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The role of human rights fact finding in the prevention of genocide

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I would like to thank the Kingdom of Belgium and its Government for this sobering invitation particularly in the context of the 20th Commemoration of the Rwanda Genocide which will take place on 7 April 2014. This anniversary serves as a reminder that genocide is not only an issue of the past. Its threat is still present in our world today.

In this presentation, I would like to focus on the role of UN commissions of inquiry and fact finding missions in preventing genocide. I would like to focus on the commissions that address human rights issues basing my remarks on my own experience in my capacity as the Executive Director of the Darfur Commission of Inquiry and the work of the three Commissions that are presently ongoing dealing with Syria, North Korea, and the Central African Republic, but I will also briefly mention other examples. Mostly these commissions are established while the violations are unfolding as a reaction of the international community to what is happening. This includes reports on the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and that may have started to translate into killings and other atrocities.

Background:

Commissions of Inquiry (COIs) are mechanisms that have developed at the national level and have been utilized since at the international level, particularly by the United Nations. National legal systems, particularly common law countries, have known the institution of commissions of inquiry for more than centuries.

Since 1946, the UN has been using Commissions of Inquiry. While most commissions of inquiry have historically been established by the Security Council (SC), the General Assembly (GA) and the former UN Commission on Human Rights, the establishment of the Human Rights Council (HRC) in 2005 has led to a significant increase in their use. The Office of the High Commissioner for Human Rights (OHCHR) has assisted almost 40 of these commissions of inquiry and fact-finding missions.

The body establishing the commission normally specifies its mandate. Commissions established by the Security Council have been established under Chapter VII of the UN

Charter, such as that on Darfur in 2004 and on the Central African Republic in December 2013. The Security Council normally requests the UN Secretary General to establish such Commissions, while the President of the Human Rights Council appoints the members of the Commissions established under this body.

COIs are composed of members selected on the basis of their integrity, impartiality, independence and expertise. Typically, the expertise is required in the areas of international human rights law (IHRL), international humanitarian law (IHL), and/or international criminal law (ICL). Commissions are assisted by a Secretariat ranging from 5 to 35 individuals depending on the circumstances. They are, as a general rule, lawyers, investigators, military analysts, and experts in gender violence.

Since 2004, a number of former judges and prosecutors have served as members of COIs.¹ This is particularly important, as in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice said that “evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention”.²

It should be stressed, nevertheless, that UN human rights commissions of inquiry are neither a judicial body nor a prosecutor. Even when they are asked to identify perpetrators, such mechanisms cannot make final determinations of individual criminal responsibility, as they are not courts of law.

I would like to talk about six aspects of their work that is relevant to the prevention of genocide:

1. Alerting the International Community on the Scale of violations

The UN intergovernmental bodies usually decide to establish COIs when the public concern about allegations of violations is growing. In this age of mass media, the main role of

¹ In addition to Judge Nino Cassese, who presided over the Darfur Commission in 2004-2005, ICTY former Prosecutor Judge Goldstone presided over the Commission that considered the situation in the Occupied Palestinian Territory and Southern Israel in 2009; Mr. Mohammed Bedjaoui, former ICJ President, was the Chairman of the International Commission of Inquiry on Guinea; former ICC President Philippe Kirsch presided over the Commission of Inquiry on Libya; Ms. Christine Chanut, Judge of the Court of Cassation of France and member of the United Nations Human Rights Committee chaired the International Fact-Finding Mission on Israeli Settlements; and we have Madame Carla del Ponte as a member of the Syria COI, Judge Micheal Kirby of the High Court of Australia and former UN Special Representative of the SG on Cambodia chairing the North Korea COI, and Mr. Bernard Muna, a former magistrate who was Deputy Chief Prosecutor for ICTR, now chairs the Commission of Inquiry on the Central African Republic.

² ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, p. 35, paragraph 61.

commissions of inquiry is to provide the international community with an authoritative and impartial narrative about what happened, and to reveal patterns and trends. Commonly, they examine whether there are consistent accounts of recurrent patterns of human rights violations that could be widespread or systematic, or pursued as part of a plan or policy.

