

**PREVENTIVE STRATEGIES, PREVENTIVE DIPLOMACY AND THE
PREVENTION OF GENOCIDE:
SOME THOUGHTS FOR THE FUTURE**

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Introduction

The International Court of Justice, in its Judgment on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, delivered on 26 February, 2007, provided authoritative guidance on the concept of genocide and the duty of States Parties to prevent genocide. This presentation will draw upon the Court's guidance. It will also consider the relevance of the judgement to the activities of the UN Special Adviser on the Prevention of Genocide.

I. The Prohibited Acts

The Court notes that genocide, as defined in Article II of the Convention, comprises "acts" and "intent". The acts prohibited are the following:

- "(a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; and
- (e) Forcibly transferring children of the group to another group."

II. The Intent

The Court points out that the above acts themselves include mental elements but stresses that in addition to those mental elements, Article II of the Convention requires a further mental element, namely the "intent to destroy, in whole or in part (the protected) group as such." It is not enough that the members of the group are targeted because they belong to that group. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

The Court observes that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics – national, ethnical, racial, or religious – and not the lack of them. For the purposes of Article II, the intent must be to destroy at least a substantial part of the particular group. The part targeted must be significant enough to have an impact on the group as a whole. It is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.

Ethnic cleansing can only be a form of genocide within the meaning of the convention if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogenous”, nor the operations that may be carried out to implement such policy, can as such be designated as genocide. However, ethnic cleansing might constitute genocide if the acts carried are such as to be characterized as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, provided that such action is carried out with the necessary specific intent, that is to say with a view to the destruction of the of the group, as distinct from its removal from the region.

III. The Standard of Proof

The standard of proof required is that appropriate to charges of exceptional gravity. The specific intent to destroy the group in whole or in part has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence it would have to be such that it could only point to the existence of such an intent.

IV. The Obligation to Prevent Genocide

The obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide. The obligation of States Parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power and which might have contributed to preventing the genocide. Furthermore, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed.

On the specific events before the Court, it found that the Yugoslav federal authorities should have made the best efforts within their power to try and prevent the tragic events then taking shape in Srebrenica, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milosevic above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. Yet the FRY did not show to the Court that they took any initiative to prevent what happened, or any action on their part to avert the atrocities which were committed. It must therefore be concluded that the organs of the FRY did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallied with their known influence over the VRS.

For a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent genocide; it is sufficient that it had the means to do so and manifestly refrained from using them.

V. The Obligation to Punish Genocide

In discussing the FRY's obligation to punish genocide, the Court considered the degree of its cooperation with the ICTY and concluded that it failed to do so. This failure amounted to a violation of its obligations under Article VI of the Genocide Convention.

VI. The UN Special Adviser on the Prevention of Genocide

From the pronouncements of the Court on the prevention of genocide it may be concluded that the remit of the UN Special Adviser on the Prevention of Genocide is to deploy his or her best endeavours for prevention. The position of Special Adviser on the Prevention of Genocide is an important one and Secretary-General Ban Ki Moon has reportedly decided to retain and strengthen it. He reportedly plans to make the position a full-time one and to increase its staff. The first Special Adviser has charted the way in the establishment of the office and the foundations have thus been laid for the development of new vistas in the development and practice of preventive diplomacy.

Based on interviews with some of its members, the Advisory Committee of the Secretary-General on the Prevention of Genocide is apparently of the view that the signs of genocide are visible long before the killings begin, often for a period of years. What was needed was some mechanism at the heart of the international system designed to ring the necessary warning bells, whenever and wherever occasion for alarm exists. The position of Special Adviser should therefore act in anticipatory, proactive and preventive ways as part of the broader Action Plan to Prevent Genocide that had been put forward by Secretary-General Annan and involving: preventing armed conflict; protection of civilians in armed conflict; ending impunity; early and clear warning; and decisive action.

The real need, in the Advisory Committee's view, was to engage in a search for preventive measures for extensive human rights abuses or genocide-prone behaviour. It was important, if the Special Adviser is to fully exercise what should be a broad anticipatory, proactive and preventive approach and that he or she not be restricted from addressing situations where violence was not imminent or already happening: the role of the Special Adviser was to help provide strong moral authority on the need to act wisely before it is too late and thus to avoid immense human suffering.

