taken into consideration beforehand.

And, we have to look at the vetting component. Somewhere along the way, if the more sophisticated countries out there are not prepared to commit troops to peacekeeping missions, they nonetheless have a responsibility to ensure that the troops which are going are properly trained and vetted beforehand, and have the necessary equipment and the proper understanding of what their mandates are.

In many of these peacekeeping operations, you also have a small component composed of trainers. These can be either police or military trainers, and they often come from the more sophisticated forces. They also have some form of responsibility to ensure that monitoring is done on a regular basis.

The major problem though has less to do with the fact that peacekeepers may be ill-disciplined or under-equipped individuals but, as mentioned by some panellists, that we are again hearing of allegations of violations by peacekeepers, which are seemingly going unpunished. Going back 20–25 years, there have been numerous allegations against a number of peacekeepers in various missions. The numbers however have not been matched in terms of prosecutions. The Special Court for Sierra Leone had a limited jurisdiction to take on some cases. However, I do not think there was a single prosecution before the SCSL against peacekeepers.

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[64] The British operation in Sierra Leone was codenamed Operation Palliser.

Joseph Roberts-Mensah during discussion on peacekeeping and training troops to protect vulnerable populations.

So the question of peacekeeping accountability is vital, and sanctions have to be applied; and by that, I mean criminal sanctions against all individuals, be they peacekeepers or not, from whichever country they come. Again, if the sending state will not assume the responsibility for violations of International Humanitarian Law, then the question is, „Who should assume that responsibility to ensure that the peacekeepers are brought to justice?"

ADAMA DIENG

Special Adviser of the UN Secretary General on the Prevention of Genocide:

I would like to make reference to an important decision that was rendered in July this year by the district court of The Hague on the role played by Dutch peacekeepers in Srebrenica, where there were victims who seized on the domestic courts' jurisdiction, arguing that the military did not do enough to protect civilians from the genocide. That decision provoked a substantive discussion among countries that provide troops for peacekeeping missions. I think this is extremely important and we need to continue to reflect on this issue.

We should also consider how the High-level Panel which has been put in place by the Secretary-General to undertake a thorough review of the current United Nations peace operations should specifically refer to the role of peacekeeping operations in protecting populations from atrocity crimes. At the same time, we have seen need for accountability for peacekeepers themselves when they are responsible for breaching their standards of behaviour. We have seen it for instance in Haiti, where peacekeepers were accused of sexual abuse. We also received reports from Sudan of an alleged rape. I think these are also important when we are talking about the protection of the civilian population.

I think the UN has learnt its lesson. I mean, we could compare what happened in South Sudan, where the United Nations Mission in South Sudan (UNMISS)[65] opened its doors to allow people to enter the camp in order to be protected, to what the UN did in 1994 in Rwanda, where they also opened the doors, but only to let the people leave the country and allow the genocide to happen. Clearly, though, there is still a lot that needs to be done because despite the lessons learnt, we have not been able to prevent these crimes from re-occurring.

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65 For more on UNMISS, see: **http://www.un.org/en/peacekeeping/missions/unmiss/**

PANEL IV:

CHALLENGES OF PREVENTING IMPUNITY AND PROMOTING ACCOUNTABILITY: SYRIA

MODERATOR
Mark Kersten Researcher at the London School of Economics and SOAS, author of Justice in Conflict

- **Uğur Ümit Üngör** Associate Professor at the Department of History at Utrecht University and at the NIOD: Institute for War, Holocaust, and Genocide Studies in Amsterdam
  TOPIC: ***Mass violence in Syria and Iraq — Causes and consequences***

- **Stephen Starr** Journalist and author, founder and editor-in-chief of Near East Quarterly
  TOPIC: ***Revolt in Syria — Eye-Witness to the Uprising, overview of mass violence in Syria***

- **Hadi Habal** Founder, The Syrian Archive
  TOPIC: ***Investigating human rights violations in Syria in preparation for possible prosecutions***

- **William H. Wiley** Founder, Commission for International Justice and Accountability
  TOPIC: ***Investigating human rights violations in Syria in preparation for possible prosecutions***

Journalist and author Stephen Starr addressing panel on promoting accountability in Syria.

UĞUR ÜMIT ÜNGÖR

Associate Professor at the Department of History at Utrecht University and at the NIOD: Institute for War, Holocaust, and Genocide Studies in Amsterdam

TOPIC:

Mass violence in Syria and Iraq — Causes and consequences

As a historian, a social scientist, and an expert on the study of mass violence, my perspective is the analysis of the process of mass violence.

HISTORY OF VIOLENCE

When we get to the origins of violence, the history of the regime matters very much. Syria is a society which has seen violence ever since it was established after the fall of the Ottoman empire. To give an example, it had eight coup d'etats between 1946 and 1970, and it fought four very destructive wars with Israel, almost every decade. It was ruled by a dictatorship, which always ruled with repression and the threat of violence. The Muslim Brotherhood rebellion between 1976 and 1982 was a low-intensity civil war, which ended in a extremely serious destruction of the city of Hama. And now we see a rebellion that turned into a civil war with genocidal aspects, contours. So that's the prehistory that matters.

EXTREME IDEOLOGY AND EXTREME POWER

Genocide almost always is a fatal combination of extreme ideology and extreme power. Now if we look at extreme ideology and if we take the regime seriously — and I think we should — the Baath party runs on secular Arab nationalism, paranoid anti-Westernism and the Assad personality cult. These matter very much for how violence is legitimised in Syria.

There is also the matter of extreme power. All key state positions are in the hands of the regime. This is a one-party dictatorship that builds on an extreme concentration of power, which in itself is conducive to violence; and the best example of this concentration of power are the perpetrator groups in Syria. So when we ask what kind of people are committing all this violence against civilians, we have to realise that Syria has an extensive, powerful and very well equipped security apparatus and that the perpetrators come from at least six groups, segments of the regime.

SYRIA'S SECURITY APPARATUS

First is the army, which is very important but the least connected to the regime. We have seen mass desertion from the army, of both soldiers and officers. The second group are the intelligence agencies. Depending on how you count, Syria has between 10 and 15 intelligence organisations or security services. In the country where I live, the Netherlands, we have one and it is not very impressive.

The third major perpetrator group is air force intelligence, the al-Mukhabarat al-Jawiyya. This is an extremely important organisation because it has a very good reputation in Syria due to the wars it fought in Israel. And it is running several torture centres in Damascus, as well as Homs. Then we have the number four, the Republican Guard, which is a Praetorian organisation with about 10,000 men. For a long time it was under the command of Bashar al Assad's brother, Maher al Assad. These men have been responsible for some very serious massacres in the first two years of the revolution and beforehand.

PARAMILITARIES UNDER CIVILIAN MASKS

The fifth group are the so-called Shabiha, the paramilitaries who operate under civilian masks and who emanate from the entanglement of organised crime and the state. For those who are familiar with Yugoslavia, recall somebody like Arkan.[66] Arkan was a Serbian mafia boss who worked with former Serbian President Slobodan Milošević in committing mass violence in Bosnia. These were the death squads of the Assad regime. They were responsible for much of the violence against civilians.

Then we have the national defence forces, which are a kind of self-defence militias that come from popular committees. The regime, especially at the beginning of the revolution, had armed civilians, gave them weapons and thereby also made them targets of other armed groups.

MULTIPLE PILLARS

Now, why does a regime have such a variety of security services? I think for two reasons. First of all, it rests on several pillars, so if one is cut off, it can still survive by leaning on one or more of the others. Secondly, the competition between these organisations, not only ensures that Assad can stay in power because he plays them off against one another, but also leads to a radicalisation of the violence, because these groups wanted to outdo each other in their vigilance against the demonstrators.

These paramilitaries are also extremely important because the regime benefits from them, since outsourcing the violence provides them with plausible deniability. In all interviews that Assad gave, he said something like, „Yeah, I know bad things are happening but we do not control these people. They are acting on their own volition."[67] And we have heard these arguments before in Yugoslavia especially, and in Darfur. Secondly, the regime is also spreading complicity and irreversibly tying certain social groups in society to the regime. So by committing atrocities, such as rape, torture and massacres, the Shabiha, who come from certain groups that are overrepresented, such as the Alawites, burn their bridges to the affected communities forever. And they prove their loyalty to the regime. It creates very strong fissures in society.

FORMS OF VIOLENCE

We can disaggregate two major forms of violence, namely murder and torture. So, murder was mentioned, more than 200,000 people have been killed to date, including more than 10,000 children under the age of ten.[68] This is an enormous conflict; this is larger than the entire Turkish-Kurdish conflict; the death toll is higher than the entire Arab-Israeli conflict.

The regime committed some very specific targeted massacres. And we need to understand what the pattern is that emerges from these massacres. Is it there a pattern at all? I am talking about the massacre in al-Bayda[69] for example, in Darayya,[70] in al-Qubeir,[71] in Houla.[72] There have also been chemical attacks.

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66 Željko Ražnatović, known as Arkan, was the leader of the paramilitary group known as the „Serbian Volunteer Guard" or, alternatively, as „Arkan's Tigers". Ražnatović died from an assassin's bullet in Belgrade on 5 January 2000. After his death, the ICTY revealed that he was indicted by the tribunal for war crimes and crimes against humanity in September 1997. For more on Arkan's ICTY indictment, see: **http://www.icty.org/cases/party/845/4**

67 For examples, see: Zeina Karam „Hama Massacre: 78 Killed In Mazraat Al Qubair, Say Activists, Assad Regime Denies Violence" Associated Press 6 July 2012 **http://www.huffingtonpost.com/2012/06/07/hama-massacre-syrian-violence-mazraat-al-qubair_n_1576969.html** & Jonathan Tepperman „Syria's President Speaks: A Conversation With Bashar al-Assad" Foreign Affairs 25 January 2015 **https://www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks**

68 For the latest official death toll from the United Nations, see: Associated Press „Syrian civil war death toll rises to more than 191,300, according to UN" The Guardian 22 August 2014 **http://www.theguardian.com/world/2014/aug/22/syria-civil-war-death-toll-191300-un**
For a report on child deaths during the conflict, see: Oxford Research Group „Stolen Futures: The Hidden Toll of Child Casualties in Syria" (Oxford: Oxford Research Group, 24 November 2013) **http://oxfordresearchgroup.org.uk/sites/default/files/Stolen%20Futures.pdf**

Moderator Mark Kersten and Professor Ugur Ümit Üngör during panel on promoting accountability in Syria.

Also there are the executions and disappearances. If the regime can kill with impunity, then why do they go to the effort of committing such different types of violence, e.g., executions of people, executions where mutilated bodies are delivered to the families? The reason for this is to intimidate the families and spread fear. Disappearances have a completely different function as compared to violence. They are intended to traumatise society because you have no body to mourn. Snipers, almost entirely forgotten, were at some point responsible for up to a third of all deaths in 2011.[73]

TORTURE

Then we have torture: we should not forget torture, often also a function of genocide of course. Thierry Cruvellier has written a book on Duch, the Khmer Rouge torture boss in the prison S21.[74] Syria has torture on an industrial

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69 The al-Bayda massacre occurred on 2 May 2013. For a narrative account, see Human Rights Watch report entitled „No One's Left: Summary Executions by Syrian Forces in al-Bayda and Baniyas" released on 13 September 2013: **https://www.hrw.org/node/118645/**

70 The Derayya massacre occurred between 20 and 25 August 2012. For a narrative account, see: Janine di Giovanni „Syria crisis: Daraya massacre leaves a ghost town still counting its dead" The Guardian 7 September 2012 **http://www.theguardian.com/world/2012/sep/07/syria-daraya-massacre-ghost-town**

71 The al-Qubeir massacre occurred on 6 June 2012. For a narrative account, see: „Syria UN team 'shot at' near Qubair 'massacre site'" BBC News 7 June 2012 **http://www.bbc.com/news/world-middle-east-18352281** & Martin Chulov „Assad regime has lost humanity – UN" The Guardian 7 June 2012 **http://www.theguardian.com/world/2012/jun/07/assad-regime-un**

72 The Houla massacre occurred on 25 May 2012. For a narrative account, see: „Houla: How a massacre unfolded" BBC News 8 June 2012 **http://www.bbc.com/news/world-middle-east-18233934** The government of Syria denied the report, but UN investigators placed the blame on the Assad government and associated forces. For their findings, see: United Nations General Assembly „Human Rights Council: Report of the independent international commission of inquiry on the Syrian Arab Republic" 16 August 2012 A/HRC/21/50 **http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf**

73 See: United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic „Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013" New York: UN, 13 September 2013) **http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf**

74 See: *Thierry Cruvellier The Master of Confessions: The Making of a Khmer Rouge Torturer* (New York: Ecco/HarperCollins, 18 March 2014)

scale, and probably tens of thousands of people have been tortured, wounded and abused. Why? Why not simply execute people?; why do you need to go to the effort of using hunger as a weapon, or siege, thirst and solitary confinement? To deny somebody water, to deny somebody food — these are really profound breaches of Syrian culture. Of course, beatings are absolutely ubiquitous and we should also not forget medical violence in the hospitals in Homs in the first year of the revolution, where doctors were forced to commit violence against civilians.