Often commissions verify existing information and conduct their own investigations using established methods.³ To establish facts and patterns, they usually adopt a “reasonable grounds” standard, while obtaining “a reliable body of information.”⁴

Let me give you as an example how the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (hereinafter DPRK Commission) obtained this “reliable body of information”. The Commission obtained first-hand testimony through public hearings conducted in Seoul, Tokyo, London and Washington, D.C. with more than 80 witnesses and experts who testified publicly and provided information of great specificity, detail and relevance, in ways that often required a significant degree of courage. The Commission and its secretariat conducted more than 240 confidential interviews with victims and other witnesses. The Commission also made a call for written submissions to all States Members of the United Nations and relevant stakeholders. At the finalization of its report, 80 such submissions had been received. In addition, the Commission reviewed satellite images of prison camps, official documents from the DPRK and the United Nations-produced data.

2. Qualifying the violations

When Commissions find widespread or systematic violations, they commonly move into qualifying whether they constitute crimes using the definitions in the Rome Statute for the International Criminal Court as a standard. The aim is to see whether the facts established on the “reasonable grounds” basis meet the thresholds and elements of these crimes.

Often, such Commissions conclude that war crimes or crimes against humanity may have been committed. On the basis of this wealth of information, the DPRK Commission went on to find that “A number of long-standing and ongoing patterns of systematic and widespread

³ International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law: Guidance and Practice, OHCHR, 2013.

⁴ The Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (DPRK) as to how this works. First, in explaining the standard, the DPRK COI stated that it “was satisfied that it had obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person would have reason to believe that such an incident or pattern of conduct had occurred”, paragraph 22 of its Summary Report (UN doc. A/HRC/25/63). The Syria COI, established by the Human Rights Council, summarized this standard in a sentence: “The standard of proof is met when the Commission has reasonable grounds to believe that the incidents occurred as described”, paragraph 6 of the Report of the independent international commission of inquiry on the Syrian Arab Republic (UN doc. A/HRC/25/65).

violations, which were documented by the commission, meet the high threshold required for proof of crimes against humanity in international law.”⁵ The COI found “a disturbing array of crimes against humanity. These crimes are committed against inmates of political and other prison camps; against starving populations; against religious believers; against persons who try to flee the country – including those forcibly repatriated by China.”⁶ The DPRK Commission found that the crimes against humanity are ongoing, because “the policies, institutions and patterns of impunity that lie at their heart remain in place.”⁷

Two Commissions debated whether genocide had or have been committed. The International Commission of Inquiry on Darfur, established pursuant to UN Security Council Resolution 1564 of 2004, concluded that "the Government of the Sudan has not pursued a policy of genocide." Nevertheless, the Commission cautioned that "The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide."⁸

The Commission kept the door open for the possibility that in some instances individuals, including Government officials, may commit acts with genocidal intent. It left it to a competent court can make on a case by case basis.⁹ Surely, on 14 July 2008, the ICC

⁵ Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, UN doc. A/HRC/25/63, 7 February 2014, paragraph 85.

⁶ Michael Kirby’s statement to the 25th session of the Human Rights Council, 17 March 2014. These violations include violations of freedoms of thought, expression and religion, particularly through operating an indoctrination machine, and denial of access to information and the persecution of Christians. It asserted that patterns of discrimination are entrenched in society, where the State assigns social class by birth, and includes consideration of political opinions and religion. Discrimination against women makes them vulnerable to trafficking, despite the prospect of refolement. There are patterns of violations of freedom of movement where the State imposes on citizens where they must live and work, with almost an absolute ban on travelling abroad. Violations of the right to food and related aspects of the right to life are severe, with the State failing its obligation to use the maximum of its available resources to feed those who are hungry, prioritizing military spending, and using deliberate starvation as means of control and punishment in detention facilities. There are 80,000 to 120,000 political prisoners currently detained in four large prison camps. The vast majority of them are victims of arbitrary detention. There is then the serious issue of abduction and enforced disappearances from other countries, with abducted foreign women being forced to marry other foreign men to prevent those from liaising with Korean women. The on-going crimes against humanity are being committed in the DPRK, including extermination, murder, enslavement, torture, imprisonment, rape, forced abortion and other sexual violence, persecution on political, religious, racial, and gender grounds, the forcible transfer of population, the enforced disappearance of persons and the inhumane act of knowingly causing prolonged starvation.

