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OTP – NGO Roundtable Meeting

***Introduction to the Work of the Special Advisers
Special Adviser on Prevention***

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Summary

I am very honoured that the Prosecutor has asked me to address you on the matter of prevention of the crimes under the Rome Statute. I would have much preferred to have been there amongst you to have this discussion with you, but I hope that this presentation is somehow an adequate substitute.

As you know, the Prosecutor has asked me to serve as Special Adviser on Prevention, and this of course arises from the fact that I have tried on the specific issue of genocide to organize a system of prevention in the United Nations after being appointed by Kofi Annan as his Special Adviser on prevention of genocide, a position that I held between 2002 and 2007.

Prevention of major atrocities is a very complex issue and one that has been central in the human rights movement ever since I have been involved with it. On the one hand, I think the human rights movement has found a pretty good way of dealing with atrocities after they happened, but I always thought that it should work on making them not happen in the first place. It has always been very difficult to think on what constitutes prevention.

Prevention is an obligation that we all have. It is in the preamble of the Rome Statute, it is also specifically the aim and objective of the Genocide Convention of 1948, it is specifically a State obligation under the Torture Convention for example, and in general it is something that we cannot afford to ignore, not only for legal reasons, but also for moral and political reasons.

However, unfortunately, the law tells us to work on prevention but it doesn't give us too much hints in the direction of how to prevent mass atrocities from happening. The legal framework, however, contains some hints as to how prevention is to be accomplished. One of them, and perhaps the most prevalent and more pervasive in international law, is that you prevent by providing accountability for the crimes that have already happened. In other words, justice is meant to have a preventive effect.

This is very much the case in the instruments that I have already mentioned. But it is also in a way an act of faith. We think that future examples of genocides or crimes against humanity or of torture are not going to happen if we successfully break the cycle of impunity and investigate, prosecute and punish those instigators of genocide, crimes against humanity and war crimes that have already happened. I think the rationality behind it is that there has been so much impunity behind those crimes that its impunity is felt to be a major incentive to the new commission of similar crimes. Obviously, if you break the cycle of impunity, you probably make it less likely that similar crimes are going to happen in the future.

Our task is very complicated and difficult. Nevertheless, I want to stress again that the fact that it is difficult doesn't mean that we can have the luxury of ignoring it. On the contrary, we have a legal but also a moral and political obligation to engage in prevention and to study the way justice can serve the purposes of prevention in specific and detailed ways. We will probably never have the specific evidence because we prosecute and punish this particular case we prevented similar cases to happen in this jurisdiction or in others. But our ability to make arguments that justice is what contributes to a preventive mechanism is important. In that sense I want to mention a couple of things: the first one is that there will always be arguments in favour of prevention but against justice: there will be always arguments made that if we investigate, prosecute and punish, the likelihood of the immediate effect is to have more violence and less peaceful solutions.

That is a very difficult issue that we need to tackle head on, granting that it is a very difficult dilemma, not ignoring the argument in any way but actually addressing it in a serious way. I think though that we have to start from the premise that it is a very contingent, very context related argument. I think we all should be modest in claims that we make about how prosecuting and punishing today will avoid crimes in the future, but at the same time we need to insist that the context is not just about everything here. The solutions are clearly not to sacrifice justice so that peace can prevail, because we can come up with many examples in which that approach has led to a very faulty, fragile peace that eventually breaks down bringing new violence to happen all over again. I am not going to spend any time with the different examples, I just want to point out that we have a duty in each case that this argument comes up to try to explore in depth, in context but also in depth, the conditions in which this argument is made, and the likely results that will come from one or the other solution.

In this sense, I think we can make the case that prosecuting wrong doers can be in some circumstances the only way to prevent violations in the future by, for example, taking out the spoilers to a peace agreement - those who are there to make sure that a decent and lasting peace will never be achieved. Sometimes the only way to do it is to deal with others that are in a better position to achieve a lasting peace. Perhaps an easy example of that is when, in Dayton accords, Karadzic and Mladic were taken out of the picture because they were under arrest warrants from the ICTY, and that actually facilitated the peace process in Dayton, rather than making it more difficult.

The other point that I want to make is that there are certain conditions under which justice can be seen as having a preventive effect. Those conditions have to do with, one, not being the only solution – justice can prevent as long as it

is accompanied with several other measures, particularly in three larger areas: (physical) protection of individuals vulnerable to human rights violations; humanitarian action that brings quick relief to victims and help for their basic needs, so they can participate to the decision-making in situations of less vulnerability; and the peace process itself, you have to pursue very diligently ultimate solutions for the undergoing conflict. In that scheme justice plays a very important role in prevention, but left to its own devices leads to failure and disappointment at the very least.

Another condition that I think is relevant, in a paradoxical way, is that justice must be pursued for its own sake, for its own value. Justice cannot be used as an instrument of peace, justice cannot go on and off for the purposes of moving the actors into the bargaining table and keeping them there. Justice has to be pursued for its own sake and under its own rules. That is as I said paradoxical because it is a condition under which justice can act with a preventive effect, only if it doesn't pay too much attention to that role and pursues its own principles, rules and values.

The third condition is almost derived to the second one, that is that to have a preventive effect, Justice has to follow very seriously all the principles of fair trial and due process. If it is perceived as trying to get results without the due respect for all of the safeguards of fair trial and due process that over centuries we have developed, then it probably not only won't work, but it will actually a lot of dissatisfaction and a lot of new grievances.

The fourth one - and I am sure that there are other conditions but these are the ones I'm thinking of now - is that justice has to be allowed to be more or less consistent and more or less automatic, in the sense that if you have jurisdiction, if the facts, the patterns of fact fit the description of the crimes, you have to act, and act consistently and appropriately. This is borrowed from the only clear lesson that I think we can derive from domestic criminology studies: it is not the punishment that seems to have a deterrent effect on criminals, but the certainty of punishment that seems to have that effect. In the international arena, the certainty of investigation, prosecution and punishment will depend on strengthening the ICC over a long period, but in the mean time the worst that we can do is make the ICC a sort of hostage to the very pragmatic and immediate kind of solutions that need to happen on a given situation. If we do that, we will probably de-legitimize the institutions of international justice, and if they are de-legitimized in the eyes of international community, they will probably have much less of a role in preventing criminality in the future.

There is a lot more to be said, but my sense was that I needed to give you some fruitful thoughts so that you can have discussions. I really wish that I could be there to hear your discussions on this issues and I hope that we will have some way of being in contact in that fashion. In the meantime, I wish you success in your deliberations and hope to be with you pretty soon to continue these discussions.