Electrocution is of course something that came from the French empire because Syria used to be a French colony. And then, finally, we have the problem of sexual violence. We have a society that has a patriarchal culture of honour: so female as well as male protesters have been raped in custody, and as a result of that we see the destruction of trust between people, suicide and also murder to cleanse the perceived stain on family honour. If you add to this the expulsions, expropriations, the millions of refugees inside and outside Syria, and the environmental and cultural disruption, this conflict has profoundly and, I would argue, irreversibly changed Syrian society.

INTENSITY OF VIOLENCE

One point I want to make is about the intensity of a very wide spectrum of violence. These are not isolated events that happen in one city or one region. I also want to make a point about the sheer extent or scale of the violence. If you look at a map of Syria (and some of these episodes of killing have been mapped), it shows that similar, systematic and deliberate violence has occurred in completely different areas and communities over a long period of time. And this, to me, suggests the genocidal nature of the regime.

Whereas a massacre in one village, in one region, can be an event, which may happen in one day, in a couple of hours, genocide is more the pattern of massacres that emerges from this regime. And we also see this in the categories of victims, i.e., young, urban, lower-class Sunni Arab men from particular neighbourhoods are overrepresented. And I think this is also important.

Why has all this happened as it has? I think there are three explanations. The first is the radicalism of the regime. This is a totalitarian dictatorship with an extreme ideology, like most of those responsible for genocide in the 20th century. Second is the logic of territorial control: if we map how, why and which religions were attacked, then the pattern is one of partly territorial control by the regime. And the third and last point is the mobilisation of sectarian fear. The regime is not alone here but it has mobilised many people from society by spreading sectarian fear among them and making them complicit, implicating them in these crimes.

STEPHEN STARR

Journalist and author, founder and editor-in-chief of Near East Quarterly

TOPIC:

Revolt in Syria — Eye-Witness to the Uprising, overview of mass violence in Syria

I am an independent journalist from Ireland. I lived in Syria for five years until 2012, the first year of the revolution. I will discuss how the regime's structure has managed to stay largely intact, and how the initial events played out in and around Damascus and other government-controlled areas during the first few months of the uprising. I will also briefly touch on accountability and amnesties, and the broad relation to international justice.

THE BEGINNING

We saw two really incredible things in the first couple of weeks of March 2011. The first was the thousands of people who took to the streets in protest in a country that had been ruled with an iron fist for over 40 years. This was really a historic event. To see people for the first time take to the streets, knowing that their lives could be cut short at any minute, was really an incredible thing. The other side, which has been less documented, less focused upon, is how the regime reacted to what was happening. So in Damascus during the first weeks of the uprising there was a mass outpouring of public support for the Syrian regime. Walking through these crowds of people, perhaps a hundred thousand marching and gathering support for the regime, shocked me, considering the violence the regime was unleashing in other regions of the country.

SECTERIAN TENSIONS

From the beginning, the regime promoted sectarian tensions in a very smart, imperceptible way. I saw how the regime created a sense of enormous fear not only amongst religious minorities that included Alawites, Christians, Druze and others, but also amongst the well-to-do citizens of the major cities, in Aleppo and Damascus, who were and are majority Sunni, like the protestors themselves. For the most part, residents in the city centres had no real sense of what the revolution was about, its demands and virtues and roots, and did not really want to be involved in a supportive sense, or otherwise. For the most part, these communities which include Christians and the urban elites (if we can call them that), did not like the regime. They did not like the regime but they did not want to get involved in something they knew could potentially end their lives or their security. So, in the early weeks, the regime would arm local neighbourhoods where Christians and Alawites lived.

TRUST DEFICIT

As an observer in and of Syrian state and society for five years, one of the most fundamental underlying — and worrying — observations I have made is that there is a crippling trust deficit between and among the population. For example, family ties are incredibly important to people in every strata of society from the richest to the poor because an average Syrian cannot trust someone they are not connected to by blood because they are living in a police state but also because regular citizens cannot rely on the state to provide them with basic security, never mind jobs and health services.

To look at Syria from 2011 onwards fails to give a sense of where the revolt sprang from and why it has arguably failed. Not only are the people dealing with a war at the moment, but for over 40 years Syrian society was a domain where people

could not trust each other outside of their immediate families. So, this sense of distrust was ingrained into people generation after generation and the fear of others became the default position for all meaning. A very warped social contract had emerged prior to the 2011 revolt. And to a point, this historical climate helps to explain why sectarian rhetoric by the regime has worked to its advantage, and why the revolt turned violent.

REGIME PROPAGANDA

The fact that the regime claims responsibility for achievements across a huge array of public life crucially means that responsibility has been taken away from Syrians — society and the individual — in general. So anything good that happens in Syria is presented as something that comes from the government, that Bashar Assad is, for example, responsible for the opening of a new pipeline or the establishment of a new set of apartment blocks. Even if a local footballer does well, immediately the regime descends, putting its hand around the individual and taking responsibility for and ownership of what the individual has done, and taking the achievement away from him. This also means that when things go badly, people tend not to take responsibility, they walk away. So, within the context of this conference, if and when attempts to establish any truth and reconciliation efforts are made, it is likely to be a tremendously challenging process from the roots up..

AMNESTIES

We also see these dynamics in the internal debate around justice in Syria. The government, Bashar al Assad himself, has put in place a number of amnesties for people who protested, for the opposition, and for people who do not have blood on their hands. Again, we see the idea that Bashar Assad is handing out amnesty, that he is giving something back to the people, and that he is being somewhat lenient and understanding of peoples' faults and missteps. This is the framing of the debate and events, and the overarching idea is that he has the control and the power to release these people, or not. Some of them have been protesters, others have perhaps done much worse things, for example, have been involved in extremist terrorist attacks. But, what is key to the success and continuity of the cult of Assad's personality, is the idea that he and he alone is in control making these decisions.

TARGETTING IMPUNITY

In each town and village, in each major city and across the country, the Syrian government has a vast and varied network of military barracks and residential compounds. The government has provided housing for hundreds of thousands of police, security officers and officers from the military and other state security apparatus. In practice, we have almost a „ghettoisation" of the regime's security base. These compounds are well known to the average Syrians and easy to see. When you take any kind of public transportation and when passengers ask to disembark at these military complexes, they speak Arabic with a slightly different accent, which is an accent from the coastal areas which is predominantly Alawite. Straight away, these individuals are recognised as being not from the locality, and that they are likely to be Alawite because of where their accent places them. Many of these individuals were responsible for the arrest, torture and killing of protestors.

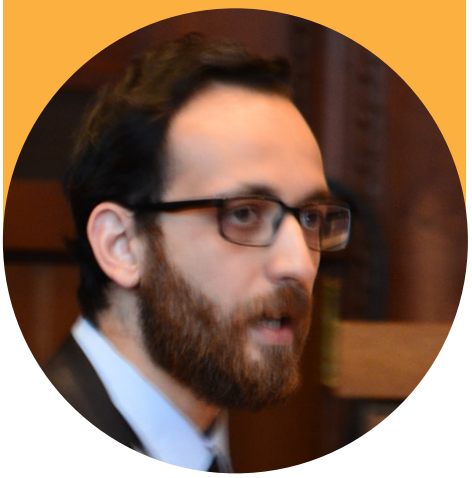
Looking beyond the ongoing war, the people involved in gathering information against protesters and cracking down on and shooting protesters (which mostly happened on Fridays and Saturdays) can be found by friends and relatives of the victims. Potentially, when we get to the point that a form of justice is being talked about and is workable, these compounds could easily be targeted for revenge attacks.

However, the fact that these compounds are easily identified means that records of who exactly the security officers were and are can be made from now on, even within the last couple of years. So it is possible to have a list of the perpetrators in each neighbourhood, in terms of bringing them to justice or at least recording who those people were. The danger of pursuing such an idea, of course, is that people would seek to take justice into their own hands resulting in reprisal attacks and a continuation of a real and very localised civil war.

William Wiley speaks on private war crimes investigations during panel on promoting accountability in Syria.

INTERNATIONAL JUSTICE

In sum, in my view, no one from the regime or security forces is sitting in Damascus today thinking about the possibility of facing an international court. It is not in their in thinking and not on their agenda. They are not concerned, I think, about facing justice. I think they feel that if they must flee the country, that they would be safe in Lebanon, in Iran, or in Russia, for example, for a very long time.



HADI HABAL

Founder, The Syrian Archive

TOPIC:

Digital Traces — Cataloguing human rights violations in Syria

The Syrian Archive was started by a collective of human rights activists, journalists and lawyers, initiated to preserve open source documentation of human rights violations committed in Syria.

DOCUMENTING VIOLATIONS

I was based in the south of Turkey almost a year, working very closely with citizen journalists, media activists and lawyers, who were risking their lives to document violations committed by all sides to the conflict. As a result of this work and of a previous work we have done since 2011 when sharing information about what happened, we identified the need for a Syrian initiative to preserve open-source documentation such as video, images and audio, collected by many credible groups that have been working hard for the last four years.

The aim of this initiative is not to duplicate efforts, but to add value to what these groups have been doing by organising their material, preserving it, and making it accessible for those who could benefit from using it. Of course, all this must be done while protecting the privacy and identity of people who could be targeted because of these materials. The challenges of documenting evidence during an ongoing conflict and the challenges of preserving this whole body of documentation created by citizen journalists, media activists and lawyers are vast. But they are worthwhile.

OPPORTUNITIES FOR DOCUMENTATION

I can start by asking a question: how many have seen YouTube videos or Facebook posts or tweets from 2011 until now about the conflict in Syria? And how many have seen any materials about what happened in Hama in 1982?

So, like any authoritarian regime over the last 40 years, the Syrian regime has been committing violations such as torture, killings, disappearances and restriction of movement. Yet it was successful in controlling information about human rights violations. This has completely changed, with regard to both the Syria conflict today and other conflicts in future. The world is more interlinked than ever before because of the Internet. People can spread news and information around the world through social media, bypassing old media giants. Instead, we see citizen journalists who are covering events globally. Also, thanks to smart-phone, camera and satellite technology, we are able to document what happens in real time or close to real time.

CHALLENGES

One of the first challenges is establishing the source and chain of custody for any evidence collected. Thousands of videos, photo's and audio documents will not be usable as evidence in court cases because of this, because electronic records do not contain all of the elements needed to make them credible, such as the location, date, source, etc.

The other challenge is verification. As everyone has seen, social media is being utilised for propaganda purposes by various actors. Videos and pictures are being used falsely and out of context. In the Syrian conflict, we have seen videos and images from Mexico, Afghanistan, Bahrain, and even some Canadian horror films. It was all fake.

JOURNALISTS TARGETTED

The other big challenge lies in efforts to control information by armed groups. Initially, in 2011 and early 2012, Syrian citizen journalists were operating in a spontaneous and independent manner but this has completely changed over time because they have fled, or been arrested, killed or incorporated into official media offices affiliated with particular armed groups.

Currently, every armed group, including the Syrian regime, jihadists and others, are trying to establish a monopoly of information in the areas they control. They are doing this by targeting journalists and activists who are not affiliated with them. So, for example, when jihadist group Jabhat al-Nusra[75] took control of the Hama and Idlib countryside, two provinces in the north of Syria, they forced out an established documentation group who were documenting the human rights abuses in this area. So now it has become very dangerous and very difficult to collect information of what is happening in this specific area.

PLATFORMS AND TERMS OF SERVICE

Another challenge is that new media platforms, such as YouTube and Facebook, are removing content published because it violates their rules.[76] To an extent, we understand this completely because they are trying to police what is on their sites, and they did not design their sites to publish things related to massacres or human rights violations.

Even so, dozens of Syria-related pages were closed over the last few years on Facebook, and YouTube channels containing thousands of videos have disappeared. In addition, some pages were targeted by the Syrian Electronic Army.[77] The effect has been the loss of a large amount of material, especially from the early months of the Syrian uprising.

The challenge also is that there was no planning or expertise by documentation centres in Syria to respond to this. They were really busy collecting and verifying the information that they collected and did not focus on preserving it from being lost. So how is one to ensure that more material is not lost?

THE SYRIAN ARCHIVE

This is the gap that The Syrian Archive is trying to overcome. Of course, the big challenge is the huge quantity of data. It is impossible to try and preserve hundreds of thousands (if not millions) of videos and images relating to the Syrian conflict, which have been created and uploaded online in the last four years. We need to be selective, and we are doing this by supporting human rights groups who remain unaffiliated or who keep collecting violations from all sides. We focus specifically on groups that have their own verification processes in place and who are at risk of losing these data.

So many things that have happened in the last four years have been captured through videos and images and uploaded, and of course it is important to preserve those. Potentially, some of these materials are evidence of human rights abuses, which might be used one day to bring perpetrators to justice. Even more importantly, this material is important for us because it is our memory of what happened, and because many Syrians risked — and paid for it with — their lives to show the world what was happening.

