



## Panel III: The ICC in its fifth year: dealing with the conflict between peace and justice

*The genocide in Darfur, the role of the UN and the ICC*

Remarks by Mr. Juan E. Mendez, Special Adviser to the Secretary-General on the Prevention of Genocide

Nuremberg, 7 October 2006

Colleagues and friends,  
Ladies and Gentlemen,

As I underlined already during my lecture last night, accountability is an important part of prevention of genocide and other grave and serious violations of human rights and humanitarian law. At the same time, I shall recall that the purpose of the Special Adviser is not to determine whether genocide has occurred or is occurring, but to propose steps to prevent it. The last paragraph of the outline of my mandate states clearly that “the Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred.” Notwithstanding the title given to my remarks by the organizers of this conference, I am afraid to say that I am not in a position to call the situation in Darfur genocide.

I strongly believe, however, that quibbles over the applicability of the term should not be an obstacle for meaningful action. The situation in Darfur and the suffering experienced by its so called “African tribes” has been of grave concern to me since I was appointed Special Adviser to the United Nations Secretary-General on the Prevention of Genocide in July 2004. I stated clearly from the outset that, irrespective of whether one were to determine that genocide had or was taking place or not, the threat of genocide in Darfur was evident and that preventive measures were required. Shortly after taking on my functions as Special Adviser, I visited Darfur at the Secretary-General’s request together with the High Commissioner for Human Rights.

After our visit to Darfur, the High Commissioner and I informed the Security Council that the lack of accountability for human rights violations was one of the causes of the widespread violence. At that time, we recommended the deployment of international police in villages and IDP camps as well as an increase of the military presence of the African Union (AMIS).

When the situation did not improve significantly and the national commissions to address rape and other criminal offenses established by the Government of Sudan proved to be wholly ineffective or worse: a whitewash, I sent a note to the Secretary-General in December 2004, suggesting the advisability of having the Security Council refer the situation in Darfur to the International Criminal Court to ensure accountability for massive and serious violations of human rights and humanitarian law.

After my first visit, the debate within the Security Council over whether genocide was occurring in Darfur had become more dominant than actual proposals for action to reverse the situation and prevent further violations. I fear that the international community has allowed the debate over the use of the word “genocide” to become a substitute for action to prevent it. I feel strongly that the obligation to act to defend innocent victims and protect them from harm is triggered by genocide but also by other widespread or systematic violations like crimes against humanity and war crimes. These are equally grave occurrences that we are duty-bound to prevent and punish.

Acting under Chapter VII of the Charter of the United Nations, on 18 September 2004 the Security Council adopted resolution 1564 (2004), in which it requested, *inter alia*, that the Secretary-General rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

In its report, dated 1 February 2005, the International Commission concluded that the Government of the Sudan has not pursued a policy of genocide. The Commission did find very gross and massive violations of human rights perpetrated by Government forces and the militias under their control that fulfilled at least two elements of the definition of genocide. It could not, however, elucidate the requisite intent to commit the crime. At the same time, the Commission underlined that their conclusion that no genocidal policy had been pursued and implemented in Darfur by the Government authorities should not be taken in any way as detracting from the gravity of the crimes perpetrated. International offences such as crimes against humanity and war crimes committed in Darfur are no less serious and heinous than genocide. At the same time, the Commission did leave open the possibility that a court of law could find the requisite genocidal intent in a particular defendant, in the course of a proceeding analyzing the evidence at that court’s disposal. The Commission strongly recommended that the Security Council immediately refer the situation of Darfur to the International Criminal Court, pursuant to article 13(b) of the Statute of the Court.

Finally, on April 1, 2005, in resolution 1593 (2005), the Security Council referred the situation in Darfur to the International Criminal Court. In June of last year, the Prosecutor of the ICC made a finding of fact that the case was *prima facie* admissible as relating to crimes under the Statute of Rome of 1998. In his two existing reports to the Security Council, the Prosecutor has described the difficulties faced by his office, in particular regarding security of investigators, access to government documentation and the protection of witnesses.

When I visited Darfur for a second time, in September 2005, I was prepared to find a situation that had become more stable. Instead, I encountered an alarming reality characterized by a large gap between the authorities’ views and handling of the situation, and the accounts of many Darfuris and observers with whom I met during the course of the visit. My findings and recommendations regarding accountability during that trip are still relevant today:

In that report I stated that the International Community was letting the Government of Sudan get away with defiance of the Security Council resolution referring the case to the ICC. That resolution was passed invoking Chapter VII of the UN Charter, so in legal terms it is legally binding and the Government of Sudan is not free to choose whether to cooperate with the ICC or not. Yet the UN was not reacting in any way to this act of defiance of a decision of its political organ in charge of peace and security of nations. I urged public, explicit support for the ICC and for its Prosecutor in their efforts to investigate the case of Darfur, but I also emphasized that accountability for the crimes already committed would require more than that.

“In the best case scenario ICC prosecutions will deal only with the persons bearing the highest responsibility for crimes under ICC jurisdiction. For that reason, it will be important to press the domestic judicial authorities to assume their responsibilities to apply Sudanese law to all other crimes. Similarly, we need to assist Sudanese civil society to contribute efforts towards a comprehensive set of policy prescriptions that will meet everybody’s expectations of justice and do so with respect for international standards of fair trial and due process. Justice and accountability are considered an important requirement for reconciliation and sustainable peace in Darfur. Compensation procedures for deaths and economic loss are generally available within the country’s legal traditions. Unfortunately, African tribes believe that the effectiveness of customary mechanisms is hindered by an unwelcome element of Government of Sudan influence.”

While some of these concerns have been addressed in the Darfur Peace Agreement, the limited acceptance and implementation of its provisions have not significantly changed the state of affairs. In fact, the situation of civilians deteriorated during the last months and accountability is far from established.

As I mentioned in my statement last night, I have found during my work that both in the short and long term, 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 to the victims, and steps to address underlying causes of conflict through peace agreements and transitional processes. In all four areas, there have been encouraging steps and then backtracking and failure to sustain what we had built. The referral of the Darfur case by the Security Council to the ICC was of historic significance in the struggle to defend human rights and to uphold both peace and justice. But we should not allow ourselves to be complacent: The ICC faces significant challenges in conducting its work and much more is needed at the level of Sudan’s domestic jurisdiction to assure broader accountability for crimes committed in Darfur. Unless we remain vigilant and mobilize to move the process forward, the temptation to sacrifice justice in favor of an elusive peace – or to put it in a different way, to placate Khartoum by removing the threat of prosecutions – can easily turn that historic gain into a major defeat in the struggle against impunity.

Needless to say, there continue to be glaring deficiencies in our efforts to address the other three integral aspects of prevention: physical protection for the 3 million Darfuris who are at risk is now less effective than it was a year ago, and Khartoum still refuses to accept either a UN force or a serious strengthening and restructuring of the African Union presence. Due to the precarious security situation on the ground, humanitarian assistance now reaches many less victims than a year ago, while the number of persons who are totally dependent on that aid continues to grow. And the Darfur Peace Agreement is virtually dead letter, since the Government of Sudan has interpreted – in bad faith, I should stress — as a mandate to renew military operations against the rebel groups that have refused to sign.

Thank you.