⁷ Report of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, *op. cit.*, paragraph 76.

⁸ Report of the International Commission of Inquiry on Darfur, UN doc. S/2005/60, 25 January 2005, p. 4

⁹ *Ibid.*, p.5

prosecutor filed charges containing three counts of genocide against Sudan's President Omar al-Bashir claiming that he "masterminded and implemented a plan to destroy in substantial part" three tribal groups in Darfur because of their ethnicity.¹⁰ This was not initially supported by the Pre-Trial Chamber as the majority of the Chamber did not find that the prosecutors had provided enough evidence to include such a charge. The Pre-Trial Chamber, however, later reassessed the evidence (upon an instruction from the Appeal Chamber) and revised its decision. Subsequently, the Chamber issued a second arrest warrant against President Al Bashir for three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction).¹¹

The DPRK reflected on the issue of excluding the political opinion from the definition of genocide, and considered whether there was "political genocide" given that extermination on the basis of political and social class had taken place. Furthermore, it left open whether the persecution of Christians in the early decades of the DPRK may have involved genocide. But in light of the finding of many instances of crimes against humanity, the Commission did not find it necessary to explore the issue further. Similar to the finding on this issue by the Darfur Commission, the DPRK Commission emphasized that "crimes against humanity, in their own right, are crimes of such gravity that they not only trigger the responsibility of the state concerned, but demand a firm response by the international community as a whole to ensure that no further crimes are committed and the perpetrators are held accountable."¹²

The International Commission of Inquiry on the Central African Republic¹³ will also have to address this issue. The chairperson of the CAR COI already stated that the COI investigators have heard allegations of genocide. He added: "I can tell you from my Rwanda experience that there is definitely hate propaganda. I think it is implied in our mandate to see that we do not wait until genocide has been committed and then we call for prosecution."¹⁴

¹⁰ *ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur*, Press Release, ICC-OTP-20080714-PR341,

¹¹ Pre-Trial Chamber I, Second Decision on the Prosecution's Application for a Warrant of Arrest, Decision no. ICC-02/05-01/09, dated 12 July 2010.

¹² Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, UN doc. A/HRC/25/CRP.1, 7 February 2014, paragraph 1158.

¹³ Established under Security Council resolution 2127 (2013) of 5 December 2013, to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in the Central African Republic by all parties since 1 January 2013, to compile information, to help identify the perpetrators of such violations and abuses, point to their possible criminal responsibility and to help ensure that those responsible are held accountable.

¹⁴ Bernard Muna, Chairperson of the International Commission of Inquiry on the Central African Republic, Geneva, 10 March 2014. See UN News Center, available <https://www.un.org/apps/news/story.asp?NewsID=47314&Cr=central+african+republic&Cr1>.

3. Whether effective measures to prevent atrocities have been taken?

In its 26 February 2007 case on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice considered that the obligation to prevent genocide is one of “conduct and not one of result”. In the words of the Court, “the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible”. State responsibility is 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”.¹⁵ The question remains, what is the threshold that must be met to establish prevention?

Typically, commissions of inquiry look at the effectiveness of national conduct to halt violations. The Independent International Commission of Inquiry on Syria has focused its attention, in its seven reports to the UN Human Rights Council, on “the absolute impunity that pervades the conflict”. In its February 2013 report, it considered the issue of the possibility of investigation and prosecution through the Syrian national justice system. It asserted, however, that “it has not yet identified any evidence that Syria is making a genuine and credible effort to punish severe crimes.” The Commission added that “There is not only a lack of willingness to institute proceedings, a country torn by almost two years of bloody and destructive conflict is also unlikely to be capable of such an effort.”¹⁶

The DPRK Commission concluded that crimes against humanity were committed on the basis of a policy set at the highest level of the State. Moreover, “...The perpetrators enjoy impunity. The Democratic People’s Republic of Korea is unwilling to implement its international obligation to prosecute and bring the perpetrators to justice, because those perpetrators act in accordance with State policy.”¹⁷

The Darfur Commission went at length in assessing the ability and willingness of the Sudanese justice system to address violations. It pointed to restrictive laws that grant broad powers to the executive undermining the effectiveness of the judiciary. The Sudanese criminal laws did not then adequately proscribe war crimes and crimes against humanity and the Criminal Procedure Code contained provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur.