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75 The Jabhat al-Nusra is a branch of Al-Qaeda operating in Syria and Lebanon,
76 Facebook's Terms of Service: **https://www.facebook.com/legal/terms** & YouTube's Terms of Service: **https://www.youtube.com/static?template=terms**. YouTube bans „content that's primarily intended to be shocking, sensational, or disrespectful" while Facebook bans content that „contains nudity or graphic or gratuitous violence."
77 The Syrian Electronic Army is a group of computer hackers which first surfaced online in 2011 to support the government of Syrian President Bashar al-Assad. See: **http://krebsonsecurity.com/tag/sea-sy/**

WILLIAM H. WILEY

Founder, Commission for International Justice and Accountability

TOPIC:

Investigating human rights violations in Syria in preparation for possible prosecutions

I would like to begin by introducing our organisation, which is somewhat unusual, to put it mildly, and conclude with a few thoughts on the place of criminal justice and the limits of criminal justice that I have seen over my career in terms of the broader context of preventing genocide and other atrocity offences.

PRIVATISED INVESTIGATION DIVISION

The Commission for International Justice and Accountability is a non-profit NGO. I would describe it as essentially a private office of the prosecutor without a prosecution division. It is a privatised investigation division, built along the lines of the investigation division of the Office of the Prosecutor at the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and other institutions in which I and some of the other senior staff have worked over our careers.

We did not set it up with an idea of duplicating existing public institutions. To be quite frank, we have better things to do with our lives. However, as we all know, the Syrian context is somewhat unusual, in that it is essentially a jurisdictional vacuum. There is no international criminal adjudicative body with obvious jurisdiction over the Syria situation, to use the ICC model. After some initial work that we did with Syrian human rights activists on a very small scale through my commercial company, we considered this vacuum and asked: why can't we have a privatised criminal investigation?

BUILDING CAPACITY

To be quite honest, I had never worked for an NGO or had anything to do with NGOs, and I was extremely naïve in thinking that it would be easy to raise money for this kind of venture or adventure. This was back in early 2012, nearly three years ago now. Today, we employ 90 staff, including approximately 35 investigators based in Syria who have been trained through a great deal of mentoring. We started with essentially zero Syrian capacity and it is developing unevenly but reasonably well in the field. We have about 40 analytical staff and again, the structure and the thinking is very much like the public institution.

INVESTIGATIONS

At the end of the day, we target those individuals who are most responsible for the international offences in Syria. We do not do individual target-driven investigations; we actually start with structures. The case files we are building are very much analytically driven, because the focus is on building the command control and communication structures of the target institutions, whether they be regime institutions or on the opposition side.[78]

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78 On 19 March 2015, a United Nations panel concluded that Islamic State „may have committed" genocide against the Yazidis with an investigation head, Suki Nagra, stating that the attacks on the Yazidis „were not just spontaneous or happened out of the blue, they were clearly orchestrated." For a narrative report on the accusations, see: Nick Cumming-Bruce „United Nations Investigators Accuse ISIS of Genocide Over Attacks on Yazidis" The New York Times 19 March 2015
http://www.nytimes.com/2015/03/20/world/middleeast/isis-genocide-yazidis-iraq-un-panel.html

Insofar as the forms of evidence for the regime case files are concerned, it is fairly simple. We follow the principle that the best way to build a criminal case file is to use documentation generated by the perpetrating institutions. So today we have moved approximately 500,000 pages of Syrian regime documentation out of Syria, and we have an evidence management unit, again as you would find in a public institution, which processes these documents for the analyst to use. It is Baath Party, military and security intelligence material.

PRIVATE INVESTIGATIONS MODEL

There are three things you need to make this model work. First, you need the right personnel with the requisite experience in building international criminal cases. Second, you need sufficient funding, as the work is relatively expensive. For example, in 2014 we spent about $6 million and, with the extension into Iraq in 2015, we are going to spend about $8 million. It is quite a bit of an effort to raise this money, and it is not our strong point.

The third requirement, and this is where we do have a significant advantage over public institutions, is a high-risk tolerance, because we are investigating in the midst of a high-intensity armed conflict. Up to now, we have had only one individual killed, but quite a few have been wounded and some have been captured by Islamists and also by the Syrian regime. That high-risk tolerance, despite the fact that the individuals taking the risk are relatively low-skilled, is what really takes us into a very high level of output.

COSTS OF INVESTIGATIONS

We never thought in terms of how much each case costs but it certainly is relatively cheap. We will have three regime case files done by the end of January 2015. Each will be „trial ready" (a bit of an odd term), with multiple accused. The total spent on investigating those three cases will probably be $6–7 million.

Of course, these cases have not been adjudicated yet, and that will be very expensive. But that of course is not our business. We build Syrian capacity, we build case files, and we do not sit around and wait for an international tribunal to emerge or what I think will likely be a hybrid court. We engage heavily with domestic authorities that are approaching the Syria situation through universal jurisdiction and also with an eye to the problem of foreign IS fighters.

CHANGING BEHAVIOUR

I will conclude with a question: are we as an organisation contributing to the fight against impunity? To be quite honest, I would say no. By the time the criminal investigative body (private or public) comes to a situation, it is really too late. I think the key to ameliorating criminal conduct probably lies in other areas, such as political or diplomatic initiatives. I am also somewhat dubious about the capacity of advocacy work by Human Rights Watch, which is a currently a powerful and well-organised machine, to change behaviour, but advocacy probably has a better chance of changing behaviour than criminal justice mechanisms.

William Wiley and Ugur Ümit Üngör during discussion on challanges of private war crimes investigations.

DISCUSSION:

PRIVATE WAR CRIMES INVESTIGATIONS

ALEX WHITING

Professor, Harvard Law School:

To take William Wiley's words, you could say that there is an „emerging privatisation" of international criminal justice. States move slowly and inadequately and tribunals are slow, inefficient, and so private organisations and NGOs are filling the gap. NGOs have always sort of filled the gap, but here they may be stepping up into a different kind of role.

That is obviously in some ways a great development, an exciting development for international criminal justice, and there are advantages that William Wiley has pointed out. But what are the risks? Is that ultimately a good thing? Normally I am not one who is in favour of privatisation of things that should be governmental or public functions. In this case, is it a good development? Should we welcome it? Should we institutionalise it and encourage it for the future?

PETER BOUCKAERT

Emergencies Director, Human Rights Watch:

I think William Wiley's efforts are very important but they raise a lot of ethical questions for HRW. Mr. Wiley mentioned that he sent people into deadly danger. HRW has never lost a person out in the field, Mr. Wiley has already lost one and many have been wounded. Mr. Wiley mentioned the fact that he relies on the interrogation of

captured combatants by rebel groups. I am sure that they are not being treated in accordance with the Geneva Conventions. And also, what happens at the end of the day with all this evidence, if the sponsors of this project decide that they do not want to prosecute the people whose crimes have been documented?

GEORG ESCHER

Editor and Foreign Policy Commentator at Nürnberger Nachrichten, Nuremberg Germany:
All of you basically mentioned that you are investigating the deeds of the perpetrators. Now everyone knows that in Syria there are a lot of foreign players on the ground. There is a lot of financing from abroad. Is anybody investigating the financing of criminal activities?

WILLIAM H. WILEY

Founder, Commission for International Justice and Accountability:

On privatisation and the contracting out of criminal investigations, I am not quite sure where to start, so first let me go back to the point that it works. We are desperate to get some of our case files into court. We are negotiating or have started a process of negotiating with a European state, which I think would be indelicate to mention, with the idea that we will build our case around their domestic needs.

Now, I am not Syrian, and it is not actually about Syria for me personally or for some of the other senior staff. What we're trying to demonstrate with this project, is that a certain vision of a form of complementarity envisaged when the Rome Statute came in, can work: the idea that partners or potential partners can provide the ICC with material that the court can then use in criminal prosecutions. At the present time, I think it fair to say that is largely not the case, and where the prosecutor has attempted to rely on what is called third-party material, essentially NGO material, he has not been very successful. For example, the Kenya cases are in complete and utter bits, a debacle of the first order. It is embarrassing for the court and, in my opinion, embarrassing for everyone concerned, though it is not the fault of the NGOs in the least. NGOs normally have a different function, which is advocacy and not criminal investigations. So, the idea of this model is not to supplant the public institutions but to fill certain gaps that the public institutions are not able to fill themselves.

As far as the necessary evidentiary standard, that is most certainly within the realm of complementarity. So in that respect, it is an unusual project, but I am not sure it should be seen as revolutionary. Certainly this NGO is meant to be temporary. I am at the end of my career and, once the Syria war is done and those files and the staff get passed off, presumably to a hybrid court, that NGO is not going to exist any more. The hope is that other NGOs will be formed or, based on this example, will take on the indigenous investigative capability to account for the low limited risk tolerance that public institutions can realistically take on.

That goes to Peter Bouckaert's point about physical risks and the ethics. The individuals on the payroll, all of us, understand what we are getting into. Everyone is a volunteer, and there is a lot of risk calculation that goes on in the context of specific operations and the project as a whole. Is it worth it? Every single individual needs to make that judgement. So we have a somewhat archaic expression in the office, but it is essentially „big boy rules" and each individual decides. It is not military force where one cannot quit. One can quit – basically, it is that simple. There is certainly no moral pressure or institutional suasion, compelling people to take risks.

And what happens to the evidence at the end of the day? Again, to go back to the point I just made, the CIJA was created as a temporary institution. When the regime was losing the war to moderate opposition, when this idea came to my mind, we thought the regime would lose the war, we would end up with a transitional justice and some kind of a hybrid justice mechanism along the lines, let's say, of the state courts in Sarajevo or something like that.

The picture is obviously a great deal more complicated now than it was in early 2012. Our hope is that that is obviously the outcome of the conflict, but the idea is that the case files, all the evidence and the personnel will go and form the nucleus of the office of the prosecutor of whatever body is set up to hear those cases, and/or form the nucleus of a national domestic Syrian war crimes unit. That is still our thinking. We are not quite sure how we are going to get there because of the political situation, but that is still the goal.

JEANINE JALKH

Senior Political Reporter L´Orient – Le Jour, Beirut, Lebanon:

To Mr. Wiley, could you tell us a little bit about how you work on the ground, and whether your team is international or whether it is composed of Syrian and international experts? Are they lawyers, are they investigators?

BERND BORCHARDT

Founding Director, International Nuremberg Principles Academy:

Mr. Wiley, you mentioned that NGOs had been collecting evidence in the past but that it was often not very usable for future prosecutions. Has there been any analysis done to what extent these more or less amateur activities have led to indictments, or have led to any further judicial steps?

UĞUR ÜMIT ÜNGÖR

Associate Professor at the Department of History at Utrecht University and at the NIOD: Institute for War, Holocaust, and Genocide Studies in Amsterdam:

My question to Mr. Wiley is: as a researcher I would be very much looking forward to doing research on these half a million documents that you have found. Will these files be accessible for historians or researchers?

WILLIAM H. WILEY

We do not give open access to the materials as a general rule. The reason is that we do not want them. First of all, we see ourselves as custodians of these materials. They have essentially all been stolen and have to go back to the Syrian people. I mean they have been stolen — there is no other way to put it.

But we do not want the materials. We are in Germany right now, so if you look at the way the Stasi archive of the East German security service is controlled, we should be careful that this collection does not become some sort of a fishing ground for revenge attacks or social or political forms of discrimination. We keep a very tight hold on the documents for that reason.

Regarding NGO materials in criminal justice proceedings, certainly since my career started in 1997 these have been useful for lead purposes, but NGOs tend to focus on what we call the „crime base," which is the victimisation or *prima facie* victimisation of individuals. NGOs normally do not focus very much on what we call linkage, which is establishing the connection between the crime base or crime scene and the higher-level perpetrators.

So, NGO researchers — Peter Bouckaert being an excellent example — can be extremely knowledgeable and can testify in court usually to pattern certain crime-based evidence, or in some cases this can be quite useful too when they touch on their interactions with certain perpetrators or individuals within perpetrator groups. But the actual paper output of these organisations is, in my experience, of very limited utility because it is prepared for advocacy purposes to a human rights standard of evidence, not a criminal standard. It is important work, but it is just different to my approach.

Ethics are extremely important but should not be confused with criminal investigative work. Mr. Dieng spoke about several meetings, which were hosted by foreign secretaries (principally the Dutch and Danish) and which I attended, on what kind of justice mechanisms will come into place after the conflict. I think a hybrid court is most likely, though as an institution we do not express a view on this, since we resolutely stay out of the policy world because we want to be perceived as neutral.

Indeed, we are an investigative body, so we do not want to be formally part of establishing the judicative body, but I think there is a *prima facie* conflict of interest there. Speaking as an individual, what I would like to see is a hybrid, which can absorb a fair number of senior accused and an ICC referral because this is not „either, or."

Certainly the European governments are afraid that, if a hybrid is set up, it will undermine the ICC, but I do not know

Human Rights Watch Emergencies Director Peter Bouckaert.

why they think that way. Ideally, the ICC can take on three or maybe six accused, so it is not going to be a big drain on the resources, and a hybrid court can take on more accused.

