

UNITAR Peace and Security Series
Seminar on Preventing Genocide
Session V - The “Carrots and Sticks” of the International Community

The international prevention architecture: Gaps and challenges

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Dear colleagues and friends,

I would like to share with you some initial thoughts on the possible gaps in and challenges for the international community in the prevention of genocide. My remarks are based on my experience as Special Adviser to the Secretary-General on the Prevention of Genocide, a position that I held from June 2004 until the end of last week.

First, I would like to recall a strong historical argument for our common cause of preventing genocide: The foundation of the United Nations is to a large extent linked to a desire to avert the horrors of the Second World War. The Organization’s Charter shows an awareness of the close connection between respect for human rights and peace. Thus, the Charter provides for the adoption of legally binding measures in cases of threats to the peace, breaches of the peace, and acts of aggression. However, these powers of the Organization are balanced by the principles of national sovereignty and of friendly relations and cooperation among states.

Second, I would like to submit that one important challenge is the lack of clarity on the exact content of the international legal obligation to prevent genocide.

On 9 December 1948, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide in which the parties confirm that genocide is a crime under international law which they undertake to prevent and punish. While the Holocaust served as the most deliberate and thorough example, discussions about the Convention also considered events involving smaller numbers of victims and less systematic approaches, such as the destruction of Carthage, the destruction of religious groups during the wars of Islam and the Crusades and the massacre of the Armenians.

Different from human rights treaties drafted within the United Nations subsequently, the Convention does not provide for a treaty body or any periodic reporting by States Parties on the implementation of their obligations. The Convention focuses more on punishment than on prevention—although, clearly, the punishment of the crime of genocide is meant to have a general preventive effect. Some indications on the obligation to prevent genocide can be found e.g. in decisions of the International Court of Justice

(ICJ) , the ad-hoc tribunals for Rwanda and Yugoslavia, the documentation on the drafting process of the Convention and two studies prepared by Special Rapporteurs upon request by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1978 and 1985 respectively.

According to the Advisory Opinion of the ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the Convention primarily confirms pre-existing legal obligations that amount to international *jus cogens*. Thus, preventing genocide is a principle of international law so fundamental that no nation may ignore it. Governments are obliged to take all measures within their power to prevent the commission of the crime of genocide, even before a competent court determines that the Convention actually applies to a case at hand. In its judgement of 26 February 2007, *Bosnia and Herzegovina vs. Serbia and Montenegro*, the ICJ provided important guidance on the interpretation of the obligation to prevent genocide. The Court established that the obligation is one of conduct and not of result so that the State has to employ all available means without the obligation to actually succeed. The State would be responsible where it manifestly fails to take all measures within its power and which might contribute to preventing genocide. However, the State can only be held responsible for breaching the obligation to prevent if genocide is actually committed.

Further clarification on the obligation to prevent genocide will hopefully arise from the ongoing discussion on the operationalization of the Responsibility to Protect (RtP) that was discussed earlier today. The responsibility to prevent genocide as one element of the RtP has to contain elements of the obligation to prevent as established by the Convention, without being necessarily identical. At the same time, for the reasons just mentioned, I argued throughout my term as Special Adviser that the prevention of genocide has a legal and political basis independent of the future of the so called “emerging” principle of RtP.

Apart from the lack of a treaty body, there are a number of institutional gaps and challenges within the United Nations with regard to the prevention of genocide. I cannot go into all the details here and would like to refer you to the Carlsson Report, the Srebrenica Report, the Brahimi Report et alia. Instead, I would like to share with you some observations from my time as Special Adviser.

As you will recall, Secretary-General Annan announced the creation of the office of the Special Adviser on the Prevention of Genocide in Geneva, during a ceremony at the UN Commission on Human Rights commemorating the tenth Anniversary of the Rwandan genocide, in April 2004. This announcement was part of an Action Plan to Prevent Genocide involving the whole UN system that the Secretary-General summarized under five headings: Preventing armed conflict, protection of civilians in armed conflict, ending impunity, early and clear warning, and swift and decisive action. When presenting the plan to the Commission, the Secretary-General pointed to conspicuous gaps in the United Nation’s capacity to give early-warning of genocide or comparable crimes. The Office of the Special Adviser on the Prevention of Genocide (OSAPG) was created in

part as a way to fill the gaps identified in the reports mentioned above, but much more is needed based on the experience of my office.