¹⁵ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment 26 February 2007, paragraph 430.

¹⁶ UN doc. A/HRC/22/59, p. 124

¹⁷ UN doc. A/HRC/25/63, paragraph 85.

4. Focus on victims

This brings me to the issue of victims. Two issues are of importance here: victim's participation, which is now at the center of the criminal justice system approach and the issue of reparations.

The recent report of the Syria's COI dated 12 February 2014 was based on 653 interviews and other collected evidence. As the Commission was not able to access the country, such information was gathered from outside the Country.

I already mentioned how the DPRK COI placed the victims at the center of its work and provided them with a voice. I encourage you to watch these remarkable videos which are available on OHCHR website.¹⁸ I already mentioned how it obtained first-hand testimony through public hearings that observed transparency, due process and the protection of victims and witnesses. The procedure was open to the media, other observers and members of the general public. More than 80 witnesses and experts testified publicly and provided information of great specificity, detail and relevance, sometimes in ways that required a significant degree of courage. This was certainly not the first time this method was used, as is the case with the Goldstone Commission, but it is the first time that it became the key method of work of the Commission. The Human Rights Council noted the holding of these hearings in the context of the DPRK.¹⁹

To act for victims, significantly, the Darfur Commission recommended that the Security Council establishes a Compensation Commission designed to grant reparation to the victims of the crimes, whether or not the perpetrators of such crimes have been identified. This is one of the recommendations that remain unimplemented.²⁰

5. Identifying perpetrators

¹⁸ Public Hearings, Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/PublicHearings.aspx> .

¹⁹ HRC Resolution on the Situation of human rights in the Democratic People's Republic of Korea, UN doc. A/HRC/25/L.17, 26 March 2014.

²⁰ In August 2012, an historic and milestone decision on reparation was issued by the ICC in the *Lubanga* case. It sets out important principles for reparation, confirming that the victims of international crimes should be at the centre of reparation processes, and that the needs of vulnerable victims, including children and victims of sexual and gender-based violence, must be addressed as a priority. We hope, States to support these processes, so that they are as comprehensive and successful as possible.

Several Commissions are requested to identify perpetrators, notably, Darfur, Syria, and the Central African Republic. The fact that perpetrators know that names are being collected for possible prosecution can serve as a deterrent measure. This is also effective in the context of command responsibility to place more pressure on superiors to stop the crimes.

The criteria of identifying perpetrators was first spelled out by the Darfur Commission of Inquiry, which decided that it could not comply with the standards adopted by criminal courts (proof of facts beyond a reasonable doubt), or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a prima facie case). It concluded that the most appropriate standard was that requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.

The Darfur Commission also set the methodology of how to practically approach this issue. While it has collected sufficient and consistent material (both testimonial and documentary) to point to numerous (51) suspects, the Commission decided to withhold the names of these persons from the public domain. This decision was based on three main grounds: 1) the importance of the principles of due process and respect for the rights of the suspects; 2) the fact that the Commission has not been vested with investigative or prosecutorial powers; and 3) the vital need to ensure the protection of witnesses from possible harassment or intimidation. The Commission instead listed the names in a sealed file that was placed in the custody of the United Nations Secretary-General. The Commission recommended that this file be handed over to a competent Prosecutor (the Prosecutor of the International Criminal Court, according to the Commission's recommendations), who may use that material as he or she deems fit for his or her investigations.