In terms of our work on the ground, we have about 55 Syrians and the rest are internationals. The majority of internationals require Arabic, either as a first or second language. Our investigators on the regime cases are independent and do have links to the armed opposition, up to but not including Jabhat al-Nusra and obviously the Islamic State.

We are very, very careful, in particular about prisoner interrogation issues, because I am not going to be the first career war crimes guy who goes to prison for war crimes because those guys are on the payroll and understand perfectly well how command responsibility works, and it runs straight up to me. So trust me, I am on it, if nothing else, purely for reasons of self-interest.

One of the reasons why we have fewer defendants in front of international tribunals is because we know that we need to look at the people who are at the top, who are most responsible, and we now focus on them. Perhaps we should not be looking at the number of defendants, but because those people are at the top and because they planned things, we are looking at the entire situation that occurred and we have to reconstruct the entire crime scene, the participants, and an entire network. That is why it is more expensive.

PANEL V:

PREVENTING AND RESPONDING TO INCITEMENT TO VIOLENCE

MODERATOR
Joseph Roberts-Mensah Africa Director, Wayamo Foundation

- **Agnes Callamard** Director, Global Freedom of Expression & Information, Special Adviser to the President, Columbia University, New York

TOPIC: ***Preventing and responding to online incitement to violence***

- **Gregory Gordon** Associate Professor and Director/Assistant Dean for the PhD-MPhil Programme at the Chinese University of Hong Kong Faculty of Law

TOPIC: ***Hate speech and incitement to genocide***

- **Falk Pingel** Associated Research Fellow, The Georg Eckert Institute for International Textbook Research

TOPIC: ***Textbook intervention and revision after crimes against humanity — An international comparison with a particular focus on the Balkans***

- **Daudi Were** Project Director, Ushahidi, Kenya

TOPIC: ***Crisis mapping and communication in humanitarian emergencies***

Agnes Callamard addressing panel on incitement to violence.

AGNES CALLAMARD

Director, Global Freedom of Expression & Information, Special Adviser to the President, Columbia University, New York

TOPIC:

Preventing and responding to online incitement to violence

I wish to begin by noting that the importance to human rights of non-discrimination and equality, including substantive equality, is a well-known and well-understood fact. Human history is riddled with instances of racism and intolerance giving rise to genocide and crimes against humanity. So that particular focus is not surprising, as it is a major cause of massive violations.

CENTRALITY OF FREEDOM OF EXPRESSION

Maybe less well known is the fact that the international community, including international conventions and international courts, have demonstrated that the right to freedom of expression and information is also central to the international human rights regime and to human dignity. We can recall the second paragraph of the preamble to the Universal Declaration of Human Rights, which states that the advent of a world in which human beings shall enjoy freedom of speech and belief, and freedom from fear and want, was proclaimed as the highest aspiration common to all people. As early as 1946, at its very first session, the UN General Assembly adopted resolution 59 which states that, „Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated."[79]

The emphasis and focus on the right to freedom of expression and information is justified because all the greatest man-made calamities that have plagued the world for centuries, not only involved but required full control over expression, opinions and, at times, conscience. The slave trade and slavery, the Inquisition, the Holocaust, the genocides in Cambodia and Rwanda, the Soviet Gulag —in every one of those cases, we are going to find full control over the media, full control over at least the mass media and over any kind of information mechanisms in those situations. Also, it will escape no-one's attention that these calamities were driven by a very high form of hatred and organised political will which, in its execution, required control over speech and propaganda.

CENSORSHIP, POWER AND CONTROL

Control over freedom of expression is the handmaiden of power, without which it is inconceivable to preserve or continue somebody's power. Whether exercised by an individual or an institutional state, this control over expression is the extension of physical power into the realm of the mind and the spirit. Most analysis now tends to focus very much on regulation and censorship of hate speech, particularly since the advent of Internet. But while we are engaging in that very important debate about the possibility of some form of regulation over some kind of speech online, we need to remember that, historically, hatred and censorship are on the same side of the coin, and that hate speech needs censorship and control over expression and information to grow into incitement to mass violence,

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79 The resolution further added that, „Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world."
For the full text, see: United Nations General Assembly Resolution „Calling of an International Conference on Freedom of Information" 14 December 1946 A/1/59 **http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/10/IMG/NR003310.pdf**

and to grow thereafter into the actual implementation of such crimes. Whenever we seek to regulate expression and information through censorship, we need to remember that whatever we do could have implications on how we can protect the vulnerable and thus meet the objectives of this conference and of humanity in general.

PROHIBITIONS

Even though the international community insisted on the centrality of expression and information as a central part of the human rights project, it also recognises that sometimes some speech goes over a limit and becomes so bad, so dangerous, that it needs to be legislated against. But, after that very general argument, we get into a very confusing and confused system. I would like to bring up this confusion and why governments and civil society activists found it so difficult to deal with hate speech and incitement.

Under international human rights law, hate speech may be prohibited under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), provided that the prohibition meets the three-part test of legality, i.e., legitimate aims, necessity and proportionality.[80] The ICCPR states that there are some kinds of hate speech that are worse than common hate speech, and these are prohibited under Article 20 of the treaty. This places an obligation upon governments to prohibit a rather confusing category of „any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" which „shall be prohibited by law."

Adding to the confusion is Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination[81] which defines incitement more or less in the same terms as Article 20, but then goes on to extend the prohibition to other forms of hate speech beyond incitement, that include the dissemination of ideas based on racial superiority.

This confusion is further reinforced by what happened in the international criminal law system and the international humanitarian standard, whether through the International Criminal Court's statute or various court cases.

LEGAL DIMENSIONS

Out of all this diversity of perspectives and the confusion in terms of the legal framework that has been handed over to governments and the people, over the years, courts which engage in the most thorough legal reasoning over incitement have tended to assess incitement speech along similar parameters or dimensions.[82]

The first is that there is a historical context of violence and discrimination, which is very much part of the way incitement speech is assessed. The second is that the speaker himself or herself is often in a position of influence and authority among the population. The third is that the content of the expression is some kind of direct call but

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[80] The International Covenant on Civil and Political Rights is a multilateral treaty, which was adopted by a United Nations General Assembly resolution on 16 December 1966 and entered into force 23 March 1976. Article 19 of the treaty states:
„Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order, or of public health or morals."

For the full text on the treaty, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx**

[81] The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969. For the full text on the treaty, see:
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

[82] ARTICLE 19, Prohibiting Incitement to discrimination, hostility or violence, Policy Brief, London: ARTICLE 19, 2012;
http://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf

that it may be coded, and so on and so forth. There is quite a bit of jurisprudence around the meaning of "direct" as opposed to "indirect" incitement.

The fourth dimension of incitement speech is its reach, and here we need to take into account the audience and how receptive it is to that kind of speech, and what relationship the audience has to the speaker. This also includes the means of dissemination, whether it is just a leaflet placed on a street corner, or whether it is something that reaches a broader audience, such as television or the Internet.

Finally, the fifth and sixth dimensions of the incitement speeches that you find almost universally, namely, the likelihood and the intent. On likelihood, there are some differences across courts, but overall, agreement that incitement speech is an inchoate crime, so somebody can be found guilty of incitement under international human rights law even where the crime that they were inciting others to commit did not actually happen. Here, courts assess the likelihood that such a crime could actually happen, so it is an important dimension.

The last dimension is the intent, and here there is some difference of opinion across courts, though I believe that intention is particularly strongly laid out under the terms of Article 20 of the ICCPR (advocacy).

CHALLENGES OF CRIMINALISATION

The six parameters above are not consistently and systematically applied by courts ruling over incitement cases. Other forms of "hate speech" that may not meet the threshold of incitement raise additional legal difficulties and confusion. It is unsurprising that the criminalisation of incitement speech and indeed of hate speech in many countries around the world has been very ineffective in tackling the root causes of hate speech. It has also been ineffective in tackling the increase in instances of hate speech.

The Internet has provided a particularly important challenge for governments and civil society in terms of hate speech and incitement because the speed at which such speech can move makes it difficult to tackle the problem properly. For example, every time that a, ISIS Twitter account, Facebook account or website is being disconnected, it reappears in the system, sometimes within minutes. This really shows that we need to be far more creative in how we address this type of speech.

ENGAGEMENT

Experts and activists like me are increasingly calling for actors, including civil society, to really look at and engage in some form of systematic counter speech. And trying to penetrate the information environment and relegating dangerous speech to a smaller and smaller corner involves working very closely with some of the audiences — particularly the most vulnerable members of some communities — in building trust. The intelligence community that is working on incitement to terrorism is also recognising that handling such speech through censorship does not work and that there needs to be a different approach.

Engaging in the battle of ideas must be the driving force in how we are going to address these questions, and that may involve denouncing, providing alternative interpretations, busting and refuting myths and rumours, counter examples, discrediting, planting seeds of doubt, and highlighting the risks linked to violence. Peter Bouckaert provided us with a very good example from the Central African Republic about how planting the seed of doubt about the risks of violence in the mind of some perpetrators had an impact.[83] Direct dialogue and contact with would-be perpetrators can have a far greater impact than prospective prosecutions.

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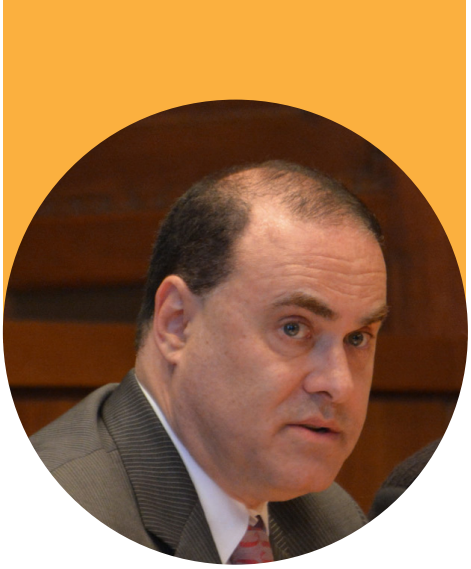
83 For Peter Bouckaert's presentation, see page 48.



GREGORY GORDON

Associate Professor and Director/Assistant Dean for the PhD-MPhil Programme at the Chinese University of Hong Kong Faculty of Law

TOPIC:

Hate speech and incitement to genocide

The three big cases that came out of Nuremberg with respect to hate speech, were the cases against Julius Streicher, Hans Fritzsche and Otto Dietrich.

JULIUS STREICHER AND INCITEMENT

Julius Streicher was charged with persecution as a crime against humanity. He was the founder and editor-in-chief of Der Stürmer, a notoriously vicious anti-Semitic newspaper. It was quite crude but also distributed and discussed fairly widely in Nazi Germany. I would submit that the judgement against Streicher was somewhat ambiguous in terms of whether or not he was found guilty based solely on his issuing direct calls for the destruction of the Jews or whether it was because of speech that did not as directly incite to violence but rather sought to poison German minds against the Jews in preparation for genocide.

The judgement in his cases noted that, „in his articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution."[84] Keep in mind that word, "incited."

At the end of the judgement, incitement is mentioned again, „Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter,[85] and constitutes a crime against humanity." This is not "incitement" in the legal sense (i.e., as the crime of direct and public incitement to commit genocide) but rather in a factual sense (in connection with the crime of persecution as a crime against humanity).

HANS FRITZSCHE AND ACQUITTAL

The other defendant charged with crimes connected to hate speech at the IMT was Hans Fritzsche, Chief of the German Press Division in Joseph Goebbels's Propaganda Ministry from 1938 to 1942. In that position, he issued press directives to newspaper editors on a daily basis. In 1942, he became head of the Radio Division and hosted a daily radio programme called, „Hans Fritzsche Speaks."

He was acquitted. The court found that he did not directly urge persecution of the Jews in his radio programmes. And he was not in a true leadership position.[86] I argue that this is inconsistent with the Nuremberg principles, and I think it was a flawed decision. I will note that Fritzsche was later found guilty of „political crimes against the German people" by a German Spruchkammer or Denazification Court. Nevertheless, with respect to Nuremberg precedent, there is not a lot that we can glean from that portion of the IMT judgment..

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84 Julius Streicher was found guilty of crimes against humanity by the International Military Tribunal, sentenced to death on 1 October 1946 and hanged on 16 October 1946. For the full text of the judgment against Julius Streicher, see: **http://avalon.law.yale.edu/imt/judstrei.asp**
85 For the full text of the Charter of the International Military Tribunal, see: **http://avalon.law.yale.edu/imt/imtconst.asp**
86 For the full text of the judgment against Hans Fritsche, see: **http://avalon.law.yale.edu/imt/judfritz.asp**

OTTO DIETRICH

The most important precedent that is overlooked in the Nuremberg jurisprudence is the case against Otto Dietrich, who served as Reich Press Chief and also as the Press Chief for the government.