To effectively discharge the Special Adviser's mandate, the holder of the position needed to be both a clear voice of moral obligation and a source of good advice as to the practical steps needed to discharge that obligation. The Special Adviser must be able to exercise multiple functions. The Special Adviser's office needed to be able to engage in effective information collection and analysis, ranging worldwide on developments relating to massive or serious violations of human rights and humanitarian law; to select and act quickly on new situations of imminent danger, giving early warning and helping mobilize appropriate responses; to respond not only to new but to ongoing crises that raised issues within his or her brief; and to promote enhanced preventive capacity through other elements in the UN system and by

engaging in educational outreach and networking. There was need for careful human rights and political analysis by the Special Adviser and less so for a system of quantitative processing of data.

The Special Adviser, according to members of the Advisory Committee, should continue building a network with other key players (international, regional and sub-regional organizations; academics and non-governmental organizations) to strengthen collective preventive efforts. There was room in particular to work with regional organizations, encouraging their activity in this field. There were many forms of concerted action possible among multiple actors. In all of this NGOs could be very helpful. The Special Adviser should therefore:

- Establish an ongoing process, drawing on readily available information from all sources, to identify targets, scapegoats and out-groups.
- Monitor trends of hatred and dehumanization toward the groups identified in such a vulnerable position.
- Help to build internal capacity of member states (as requested) for early, ongoing conflict resolution, including essential concepts, techniques (e.g. negotiation and mediation) and institutions (e.g. an independent judiciary).
- Help leaders and the public understand the merits of these enterprises, showing how a country caught up in deep antagonisms would find such measures to serve its own interests.
- Identify predisposing factors, for example economic deterioration, social disorganization, an alienated position with prospects of war and/or revolution in the background. The earlier such problems were identified and the better they were understood, the greater the opportunity for international organizations to help.
- Enlist the help of key member states who had strong interest in the genocide problem and how to overcome it and persuade them to commit the intellectual, technical, financial and moral resources.

Prevention and Protection

The central task of the Special Adviser must be to help the Secretary-General prevent against and protect from genocide. This will require active behind the scenes cooperation with all the entities of the United Nations system working on prevention, partner organizations, regional preventive mechanisms, and academic and research institutions with a view to advising the Secretary-General about situations where he may need to deploy his preventive efforts. It would be helpful to the Special Adviser if a partner academic or research organization were to maintain a data-base of potential risk situations – a watch list. This is best done outside the UN as its existence and maintenance within the UN are likely to engender leaks and diplomatic protests in an environment in which developing countries in particular are already sensitive to intrusions into their internal affairs.

Based on consultations with partners indicated in the preceding paragraph, the Special Adviser could send a Briefing Note to the Secretary-General at the start of each quarter, after consulting the head of the Department of Political Affairs and the High Commissioner for Human Rights discreetly and personally, indicating situations of high concern and suggesting behind the scenes approaches that the Secretary-

General might undertake or that he might approve be undertaken on his behalf. Such measures might include discussions with the Head of the relevant regional organization or the deployment of a discreet fact-finding mission on behalf of the UN and the regional organization. Great care would need to be exercised to ensure that this does not become a routine inter-office exercise that could leak and spoil the effort. The most careful and sensitive diplomacy would be called for.

In cases of acute concern where the Special Adviser considers that stronger measures might be needed he or she would need to assess the options of the Secretary-General raising the matter in conversation with the Head of State or Government concerned, advising the Security Council discreetly about such a situation, provide the Secretary-General with an analysis of the risks involved in the situation, the contribution that the Security Council, the Head of DPA, or the High Commissioner might make, and the potential advantages or pitfalls of involvement by the Secretary-General. The responsibility to protect would need to be pursued simultaneously with the practice of preventive diplomacy.

Where the situation seems to call for it and the political context is positive the deployment of a small corps of UN goodwill ambassadors could be considered for a short period as a calming, preventive and protective device. In the training of national peacekeepers for rapid deployment missions, as well as in UN peacekeeping planning, specialized courses could be provided in the role of UN goodwill ambassadors.