My office was expected to provide early-warning and proposals for early-action to the Secretary-General and through him to the Security Council.

Early warning requires indicators, or warning signs of situations that risk deteriorating. Numerous governmental agencies, NGOs and academic institutions provide indicators and methodology for the early-warning of massive violations of human rights and humanitarian law. However, there is no agreed set of indicators within the UN. Most of the internal UN mechanisms for early-warning rely on the analysis and expertise of staff on the ground and in headquarters to evaluate a situation based on a case-by-case basis. Even more, while early-warning systems exist for humanitarian crises and refugee flows, the Member States are very reluctant to allow the Secretariat to establish a general system for the early-warning on conflict or genocide. Therefore, information related to risk factors for genocide needs to be gathered in a very time consuming way from information sources provided for only remotely related purposes. Nevertheless, the OSAPG made some attempts to fill the gaps. For example, we worked with the Department of Public Information (DPI) to help monitors in the field identify when the exercise of free speech crosses the line into instigation or incitement to commit genocide or crimes against humanity.

With regard to early-action, the prevention of genocide seems predicated on acting comprehensively in four interrelated areas: the protection of populations at risk against serious or massive violations of human rights or humanitarian law, establishing accountability for violations of human rights and humanitarian law, humanitarian relief or access to basic economic, social and cultural rights, and steps to address underlying causes of conflict through peace agreements and transitional processes. In all of these areas, international action requires the consent and cooperation of the State concerned. While international action could be imposed, based on Chapter VII of the Charter, we have learned in Kosovo and Darfur that the implementation of measures against the will of the State concerned requires unanimity of the P5 in the Security Council, which is very difficult to obtain. As stated, we need to act simultaneously on all those fronts; more importantly, we need to avoid the vicious circle that we see today in Darfur, where we don't protect the population because we can't obtain an agreement, and we can't deliver humanitarian relief because we can't protect those services, and so on.

To a large extent, I have seen my mandate as an experience and, from the beginning, reached out to academia, civil society, Member States and UN colleagues to seek their views and suggestions regarding the role of the Special Adviser. In November 2005, Payam Akhavan prepared a report at my request reviewing the work of my office, gathering and assessing the views and expectations of the mandate within the UN system, and providing recommendations and options for further action with a view to improving the effectiveness of the office. Secretary-General Annan appointed an Advisory Committee on the Prevention of Genocide, in May 2006, to provide guidance and support to the work of the Special Adviser on the Prevention of Genocide, and contribute to the

broader efforts of the UN to prevent genocide. I had the privilege of being named to serve in that Advisory Committee formed by distinguished personalities and chaired by Dr. David Hamburg. In October 2006, the Committee presented a report to the Secretary-General in the hope that its content and recommendations will help ensure the continuation of his strong commitment to the prevention of armed conflict and other mass violence, along with genocide, and making the UN more effective in this crucial role. The Committee provided specific recommendations on the strengthening and work of my office, which are currently pending with Secretary-General Ban. I hope the recommendations will be implemented soon and that they will make an important contribution to overcome some of the challenges I have tried to outline.

I would like to close, however, by saying that without precluding the possibility of reform within the UN, the most important contributions to the prevention of genocide is raising public concern. One of the conclusions of *Samantha Power* after reviewing the reaction by the USA to situations of massive violations of human rights and humanitarian law is the crucial role of public opinion at home for the motivation of governments to address a certain situations abroad. The same is true, for sure, for any other government. In previous and current situations of concern, there have been early signs of a deteriorating situation, concrete proposals for preventive action and some degree of public concern. However, governments intervened only when urged by their electorate under the leadership of national and international civil society organizations or influential individuals.

In the exercise of my duties I have learned to recognize: 1) that political will to prevent or to punish genocide is never there spontaneously; and 2) that political will is built, step by step, by men and women of good will who are ready to engage in campaigning against genocide. In many instances, I chose to exercise my role in a manner designed to contribute to the creation of a global wave of public opinion that can make political will inevitable.

Thank you.