Dietrich exerted complete control over the policy and content of print media in Nazi Germany. He had a close relationship with Adolf Hitler, could go over Goebbels's head and was charged in the „Ministries Case,"[97] one of the subsequent Nuremberg trials under Control Council Law No. 10.[88] He was found guilty of persecution as a crime against humanity for speech aiming to enrage the Germans, justify persecutory measures, and subdue doubts about persecution.[89] So, his guilt was not necessarily directly predicated on directly urging the extermination of the Jews. This is important, as I will explain in a little bit.[90]

THE GENOCIDE CONVENTION AND ICTR JURISPRUDENCE

The next big event in the criminalisation of hate speech in respect of mass atrocity is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and Article 3 of the convention criminalises direct and public incitement to commit genocide.[91] The content of that provision was fleshed out in a number of cases at the International Criminal Tribunal for Rwanda, cases that I was able to work on when I was with the Office of the Prosecutor.

From the resultant jurisprudence, we can discern the elements of the crime. The first is intent. This is the same as the intent for the substantive crime of genocide. In other words, it is the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. This is known as *„dolus specialis"* and it is a very high standard. The next element is „direct", i.e., when considering the language in the light of its cultural and linguistic content, whether the persons for whom the message was intended immediately grasped the implication thereof. The speech also has to be "public," which is pretty straightforward. Was it uttered to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television?

The most controversial part of all this is the content, and the ICTR has pointed to four factors, namely: purpose; text; context; and the relationship between the speaker and the subject. I do not think that the elements have been fleshed out sufficiently and I do hope the jurisprudence will do that going forward. For example, in my scholarship I have pointed out that the "context" element ought to be bifurcated between internal and external context. Also, the channel of communication should be one of the factors that is considered. Finally, there is the issue of causation, and, as Agnes Callamard has pointed out, incitement is an inchoate crime so when the words are uttered in the proper context, that is what gives rise to criminal liability.[92] Thus, causation is not an element.

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87 The case was officially known as The United States of America v. Ernst von Weizsäcker, et al. and had 21 defendants, including three ministers. The indictment was filed on 15 November 1947 and the hearings took place between 6 January 1948 and 18 November 1948. Judgment was handed down on 11 April 1949. For the indictment, see: **http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf#page=218**

88 For the full text of the Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, see: **http://avalon.law.yale.edu/imt/imt10.asp**

89 For the full text of the judgment against Otto Dietrich, see: Records of the United States Nuernberg War Crimes Trials United Sidles of America v. Ernst Von Weizsaecher et al. (Case XI) December 20, 1947-April 14, 1949 (Washington: National Archives Trust Fund Board, 1979) **http://www.archives.gov/research/captured-german-records/microfilm/m897.pdf**

90 For an in-depth discussion on the importance of this judgment, see: Gregory S. Gordon „The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law" Ohio State Law Journal 75:3 pp. 571-607 **http://moritzlaw.osu.edu/students/groups/oslj/files/2012/01/8-Gordon.pdf**

91 Article 3 of the convention states that „the following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide." For the full text of the convention, see: **http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx**

92 For Agnes Callamard's presentation, see page 75.

JURISPRUDENCE

Unfortunately the jurisprudence has been ambiguous. Despite the fact that causation is not a requirement, many cases have looked at whether there was in fact a causal link between the speech and subsequent violence and that has caused unnecessary doctrinal confusion. There needs to be clarification on that. I also think that the jurisprudence has been under-inclusive in terms of addressing the kinds of speech techniques that can constitute incitement. So, for example, in the case of „accusation in a mirror," a technique wherein the speaker warns the audience that if they do not take extreme violent action, they themselves will be the victims of atrocity. These less direct techniques have not been specifically focused on in the jurisprudence and they should be. We should, in fact, have a developed glossary of incitement techniques.

Obviously, when I talked about the origins of this doctrine, I began with Nuremberg and, as I pointed out, persecution as a crime against humanity is what was charged during those ground-breaking trials because the 1948 Genocide Convention did not exist at that point. When we look at today's law, Article 7 of the Rome Statute[93] sets out crimes against humanity as any of a number of acts committed as part of a widespread or systematic attack directed against any civilian population with knowledge that the perpetrator's acts are part of the attack. Those enumerated acts include persecution.

SPLIT BETWEEN ICTR AND ICTY REGARDING PROSECUTION

We heard Michelle Jarvis speak earlier about the fact that, since persecution cases are based on certain enumerated discriminatory grounds, they are somewhat akin to genocide, though without *dolus specialis* (in other words the intent to destroy the group, in whole or in part).

There is a list of criteria that have been developed through cases at the ICTY: the acts that are committed as part of the persecution have to be committed as part of a widespread or systematic attack against the civilian population; the defendant must know that his or her act is part of the widespread or systematic attack against the civilian population; and there must be a gross or blatant denial of a fundamental right, attaining the same level of gravity as the other enumerated crimes against humanity.

As mentioned above, that denial of a fundamental right must be based on discriminatory grounds. But this is another important crime that can be charged in reference to hate speech and mass atrocity. And it will be easier to prove given the lower mens rea standard (knowledge rather than the *dolus specialis*). Unfortunately, the jurisprudence is not clear as to whether speech not directly calling for violence can be the basis of a persecution charge. There is a split between the ICTR and ICTY on this issue.

RECOMMENDATIONS

We have been asked to give recommendations on how things can be changed so that we can deal more effectively with these atrocity crimes. Once again, the big issue that has come up is this spilt between the ICTR and the ICTY in terms of whether hate speech not directly calling for violence can be the basis for a charge of persecution as a crime against humanity. The ICTR has said yes in a number of decisions, and the ICTY in a trial chamber decision, Prosecutor v. Kordić,[94] has said no. And, that is where the Dietrich judgment becomes crucial.

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93 For the full text of the Rome Statute of the International Criminal Court, see:
http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf
94 Dario Kordić was sentenced to 25 years' imprisonment for crimes against humanity and war crimes on 17 December 2004.

I I would submit that the Dietrich case, which was issued from this very courtroom, should be consulted in terms of telling us whether hate speech not directly calling for violence can constitute the crime against humanity of persecution. Although it has been completely overlooked, the Dietrich case tells us that it ought to be the basis for such a charge. And if we are worried about freedom of expression, let me just say that we have to keep in mind that the chapeau of the crime, or the conditional part of the crime that makes it international, tells us that such speech has to be uttered as part of a widespread or systematic attack against a civilian population, with the speaker knowing that it is part of that attack. We should not worry about the value of this kind of speech; and even if the speech is not directly calling for violence, it should be prosecuted.

Moving away from persecution and turning back to the crime of incitement, I think the problem with the incitement jurisprudence is that, in some ways it is over-inclusive (for example, in taking too much of a blunderbuss approach regarding context) and in some ways it is under-inclusive (not considering the full panoply of incitement techniques). The elements need to be applied more systematically because, as Agnes Callamard has pointed out, the law can potentially be abused by leaders to suppress speech illegitimately. And courts need to stop factually considering causation in incitement judgments — that is leaving confusion as to whether causation is an element of the crime (when, in fact, it is clearly not).

Let me also stress again that the jurisprudence after the media case has not been applied consistently, so that has to change. We need that glossary of incitement techniques, so that we know the exact parameters of the law. We need to fix the problems with respect to prosecution of crimes against humanity charges and make it clear that hate speech not directly calling for violence can be the basis for persecution charges.

Overall, if we step even further back, we should have a re-thinking of all atrocity speech crimes. I propose a „unified field theory" of atrocity speech law. I submit that incitement is not just limited to genocide, but should also apply to crimes against humanity and war crimes, as I suggested earlier. In the end, we should have three crimes in this area: incitement, which should apply to all the atrocity crimes (genocide, crimes against humanity and war crimes); what I call „speech abetting," which should apply to speech that is contemporaneous with violence but is not causally bringing it about (in the current jurisprudence, this type of liability has been confined to crimes against humanity persecution but it could apply equally to genocide and war crimes); and finally, instigation, which is when speech is actually causally responsible for violence (and is a form of criminal liability that already exists). This way, the entire spectrum of atrocity speech crimes can be covered and we can achieve doctrinal coherence.

FALK PINGEL

Associated Research Fellow, The Georg Eckert Institute for International Textbook Research

TOPIC:

Textbook intervention and revision after crimes against humanity — An international comparison with a particular focus on the Balkans

We often keep very close to the concrete locality of the conflict but it is also important to deal with the more general, ideological dimension which can make perpetrators or prevent people from becoming perpetrators, by developing mindsets for peaceful conflict resolution.

Education, and particularly history and civics and the educational tools used, such as textbooks, form part of this ideological dimension. Therefore, the international community put the revision of textbooks with the aim to foster international understanding on their agenda after the brutal experience of the First World War. Textbook revision was first developed as a systematic activity by the League of Nations after the brutal experience of the First World War. It failed in the long run because we all know that the Second World War followed.

UNITED NATIONS

The United Nations took up the issue with almost the same aims and same methodology. They commissioned UNESCO,[95] the cultural organisation of the United Nations, to perform activities on both global and regional levels, with the aim of combating ethnic and racial stereotypes and enemy images in textbooks, particularly for history, geography and civics, the main subjects dealing with conflicts on the international level. They fostered the development of texts which should have developed an understanding for peaceful conflict resolution.

This is a post-conflict activity and it is a long-term activity. It follows the conflict and it should secure peacebuilding processes. Education is a long-term endeavour, and we do not change minds and behaviours just within a year and with a new curriculum. That is part of the problem because international organisations look for quick results, particularly when a lot of money is involved. The World Bank is one of the main sponsors and it has even developed a fast-track approach where one has to produce preliminary results after half a year or so to satisfy the sponsors. In education, that is almost impossible.

Though it developed, conducted a lot of teacher-training seminars and conferences with educators on a global and regional level, UNESCO failed to develop an implementation mechanism. That is the main shortcoming of UNESCO — it does not monitor and check the recommendations that it issued (or does so very rarely) and does not put pressure on its member states to implement these recommendations. In this regard, bilateral commissions set up mostly by or with the support of education ministries of the countries involved have been more successful.

CONSULTATIONS

One of the best-known textbook consultations were the German-French[96] and German-Polish[97] textbook commissions after the Second World War. One of the most interesting commissions which could never finish its work successfully was a United States-Soviet Union textbook commission, which developed recommendations. But the

[95] The United Nations Educational, Scientific and Cultural Organization was formed on 16 November 1945 and is headquartered in Paris, France.
[96] For more information on the German-French Textbook Commission, see: **http://www.gei.de/en/projects/completed-projects/bilateral-textbook-commissions-and-projects/german-french-textbook-commission.html**

recommendations were rejected by both governments.

These examples show that international textbook revision projects are not always successful. If they are related to educational authorities, the authorities have the final say as to whether recommendations will be implemented. On the one hand, that is an advantage: the educational authorities can implement recommendations at a state level when there is agreement; but, at the same time, they can prevent teachers and textbook authors from implementing that, where agreement is missing. In this regard, and particularly in the last 15 years, the participation of NGOs has become more important because we are confronted with new issues.

SHIFTING PATTERNS OF CONFLICT AND NGOs

We also have new challenges. Conflict patterns shifted in the 199Os from wars between states to civil wars within states and society. In these cases, governmental institutions are often unable to act in any way because conflicts are still ongoing and everyone forms a part of them. So NGOs come in and are able to act where governments cannot. In some cases, the Georg Eckert Institute for International Textbook Research became involved in textbook projects dealing with open, partly still violent conflicts such as in South Africa and Israel/Palestine.

For example, in Israel and Palestine, the institute supported a group of Israeli and Palestinian teachers who developed joint textbook material for youth in Israeli and Palestinian schools.[98] This was successfully finished and even published, but again the governments of both sides forbade the use of the material in schools. Nevertheless this work has had an impact because it shows that, even against governmental policy, co-operation is possible and leads to results which can be accepted by people from both sides, by experts from both sides.

BUILDING TRUST

Bosnia is another case where the institute was active over a period of years. In Bosnia we had the situation where the Dayton Peace Agreement[99] mandated that education was to be the responsibility of the local or regional governments. So we had a number of different curricular and textbook patterns in the country and, because it was regionalised and divided by ethnicity, these followed Croat, Bosniak or Serb approaches. In the first years after the war, the international community set a priority on material reconstruction and neglected education almost totally. Only when people became aware that incitement and even hatred were found in the textbooks, did they realise that this was in contravention of the Dayton Agreement.

Building on the Dayton Agreement, we set up commissions of experts from all the different political institutions to compare the textbooks, and try and harmonise them, and take out what the international community considered to be inappropriate language. Progress was very slow and limited, but the most important issue was that the ministries picked the experts at hand for the commission. After one or two years of work, the teachers and the experts in the commissions changed their minds and, instead of feeling like political representatives defending their ministries' opinions, they turned into subject-oriented experts, and when talking, we no longer had to take their ethnic background into account. This experience alone was probably more important than any practical result or change in the textbooks. Therefore, it is difficult to measure the success of textbook projects. Their impact can be long-term or short-term, they may directly influence textbook content or indirectly mould the minds of authors and concepts of educational authorities.