With regard to impact on command responsibility, this was particularly useful in Cote D'Ivoire when commanders issued instructions about prohibitions. While the mandate of the DPRK did not require the DPRK Commission to identify perpetrators, the Commission wrote a letter to the DPRK Supreme Leader on 20 January 2014, sharing with him the entirety of findings contained in its final report. The Commission drew the Supreme Leader's attention to the principles of command and superior responsibility under international criminal law. The Commission urged the Supreme Leader to prevent and suppress crimes against humanity, and to ensure that perpetrators are prosecuted and brought to justice. Significantly, the COI informed the Supreme Leader that it will recommend that the UN refers the situation in the DPRK to the ICC "to render accountable all those, including possibly yourself, who may be responsible for the crimes against humanity".²¹

²¹ North Korea: UN Commission documents wide-ranging and ongoing crimes against humanity, urges referral to ICC, OHCHR News, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14255&LangID=E> .

6. Making recommendations to the international community and follow up:

The most common recommendation to the international community when such crimes are being investigated is the referral to the international criminal court. The only Commission that succeeded in this regard is the Darfur Commission. The Libya referral to the ICC took place three days after the Libya COI was established by the Human Rights Council, which raised issues of sequencing.

As the referral of the situation in Syria is blocked at the level of the Security Council, the Syria Commission elaborated a menu of available options on accountability invoking criminal prosecution in an annex to its February 2013 report.²² The mandate of the COI was extended by the Human Rights Council for another year.

The DPRK Commission has strongly made the case for the Security Council to refer the situation of the DPRK to the ICC and to use “targeted sanctions against those who appear to be most responsible for crimes against humanity”.

The issue has been on how to bring the DPRK report before the Security Council, since the report was requested by the Human Rights Council. But on Friday the Human Rights Council recommended to the General Assembly to submit the report of the COI to the Security Council for its consideration including through consideration of referral of the situation in the DPRK to the appropriate international criminal justice mechanism and the consideration of the scope of targeted sanctions against individuals that may be most responsible for crimes against humanity.²³

The Central African Republic is a State Party to the Rome Statute for the International Criminal Court (ICC). The ICC Prosecutor decided on 7 February 2014 to open a preliminary examination on the situation in the CAR since September 2012. There is already a case before the ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, who is accused of two counts of crimes against humanity of murder and rape and three counts of war crime: murder, rape and pillage. He was arrested here in Belgium on 24 May 2008 and is currently standing trial in The Hague.

²² The Human Rights Council has found ways to keep the focus on the need for prevention and accountability. In the case of Syria, it asked the Commission to develop a methodology for casualty count. It asked the COI with specific mandates to report on massacres and disappearances.

²³ UN doc. A/HRC/25/L.17, op paragraphs 7 and 10. The Human Rights Council also requested the Office of the High Commissioner for Human Rights to establish a field-based structure to strengthen monitoring and documentation of the situation and enhance engagement with capacity building with all concerned, including other States and civil society and other stakeholders.

Conclusion:

I would like to conclude by recalling the UN Charter. Reaffirming faith in fundamental human rights, in the dignity and worth of the human person, the Charter promised the people of the world to save them from the scourges of war that “brought untold sorrow to mankind”. It pledged the determination to establish conditions under which justice and respect for international law can be maintained. These are important recipes for genocide prevention.

Prevention of heinous crimes needs facts, systems, and options for action.

Each body in the UN system has a role. The work of Security Council and Human Rights Council must be and is at the centre of the preventive approach. Prevention is not only part of their respective mandates, but is essential to their effectiveness. Human Rights Commissions of Inquiry provide them with the tools that are needed for action.

The UN Secretariat also has a key role. The Secretary-General’s initiative called *Rights Up Front*, recently assessed the role of the United Nations in the context of the Sri Lanka conflict that claimed 40,000 lives. Through his *Rights Up Front* initiative, the Secretary General, identified six action points that can make a qualitative difference in the way the UN System meets its responsibilities. The most important actions include measures to integrate human rights into the lifeblood of staff so they do not look the other way as violations are unfolding. The report also stresses the need for the UN to achieve through better analysis greater impact and to develop coherent strategies of action on the ground. The importance of providing Member States with candid information with respect to peoples at risk was also stressed.

Let us all take our role seriously and act now.

Thank you.