In cases of acute concern the Special Adviser would need to weigh the options, and advise the Secretary-General of the pros and cons of alerting the States Parties to the Convention on the Prevention and Punishment of Genocide, briefing the Security Council informally, or raising the matter under Article 99 of the Charter. In such a situation the role of the Under-Secretary-General for Political Affairs would be central for the Secretary-General would then be embarking on highly sensitive political options that should only be undertaken after the most careful consideration.

International and Regional Cooperation

A mission such as the prevention of genocide calls for the deployment of diplomacy towards international and regional partners so as to sensitise them to the need for preventive measures and to draw on their continuing support in this endeavour. One way of proceeding on this mission would be for the Special Adviser to engage in continuous contacts with the Heads of regional organizations, their conflict prevention mechanisms, and their human rights organizations and leaders so as to draw insights from one another and to move forward cooperatively in strength. After initial contacts with these entities the Special Adviser, with the blessings of the Secretary-General, could make policy addresses to each of these entities with a view to laying down lines of cooperation and joint endeavour. Eventually, when the time is ripe for it, the Special Adviser could prepare the ground for the Secretary-General to conclude Memoranda of Understanding with the Heads of each regional organization on cooperation in the prevention of genocide. The purpose of this would be help raise awareness, promote policies, and develop practical cooperation for the prevention of genocide.

High-Level Policy Statements

The Special Adviser, in close concertation with the Secretary-General, could aim for the occasional adoption of high-level policy statements expressing commitment to cooperate for the prevention of genocide. One could aim, eventually, for such a statement at the assemblies of the principal regional organizations and at the UN General Assembly. The purpose of such policy statements would be sensitization and commitment to practical cooperation.

Cooperation with Human Rights bodies

There are many related activities of UN and regional human rights bodies that would provide room for beneficial cooperation on the prevention of genocide. Within the framework of the UN Human Rights Council there are several parallel efforts on the implementation of the Durban Declaration and Programme of Action against racism, racial discrimination and xenophobia. The inclusion of an item on the prevention of genocide would seem natural in these efforts. The ECOSOC's Permanent Forum on Indigenous Populations and, if it continues, the former Human Rights Sub-Commission Working Group on Indigenous People would be natural partners for efforts on the prevention of genocide. There is also an Independent Expert of the Office of High Commissioner for Human Rights dealing with the protection of minorities and there is room for cooperation here also. The field offices and national offices of the Office of High Commissioner for Human Rights can be helpful, as indeed can be the High Commissioner across the board. The OSCE High Commissioner on National and Ethnic Minorities and the Council of Europe Commissioner for Human Rights are natural partners. The regional commissions on human rights and offices such that of the OSCE on democracy and human rights can make a useful contribution. It needs to be stressed that what we have in mind is careful diplomacy towards, and with, these different organizations. A certain measure of advocacy might also be required, keeping in mind the primary advocacy role of the High Commissioner for Human Rights.

National Policy Statements and Preventive Measures

It could be a key objective of the Special Adviser, in cooperation with the UN High Commissioner for Human Rights and other partners, to promote the adoption of national policy statements on the prevention of genocide in multi-ethnic countries. Secretary-General Annan, in his final report on prevention, called for the promotion of national prevention systems within countries. The adoption of national policy statements on the prevention of genocide would be a good start towards this end in multi-ethnic countries. There would naturally be sensitivities in such a matter and the Special Adviser would need to be prudent in pursuing this course of action. But it would be a step-by-step approach, starting with countries that are positively inclined and spreading out to others in time.

Cooperation with NGOs, Academic and Research Bodies

NGOs, scholars and researchers have already made an important contribution towards the development of preventive strategies and institutions and their continuing efforts would be crucial in support of the efforts of the special adviser and the mission for the prevention of genocide. One way of drawing upon the efforts of this talent and

advocacy pool might be to work with them in the organization of an annual seminar or conference on the prevention of genocide. Each conference could lead to the publication of a book on the prevention of genocide containing the latest research yields in this area, national, regional and international policy developments, and generally promoting scholarship and thinking in this field.

Conclusion

The International Court of Justice has provided importance guidance on the crime of genocide and on the duty to prevent and to punish genocide. The Advisory Committee on the Prevention of Genocide has provided valuable pointers on the road ahead. The task now is one of meaningful, solid and effective international and regional cooperation for the prevention of genocide. All parts of the UN system and constituency must play their part. This is a charge that belongs to all.