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97 For more information on the German-Polish Textbook Commission, see: **http://www.gei.de/en/departments/europe-narratives-images-spaces/europe-and-the-national-factor/german-polish-textbook-commission.html**

98 For more information on The Texts of „the Others," an Israeli-Palestinian Textbook Project on the History of the Middle East Conflict, see: **http://www.gei.de/en/projects/completed-projects/schulbuchprojek-israel-palestina.html**

99 The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement, was reached on 21 November 1995 by the presidents of Bosnia, Croatia, and Serbia, ending the war in Bosnia. It preserved Bosnia as a single state made up of two parts, the Bosniak-Croat federation and the Bosnian Serb Republic, with Sarajevo remaining as the capital. For the full text of the agreement, see: **http://www.ohr.int/dpa/default.asp?content_id=38O**

DAUDI WERE

Project Director, Ushahidi, Kenya

TOPIC:

Crisis mapping and communication in humanitarian emergencies

As I sit here this afternoon, my ‚phone is buzzing with hundreds of SMSs coming in, all sharing the same news that the International Criminal Court has withdrawn the case against Uhuru Kenyatta.[100] Whether or not you support that decision, it is really sad that 1,200 people died and 600,000 were displaced. Many are still displaced and are still searching for justice. This reminds us that what we are doing here is not theoretical at all.

I am the director of innovation at Ushahidi, a global technology company, founded and headquartered in Nairobi. We build platforms for data, and we like to say that data science is story telling. So first, I will share the story of Ushahidi itself, which was born out of a humanitarian crisis in the middle of the post-election violence that rocked Kenya after the 2007 election.

When we got over the shock of what was going on in our country, we noticed a couple of things. A lot of the stories and a lot of the incidents that we were seeing around us were either underreported by traditional reporting channels such as the mainstream media and humanitarian agencies, or they were completely unreported. And the further away you moved from urban centres, the more this problem was emphasised. So we decided to build a platform that allowed anyone with whatever technology they had available to them, to submit that information to us.

BUILDING QUICKLY

Once we received that information we would take it through a couple of processes. We would categorise the data, to figure out what was happening, we would geolocate the information to figure out whether incidents were happening and then archive it, in case someone would later want to examine the type of data from that time. The interesting thing about the work of Ushahidi is that from the time the idea was first mentioned, it took us three days to build a prototype and three days to launch it. So it took us six days and we had a working platform up and ready. In the middle of the crisis, you do not really have time for focus groups and many different versions of software.

The other interesting thing is that we had no experience of running a humanitarian organisation, we had no experience of running an open-source technology company, and we had no time and definitely no money. But we were still able to do it, and the reason was that we were networked, we were connected to each other and we trusted each other. And when we got together to build this, we already had that foundation to build upon.

VERIFYING AND ACTING QUICKLY

Second story: a couple of years after that post-election violence, Kenya went to the polls again in 2010 for a

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100 The International Criminal Court vacated its case against Uhuru Kenyatta on 5 December 2014. Kenyatta was accused of crimes against humanity in relation to post-election violence that occurred in Kenya in December 2007 and January 2008 but the prosecutor withdrew all charges. On 13 March 2015, ICC judges decided to terminate the proceedings. For more information on the case, see: **http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx**

Journalists from around the world were invited to attend the conference and media workshop.

referendum to bring in our new constitution. This time, we knew the election was coming, so we were ready beforehand. One of the messages we received on our situation warned us about a group of young men congregating at a polling station, armed with machetes. Fifteen minutes after we received that SMS, a lorry of 30 police officers turned up at the polling station, and having a police presence meant that the young men went away.

So what happened in between? We know from data from the UN that Molo was a hot spot for election violence in most Kenyan elections.[101] We also knew that if you know anything about Kenyan elections that there usually is a lot of violence around Molo. . So we trained our situation room that any messages that come from these hot spot areas needed to be dealt with very quickly. In addition, we had developed partnerships with local election observers who had a presence on the ground at most polling stations, these were our "trusted reporters". We treated information received from them as verified and crucially they were the ones who were able to verify the information we received from unknown sources, such as members of the public.

Additionally, we had also developed contact with local law enforcement through the UWIANO Platform for Peace a Conflict Prevention and Response Initiative for all Kenyans steered by the National Cohesion and Integration Commission (NCIC), National Steering Committee on Peacebuilding and Conflict Management (NSC) at the Ministry of State for Provincial Administration and Internal Security, PeaceNet Kenya a local NGO collective and UNDP Kenya.

This partnership meant that when law enforcement agencies received information from us on election day, they trusted the information that we got. So when the message got in, we were able to contact the people on the ground, verify it, escalate it to the police, and get a response. However, if you are the ordinary citizen who sent in that SMS, all you did was send an SMS, and 15 minutes later 30 police officers turned up. The fact that it went through five different agencies before that action took place is the work that all of us, the people in this room, do together.

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101 For an overview of the tensions in Molo, see: IRIN News „KENYA: Clashes, tension ‚routine' in troubled Molo" IRIN 10 February 2008 **http://www.irinnews.org/report/76663/kenya-clashes-tension-routine-in-troubled-molo**

FINDING PEOPLE

Finally, a third story from December 2013, when our newest country in Africa, South Sudan, started descending into violence. When it became clear that things were going to get worse before they got better, the Kenyan government decided to evacuate Kenyan citizens and anyone else that could get out of South Sudan. So on 23 December 2013, we got a ‚phone call from the Ministry of Foreign Affairs saying that they wanted to evacuate Kenyans and asking if we could help.[102]

We put together a small team, and asked them if they could broadcast a mobile ‚phone number across the country. On December 24, much to the annoyance of our spouses, we set up a situation room in the Ministry of Foreign Affairs, trained them on how to process the data, and started publicising the number. The messages started flying in with an incredible amount of detail from people on the ground. They told us where they were being held, how many were being held and who was holding them. A couple of days later, the evacuations by the Kenyan defence forces started.

The three stories I have shared are all from Kenya, but stories like this were seen from around the world. In fact, Ushahidi and the technology we developed has been used in a 159 countries, 45,000 different times and has been translated into 49 different languages to be used in places such as Syria, Libya and even the Central African Republic. So we are really a global technology company, but definitely made in Africa. And the good thing about technology is that, if it works in Africa, it will probably work anywhere else in the world.

THE POWER OF PARTNERHIPS

Yesterday, a journalist asked the following question: what's worst – no information, false information or correct information that comes too late? And we had a vigorous debate about which of those three was worst. But questions like this remind me of something my good friend Ken Banks, the founder of Frontline SMS always says: if you think that technology is the answer, then you probably do not understand the problem and you definitely do not understand technology.

The most powerful tool that we have in our toolbox are partnerships, and I hope I have demonstrated that with the examples. And my challenge to the experts gathered here is to expand your partnerships and to expand your networks. In our line of work, we like to say that in many cases the local is the expert, and often the locals on the ground are the experts on what they have seen and on what the causes of what they have seen, are. Maybe they are even experts on the solutions for what they have seen.

USEFUL DATA

The second suggestion is that, too often, the problem is that there are too many data in the world, too much information for us to process, and that what we have to do is to limit the amount of data flowing around. But the problem is not that there are too many data: the problem is that your filters are failing, and we are not giving you the data that you need.

In the last couple of weeks, there have been a lot of attacks in north-eastern Kenya, and the most irritating thing about those attacks is that we knew beforehand, at least 48 hours beforehand, that the attacks were coming. But again, correct information that comes too late is almost useless. The filter failure problem strikes again. To avoid this, we can look for technology companies or partners that work, that are based in the country that you work in and can develop the platform you need.

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102 For more on the evacuation, see: Lucas Barasa „Over 20,000 Kenyans back from South Sudan" Africa Review 2 January 2014 **http://www.africareview.com/News/Over-20000-Kenyans-back-from-South-Sudan/-/979180/2132218/-/fiw2xy/-/index.html**

Discussion between journalists and panellists at „Reporting on Genocide and Mass Violence" media workshop.

My third suggestion is that, once we have established that too many data is not the problem, the thing to do is to liberate your own data, preferably as open data in machine-readable format, so that technology companies like ours can work with them and work with you to help make sense of and bring the stories out of the data which allow us to have an impact on the ground.

We at Ushahidi like to say that you are OO7 and we are Q. James Bond, the special agent out in the field relied on a group of people back at headquarters to develop the tools for him. Sometimes it is not best for the deployers to be the people who build the software, and very often it is not best for the people who build the software to be the deployers, but we must continue to work together to solve this problem of atrocities.

Gregory Gordon, Joseph Roberts-Mensah and Falk Pingel during discussion on history text books.

DISCUSSION:

HISTORY TEXT BOOKS

BERND BORCHARDT
Founding Director, International Nuremberg Principles Academy

Mr. Pingel, you gave us some examples which were very encouraging, such as the French and Polish school books, and also the most sobering example of Palestine and Israel. I know from your website that you are working in Africa, that you are doing more in the Balkans, and that you just had a conference in Albania. What is the level of acceptance for what you are doing in other countries where you are still working?

FALK PINGEL
Associated Research Fellow, The Georg Eckert Institute for International Textbook Research:

It very much depends on the countries involved. Within Western Europe, the political and economic context was very conducive to textbook consultations, and the process was framed by friendly mutual relations. That is more difficult if you really still have the conflict; and the conflict was resolved in this regard after the Second World War. In the case of Poland, textbook consultations could only begin when the social democratic government under Chancellor Willy Brandt[103] took a different stance on the German-Polish border. That opened up the political space for conducting a textbook project, which was the first to overcome the then Iron Curtain.

Another positive example is the German-Czech textbook consultation after 1990. Many Germans were forcibly expelled from Czechoslovakia after the Second World War, and the fact that this was done forcibly was neglec-

103 Willy Brandt was chancellor of the Federal Republic of Germany from 1969 to 1974. He was awarded the Nobel Peace Prize in 1971 for his efforts to strengthen co-operation in Western Europe and to achieve reconciliation between West Germany and the countries of Eastern Europe..

ted. The Germans and Czechs worked on two levels. They set up a historians' commission, finding out what really happened, and a textbook commission. These worked closely together, and both sides agreed on joint recommendations of what happened and how it should be presented in the textbooks of both countries. It has been implemented, though it is still very controversial in the Czech Republic.

There are more difficult examples, e.g., East Asia, where the issue is almost the same as that between Europe and Germany after the Second World War. It is about the role of Japan in the Second World War and the war crimes committed by the Japanese army, which the Japanese government is very reluctant to acknowledge.[104] But in the last ten years, semi-official commissions working together with NGOs have worked out joint-source material giving evidence of what happened, and that has even been distributed in schools in China, South Korea and Japan. Most copies were distributed in China but none of these booklets replaced the curricula; they are just additional material, and often this additional material is forgotten. It made some noise in the press in all three countries but then after one, two, three years, it has almost been entirely forgotten and does not have any long-term impact.

Complicating matters further is the Japanese government, which has taken very difficult political positions, very close to denial of crimes that have been accepted by former Japanese governments. So it very much depends on the political framework. In many cases, NGOs are very helpful in breaking the ground and setting examples but there are weaknesses in implementation.

THIERRY CRUVELLIER

Veteran journalist and author of The Master of Confessions: The Making of a Khmer Rouge Torturer:

I was fascinated by the story on the textbook commission between Germans and Czechs, and I wonder how they took on the events in the Sudety/Sudetenland region. Mr. Pingel, could you just tell us when it was that they agreed on common textbooks?

FALK PINGEL

They did not produce a joint textbook, only a recommendation referring to some very controversial issues of German-Czech relations; and the most important one was the refugee issue. But interestingly, none of these recommendations is binding because both countries have a pluralistic textbook system where textbooks are not commissioned by the state but written by private textbook authors and published by private publishing houses, and teachers are free to choose which text to adopt.

The recommendations were mostly accepted by the textbook authors. The ministries of both countries could exert some power through textbook-approval procedures, which are not used very often. For example, in the case of the German-Israeli textbook recommendations which were published in 1985, some of the German states made acceptance mandatory so that textbook authors had to follow suit.

As far as I can see, there is only one regular bi-national textbook and that is the German-French textbook. This was developed, not only against the backdrop of the German-French textbook consultations but also against the backdrop of German-French youth exchange because students who took part in the German-French youth exchange, school students, made the proposal to do away with national history textbooks in Europe in favour of joint textbooks. And they put this proposal to the leaders on both sides, to the President on the French side and to the German Chancellor, and they adopted the proposal.

An expert group was commissioned to develop a concept of this book, and then the German-French textbook was developed by two private publishing houses, one German and one French, and published some years ago. It is used in both countries and has identical content in two different languages.[105]

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104 For an outline of the controversy, see: James Fallows „What Is a ‚Class-A War Criminal'? More on the Yasukuni Controversy The complications of wartime memory" The Atlantic 11 January 2014 **http://www.theatlantic.com/international/archive/2014/01/what-is-a-class-a-war-criminal-more-on-the-yasukuni-controversy/283004/**

105 For more information see Corine Defrance/Ulrich Pfeil: Symbol or Reality? The background, implementation and development of the Franco-German history textbook, in: History Education and Post-Conflict Reconciliation. Reconsidering joint textbook projects, ed. Karina V. Korostelina/Simone Lässig, Oxon: Routledge, 2013, pp. 52-68.

FATHER BERNARD KINVI

Hospital Director, Roman Catholic Mission in Bossemptele,
Central African Republic

TOPIC:

Before you kill them, you must kill me first — A first-hand account from the Central African Republic

I am not a specialist in the prevention of genocide or atrocities but I am an individual who has lived through a period of such atrocities and would like to share my experiences with you.

I am the director of a hospital in Bossemptele, 300 kilometres from Bangui, close to the border with Cameroon. In March 2013, when the rebellion that took power in the Central African Republic began, the rebels gradually took possession of all the provinces. Our province was seized by the Seleka in April, and when the rebels arrived, it was a total rout. The population was terror-stricken and fled into the bush.

We feared the arrival of the Seleka. When I was getting ready to meet them, I knew they could just burst in and loot the hospital, the community and the parish. Fearing this, I therefore concealed the computers and printers in the attic, dug a big hole in the henhouse and hid the hospital money. When we heard the Seleka were coming, we were frightened. But fortunately — or unfortunately — they arrived with some fighters who had been injured in a road accident. They had come to the hospital for treatment. And I took care of them, regardless of the fact that they were rebels or that they had killed people. This first contact with them stopped them from committing any atrocities locally, at least for a time.

The Seleka stationed themselves in the area because of the stability that the presence of the hospital afforded. They did not commit any atrocities in Bossemptele itself but sometimes went to small villages and caught and tortured people there. They did such terrible things to the population that, as a priest, I took it upon myself to talk to them and beg them to stop committing such atrocities. But there was no way they would listen. After a time, I had to forbid them from coming into the hospital with their weapons. To tell the rebels that they could not come into the hospital with their arms took a lot of courage. At the start I was very scared, but that did not prevent me from entering into an argument with them. Finally, they relented and agreed.

The population was terrorised by the Seleka, and they decided to rebel. The rebellion began in small villages, where new groups called the Anti-balaka were formed. I know the reality of the Anti-balaka. They would attack, and after they retreated, the Seleka would commit atrocities against the population, systematically killing everyone. After the Seleka committed these atrocities, I took the wounded villagers into my hospital but I was threatened by the Seleka, who wanted to hurt me because they said I was treating their enemies. I explained that it was our duty to treat everyone without distinction or discrimination.

As the Anti-balaka gained prominence, I knew I could not stay silent. So my colleague Father Brice Patrick and I decided to hold meetings with all the religious leaders in the area. We met with all the priests, pastors and imams, and talked at length about the possible preventive measures to be adopted. At these meetings, we gave one another encouragement and decided that we would have to stand together before our congregations when we were praying, holding religious services or preaching. We also organised meetings with the general population to remind them that we were one community, despite the fact that we belonged to different religious denominations. These steps bore fruit for a time but the abuses of the Seleka militias, encouraged or assisted by some members of the Muslim community, nevertheless continued.

The atrocities continued apace. We appealed to African Union (AU) troops many times to settle in our area and prevent the violence, and I even got hold of the ,phone number of a commander who told me that he would consider doing so. But he did not act. On two occasions, we were visited by AU forces because some soldiers had

Journalist Jeanine Jalkh from Lebanon.

been injured in road accidents, and we cared for them when they arrived at the hospital. Before they left, I begged them to see the situation for themselves, and to stand between the warring groups, to prevent clashes. But my pleas went unheeded.

I also tried to set up a meeting with the Anti-balaka to talk to them and beg them not to attack the villages. A colleague who went to meet them, came back and told me that it was too difficult. He did not think he could go back a second time. Two days after my friend tried to play the role of mediator, the Seleka attacked the Anti-balaka base. So, the Anti-balaka flew into a rage and decided to fight.

I felt that I had to try mediation and that if I managed to talk to them a second time, they might perhaps be able to understand the need to put an end to the attacks. I first asked permission from a Seleka colonel who was in the area because, if I went without his agreement, he could have accused me of being an Anti-balaka ally. For several days he refused to grant me permission but eventually he called me and agreed that I should play the role of mediator. He even handed over two Anti-balaka prisoners that I was to return to the Anti-balaka.

It was a difficult mission. I hung the flag of the Red Cross on the front of our car, but when I arrived in the area, I was met by furious Anti-balaka fighters. They made me get out of the car and called me a traitor. They had received orders to shoot any car that passed because, when the Seleka had first come to the area, they had used a Congolese police car in their attacks. Where exactly they found this car, there's no knowing. But they also wore Congolese police uniforms which they definitely stole.

When I arrived, the Anti-balaka fighters were infuriated and threatened to attack me. I pleaded with them not to harm me, explaining that I had come with a Red Cross car to find out if they had any wounded or sick who needed

106 The French military's Operation Sangaris is an ongoing military intervention in the Central African Republic which began on 5 December 2013.

treatment. I asked them to let me examine and care for anybody who was sick but, if there was nobody, then just to let me return home in my car. After quickly thinking this over, they asked me to see their wounded; so I went to see them but that was also difficult. When I saw that they were beginning to trust me, I started asking their opinions, what they wanted to do, and whether or not they were going to attack us. They said that they wanted to attack, and that they were waiting for reinforcements.

During these conversations I begged them not to attack and, after several hours of talks, they said that they would wait. Once again, I tried to play a mediating role. Not only did this role enable me to get to know the Anti-balaka fighters, but it also allowed me to gain their confidence and have a small measure of authority over them. Unfortunately, on 17 January 2014, it became known that a force of French soldiers was on its way to disarm the Seleka.[106] It had only got as far as Boily, five kilometres from Bangui (and so still had over 200 kilometres to go), but when the Seleka militias learned that the French troops were approaching, they decided to flee the area. They attacked the hospital, stole our car and motorcycles, and escaped.

I was robbed and had to beg them not to shoot me, convincing them that I was the very same Father Bernard who had cared for them in the hospital. After they left, the Anti-balaka militia arrived and wanted to steal the Muslims' belongings. While there were some Muslims who begged them not to attack, unfortunately there were others who were armed and wanted to fight to the death against the Anti-balaka. There was a shoot-out, and since our mediation failed and the AU and French forces did not intervene to prevent this confrontation from taking place, it resulted in more than 80 deaths.

We could not simply watch on. My colleague and I opened the doors of the hospital to house all the refugees, all those who felt threatened. We even called on people to take refuge with us, and indeed many Muslims came before the fighting broke out, seeking safe haven with us or with the nuns, the Carmelite sisters. And when I sensed that the firing had died down, I went to the area to recover the dead and all the wounded, injured, survivors, children, and women who had not managed to flee and were still under threat. It was hard work because the Anti-balaka had taken over the whole area. They prevented us from saving men, and even threatened to kill young boys, alleging that little boys would grow up to become rebels and eventually return to kill them. We said this was nonsense and pleaded with them to let people live. The next day, I buried the dead. The dead bodies were rotting. I did not have enough strength to dig the graves for all the bodies, so we had to dig mass graves. What upset me most was the lack of support in protecting the 1,500 Muslim refugees who had come to our Catholic mission. We were responsible for feeding them, for taking care of the wounded and for protecting everyone against the attacks of the Anti-balaka. It was extremely difficult, especially as we felt so abandoned. There were no armed forces there to help us. We had called on them in vain.

As some of our refugees were more being more keenly hunted than others, we hid them in our rooms so that they would not be killed. One day, the French forces finally arrived, almost a month after the confrontation. When they came, I was overjoyed and announced to the refugees who were highest on the wanted list that their salvation had arrived and that I would negotiate their safe conduct with the French troops. I went to see a lieutenant and when I discussed the situation with him, he told me to come back the next day at five in the morning and we would organise their evacuation.

The next day at five in the morning, the lieutenant was gone and entire the French force had left the area. It was very difficult for me to understand what happened. I am a civilian, and it was the military personnel who had the duty to protect the population. Yet they abandoned us. And the hardest thing for me was going back to the refugees and telling them that the soldiers who were supposed to protect them, had left. They cried, and I know what they going through.

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107 Bosco Ntaganda is a Congolese national presently facing trial at the International Criminal Court in The Hague. He surrendered to the court on 22 March 2013. He is accused of 13 counts of war crimes (murder and attempted murder, attacking civilians, rape, sexual slavery of civilians, pillaging, displacement of civilians, attacking protected objects, destroying the enemy's property, and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and 5 counts of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer of population) by the International Criminal Court in The Hague. Ntaganda allegedly committed these crimes in 2002-2003 in the Ituri Province, Democratic Republic of the Congo (DRC).

Refusing to abandon these refugees to their fate, we ended up paying some African Union forces to come to the hospital and take them to safety. I had to disguise one Muslim man as a woman, by dressing him in a wig and woman's clothes. We even made some artificial breasts to make it more realistic. We took him out of the room and put him in a car so that his life could be saved. All this was something that I simply could not understand. It was not my role. Yet, I could not just let a man die.

In order for the displaced to leave and be sent to Cameroon, I would often make my way to the roadside with a number of women and children — above all the women and children — and the Anti-balakas began to let them go. And so I would go to the roadside to help them leave. But African Union forces that passed through our area did not like to stop, and it was only thanks to some drivers who agreed to stop that we could get them out. It was only by bundling them into the back of large trucks that the displaced people were able to leave, though without much dignity. It was difficult for us, and I did not understand why the forces that were supposed to protect people did not want to stop, until Human Rights Watch arrived in the area. It was only then that the African Union forces agreed to stop in the area and take away some of the displaced people to Cameroon in a dignified manner.

This has been our life. Today the militias are here again. They are always armed. Yesterday they were armed with shotguns, today they have Kalashnikovs, grenades and are ready to act.

To protect these Muslims, we sometimes had to convince the Anti-balaka not to kill, by telling them that there were satellites in the sky watching them. „If you kill the Muslims", we used to say, „the International Criminal Court will catch you one day." And such threats worked very well. I remember that when Bosco Ntaganda[107] was caught, they were reminded that, if they were not careful, they risked the same fate, which deterred them.

I don't know much about the role of the International Criminal Court in the world, but at least I know that it had an impact on the actors here. But today, if the situation continues, it is because none of the perpetrators have been caught, none have been imprisoned, and none have been prosecuted. They all feel that they can act just as they did in the past, regardless of the presence of the powerful international forces in the area.

When I hear about the situation in Libya and a journalist says that there is still a possibility of mass atrocities or genocide against the population there, I sometimes think of the cries of alarm which we raised and which fell on deaf ears. But after the killings, I saw how many people came just to draw up reports, to record how many people had been killed, how many refugees there were. If nothing is done with this information, it will be a real shame. Today we have set up a Committee for Justice and Peace to continue the dialogue with the Anti-balaka. We still have an imam who stays with us in our compound. And every time I discuss reconciliation, justice and peace, the imam is also with me, and this has gradually become accepted in our community.

We do this work hoping that one day there will be a justice system that may be able to punish these people or at least deter them from committing further crimes — in the understanding that nobody is above the law.

ADAMA DIENG

Special Adviser of the UN Secretary General on the Prevention of Genocide

CLOSING REMARKS[108]

I was very moved when listening to the testimony of Father Bernard Kinvi.[109] I want to thank him particularly for his thoughts on accountability —as long as justice is not rendered, we must fear that the crimes in the Central African Republic will continue. This is why it is essential that we do everything possible to ensure that accountability is taken seriously, both by the Security Council and by the African Union.

So once again, Father Kinvi, thank you. You showed great courage to speak to men who had blood on their hands, and I think that your conversation with a rebel leader who immediately understood that there was the risk of facing justice and changed his behaviour, is a great example for us all.

I personally had to say the same to President Michel Djotodia to make him understand that he was in charge of law and order and could not sit idly by when men and women were being killed in his country,[110] and could not say that he did not know what was happening. I told him that people had been convicted, Rwandan officials for example, simply on the basis of their position in government. They were told, „You cannot claim that you did not know. You ought to have known."

So even heads of state — if you speak to them, they understand. This shows that justice can definitely play a deterrent role.

And with this, let me simply say a few words by way of concluding this conference. Firstly, a word of thanks. Thanks to the Nuremberg Academy, but thanks particularly to two persons who were working behind the scenes, Michaela Lissowsky and my good friend Bettina Ambach, who have been extremely efficient in preparing this conference at such short notice.

I would also like to thank all of you for joining us in Nuremberg, where we have had a very fruitful discussion. Your active participation during this two-day debate is something really worth mentioning. The panels showed that we have to be concerned with what is happening on the ground. We know that theories are important, but what is more important is addressing the plight of victims.

This is one of the reasons to refer to the current situation in the Nuba Mountains in South Kordofan, Sudan, where Omar al-Bashir's defence force allegedly continues to attack the population. Hospitals are being attacked, fields and crops are being destroyed. All of this is happening off the international radar and nobody seems to be really interested in the situation in a part of Africa that has also witnessed the atrocity crimes committed in Darfur.[111]

Yesterday we kicked off the conference by paying a tribute to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Sixty-five years after its adoption, the Convention's provisions are widely accepted as part of customary law, testifying to the universal nature of the mission it enshrines.

Today, the Convention is as relevant as ever in a world where too many people continue to have their human rights

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108 The text was adopted from spoken remarks made by Special Adviser Adama Dieng on 4 Dec. 2014 in Courtroom 600 in Nuremberg.
109 For Father Bernard Kinvi's keynote address, see page 90.
110 Michel Am-Nondokro Djotodia was President of the Central African Republic between 24 March 2013 and 10 January 2014, when he was forced to resign. Djotodia was the leader of the Seleka rebellion.
111 For more on the International Criminal Court indictments related to atrocity crimes in Darfur, see: **http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx**

Journalist Cheang Sokha from Cambodia.

violated on a daily basis. There is not a single region of the world that is immune to atrocity crimes, and that is why we need to redouble our efforts to make sure that tomorrow everybody will embrace humanity. During the first panel, a key question raised was how to help states in implementing their obligations under the Convention and, in particular, with respect to prevention. Here, a specific recommendation has been formulated on the possibility of exploring how states understand their obligations in terms of co-operation, in good faith, towards preventing atrocity crimes.

We also discussed the responsibility to protect, R2P. We recalled the commitment made by world leaders ten years ago to take action, in line with the United Nations Charter,[112] when States fail to protect their populations — to use force, but also to assist and to respond. A point was made that although R2P indeed reflects a consensus, there is a need to further engage with states and regional organisations, for instance, in Africa and the Middle East, to dissolve remaining prejudices and make this principle fully operational.

A couple of months ago, when I engaged in dialogue with the African ambassadors in New York in preparation of the report of the Secretary General on R2P, some argued that the R2P principle is a Western principle, a result of Western academics and an attempt to impose Western views on the rest of the world.

I had a divergent view. Because in 2000, when African leaders adopted the Constitutive Act of the African Union, there was a revolutionary provision, Article 4(h), which called on heads of state and governments in Africa to intervene whenever a situation could lead to genocide, crimes against humanity and war crimes.[113] In other words, Africa pioneered the R2P principle.

This is extremely important and means that in Africa we have been witnessing a shift away from the famous princip-

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112 For the full text of the Charter, see: **http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf**

113 Article 4 (h) enshrines, „The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity."
For the full text of the Constitutive Act, see: **http://www.au2002.gov.za/docs/key_oau/au_act.htm**

le in the OAU charter, the principle of non-interference. We have moved from non-interference to non-indifference. I think that was a result of the failure of the OAU in Rwanda, the failure also shared by the international community. But at least the African Union drew the right conclusions and learnt the right lesson, and today we should be truly committed and make sure that the responsibility to protect becomes a reality on African soil.

In this regard, my office is aiming to organise a continental conference in Africa around the theme of the prevention of genocide and the responsibility to protect, to mark the commemoration of the 10th anniversary of World Summit and the commitment to R2P in its outcome document. We will also try to invite the African Commission on Human and Peoples' Rights[114] to update the resolution it adopted in 2007 on R2P.[115]

We also discussed how judicial processes and jurisdictions are instrumental in the fight against impunity and the prevention of atrocity crimes. I think we all agree on how important justice processes are. A very important question was raised on the close links between accountability and prevention. I believe that for accountability to support prevention, accountability must be made to work. The international community should increase support for international justice mechanisms, including the ICC. I deliberately say „including the ICC" because we should not exclude other potential international justice mechanisms.

While discussing the role of judicial processes in preventing genocide, participants at our conference recommended that more attention be paid to national courts when it came to prosecuting genocide, the idea being to strengthen the capacity of states to try perpetrators of mass atrocity crimes at a domestic level in accordance with international standards.

Jamie Williamson, Legal Advisor to the International Committee of the Red Cross, also mentioned the necessity of reinforcing the capacity of peacekeeping operations, so as to enable these to respond to the specific operational demands of preventing mass atrocity crimes.

The other side of the coin is that it is becoming increasingly clear that international justice institutions are coming to an understanding that they do not operate in a vacuum. International courts should become more keenly aware of the political context in which they operate, in order to become more effective. I think a similar message was implicit in our colleague William Wiley's statement about the complementarity of efforts between prosecution and advocacy, or in the crystal clear point made by Sana Elmansouri from Libya, who asked, „Why do we need to acquire information, proof and evidence, if in the end there is no political will to act?" That question from Ms. Elmansouri is important and relevant when we see what is happening today. I think it is time to really stop paying lip service to protecting civilian populations.

This morning, we started by looking at challenges in the protection of civilians. I wish to highlight the need to step up co-operation among all relevant stakeholders who are engaged in monitoring, investigation, reporting and acquisition of evidence. I think that, under certain circumstances, there might be a need to engage with all parties, even those who bear possible responsibility for serious violations of human rights or international humanitarian law.

Of course, this could expose us to criticism. For instance, as a senior official of the UN, I cannot engage in discussions with Omar al-Bashir who is an indictee of the International Criminal Court, unless it is a critical situation. I cannot socialise with this man but there might be circumstances where, if I realise I have to engage in a discussion with him to protect civilians, I will not hesitate to do so.

For instance, there was a time when some Western leaders were of the view that nobody should meet with the President of Zimbabwe, Mr Robert Mugabe.[116] I remember the same was also said about the former President of Iran,

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114 The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission is officially charged with three major functions: the protection of human and peoples' rights, the promotion of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights. For the full text of the Charter, see: **http://www.achpr.org/instruments/achpr/**

115 In November 2007, the African Commission on Human and Peoples' Rights passed a Resolution on „Strengthening the Responsibility to Protect in Africa" at its 42nd Ordinary Session in Congo Brazzaville. For the full text of the Resolution, see: **http://responsibilitytoprotect.org/files/Resolution%20on%20Strengthening%20the%20Responsibility%20to%20protect%20in%20Africa%20-.doc**

Journalist Florence Bonabaana from Uganda.

Mr Mahmoud Ahmadinejad.[117] Of course, he made very unacceptable statements. But UN Secretary General Ban Ki-moon met with him, discussed with him, and argued with him. That was extremely helpful because the following year, when Mr Ahmadinejad travelled to New York, he changed his language.

Sooner or later, accountability will come. We have seen it in the case of Mr Augusto Pinochet. Twenty years after he ended his mandate, he was arrested.[118] I also underline Peter Bouckaert's conclusion to his presentation on the Central African Republic[119] when he said that, „There are cheaper ways than peacekeeping operations to prevent atrocity crimes." I could not agree more. This has been confirmed by the panellists speaking on Syria, on Iraq and also on the intervention in Libya, and I think we have to address such situations collectively before they escalate to the level of destruction that we see today. One of the participants' recommendations was to implement, not only more, but also better early warning mechanisms.

UN Secretary General Ban Ki-moon has made prevention his mantra, and Member States, which are increasingly under budgetary constraints, have formally declared that they think the same. I mentioned yesterday that the Security Council adopted resolutions highlighting the importance of my mandate in April and August 2014, and the need to really put more emphasis on prevention.[120] But the reality on the ground is different, and a culture of prevention has yet to take root in international affairs.

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116 Robert Mugabe is the President of Zimbabwe, and has been in office since 31 December 1987. Between 1980 and 1987, he served as the country's prime minister and head of government.
117 Mahmoud Ahmadinejad was President of Iran between 2005 and 2013.
118 Augusto Pinochet governed Chile between 1973 and 1990 and was Commander-in-Chief of the Chilean Army from 1973 to 1998. He was President of the Government Junta of Chile between 1973 and 1981. On 10 October 1998 he was indicted for human rights violations committed in Chile, by Spanish magistrate Baltasar Garzón under the principle of universal jurisdiction. He was arrested in London six days later and held for a year and a half before being released in March 2000.
119 See page 48 for Peter Bouckaert's presentation.
120 See United Nations Security Council „Resolution 2150 (2014)" 16 April 2014 S/RES/2150 **http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2150(2014)** and United Nations Security Council „Resolution 2171 (2014)" 21 August 2014 S/RES/2171 **http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2171%20%282014%29**

It is true that prevention is not attractive to the media. Most of the time, the media prefer to report on tragedies and catastrophes but not successes. Yet we need to reflect on how, in future, investing in prevention can be shown to be seen as something that is very positive and that might help make our world a better place.

On the other hand, some of the journalists here at our conference have reminded us to take local media in conflict areas more seriously because they can contribute to preventing genocide, particularly through identifying and putting a stop to hate speech. Another critical issue is respect for the media's right to report in conflict areas and ensuring the necessary protection to do so.

Let me say once more that prevention of atrocities is not the sole responsibility of human rights activists, humanitarian practitioners or crisis responders. The prevention of atrocity crimes is really the responsibility of each and every one of us. Everyone has a responsibility, and we need to make efforts to understand the root causes and the dynamics of atrocity crimes. We need to make that effort in order to devise comprehensive policies that affect all areas of governance.

The last panel highlighted this very well, and this is why the fight against hate speech and incitement to violence is such an important component of state policies on the prevention of atrocity crimes. That is why, after having closely assisted the High Commissioner for Human Rights (OHCHR) in the preparation of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, my office decided to translate that declaration into a policy option paper.[121] So, we produced a policy option paper on measures that can be taken to prevent incitement by different actors, with the help of various experts, and also with the help of the OHCHR and United Nations Special Rapporteurs on freedom of religion or belief, on freedom of opinion and expression and on contemporary forms of racism.[122] I think that such documents are so very important and should be used by Member States, regional organisations, civil society and the media.

We also have to make sure that education systems pay specific attention to the tragic genocides in the history of mankind, as well as prevent such tragedies from happening again. We have to make the principle of non-discrimination a reality of our societies. During our deliberations we discussed the possibility for UNESCO to work on the concept of textbooks such as the ones mentioned by Dr. Falk Pingel[123] and I have offered to follow up because my office is currently engaged in a joint project with UNESCO on Holocaust and genocide prevention education.
I usually say that genocide is the ultimate form of discrimination. Therefore, we need to make every effort to promote the constructive management of diversity in our societies.

The very poignant statement delivered by Father Kinvi is still very fresh in our minds, and I will say once again that we could not have a more inspirational way to close our session. Let me stress that I myself and my office remain very much committed to working with all of you in the weeks and months to come, and in the past two days I have personally learnt a lot from your contributions. Sitting in this venerable room, my thoughts went often to Raphael Lemkin, the father of the term „genocide".

A young Lemkin entered this building in the spring of 1946, continuing his determined lobbying for the inclusion of the charge of genocide in the trials. This city probably left him with some bitter feelings. Let me quote from his diary:[124]

„When the Nuremberg judgement was pronounced, I was not in Nuremberg. At that time, the peace conference with the satellite axis powers was taking place in Paris. I went to Paris and tried to include genocide in the clause of the treaties. I came at the wrong time because there was a statement in the negotiation. The delegates of the

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121 The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence was the result of the conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR in 2011 and adopted by experts in Rabat, Morocco on 5 October 2012. For the full text, see:
http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf
122 Mr. Heiner Bielefeldt assumed his mandate as Special Rapporteur on freedom of religion or belief on 1 August 2010.
123 See page 82 for Falk Pingel's presentation.
124 For Lemkin's memoir, see: Raphael Lemkin Totally Unofficial: The Autobiography of Raphael Lemkin (New Haven, Connecticut: Yale University Press, 2013)

„Reporting on Genocide and Mass Violence" media workshop held in December 2014 in Nuremberg, Germany.

peace conference listened to me but their minds were elsewhere. Under the stress of this work, I became ill and was confined to the American military hospital in Paris. It was there that I listened over the radio to the Nuremberg judgement which condemned the Nazis, that failed to take into account under the international law the full moral, social and humanitarian implication of genocide as an international crime."

The biggest legacy of Raphael Lemkin is to have demonstrated the potential and responsibility of each and every one of us in our various roles -governments, regional organisations, international organisations, civil society, academia and the media — to promote the agenda of prevention of atrocity crimes. I insisted on the media because the media play a key role. And we need to explore that role even beyond traditional media, and how we can use social media to further strengthen the prevention of atrocity crimes.

There are examples such as the one from Kenya highlighted by Mr. Daudi Were.[125] There are examples such as Abdullah-X, where there is a lot of potential.[126] This is why initiatives like this conference and the journalism training under the leadership of the Wayamo Foundation are so essential to catalyse the commitment of relevant stakeholders to this agenda.

I will end my concluding remarks by wishing the International Nuremberg Principles Academy all possible success in this endeavour. And I would like to ask all of you to thank the organisers for this very successful meeting, for their warm hospitality, and to wish all of you a safe journey back to your respective countries. A Merry Christmas and a Happy New Year to you all.

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125 See page 84 for Daudi Were's presentation.
126 For more details on the Abdullah-X project, see: **http://www.abdullahx.com/**

INTERNATIONALE AKADEMIE NÜRNBERGER PRINZIPIEN

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