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INTERNATIONAL HUMAN RIGHTS

THE 60TH ANNIVERSARY OF THE UDHR

JUAN E MÉNDEZ*

1. INTRODUCTION

Numerous atrocities and affronts to the dignity of human beings continue to happen sixty years after the world agreed to the Universal Declaration of Human Rights (“UDHR”). In itself, that is a sobering reminder of the challenges ahead, but it does not diminish the importance of the landmark that we commemorate. The UDHR was conceived both as a guiding principle to orient the behavior of governments and as a fundamental agreement across cultures and ideologies regarding the inherent dignity of each human person and the equality among them. In assigning to the Declaration the nature of a “common standard of achievement,” the framers may have wanted to indicate these two different, but not incompatible meanings. It is a *common* standard in the sense that the rights and principles enumerated are an irreducible minimum applicable under any circumstance and not subject to any form of relativism—cultural, ideological, etc. It is a *standard* to the effect that behavior of governments can and will be judged in comparison to it. The reference to a standard of *achievement* is meant to signify two things: (1) that, as of 1948, there is no going back on these principles through interpretation, rationalization, exceptionalism, or exigencies of the circumstances; and (2) that full compliance with these standards was not a reality in 1948. In this sense, the UDHR was meant, at the time it was passed, to indicate a blueprint for how governments should relate to their citizens,

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and that such a blueprint was to become a reality through specific government action and international cooperation over time.

Even if full compliance with the UDHR is far from being achieved six decades later, the Declaration is still the source of much of the progress that has indeed happened in this period. Many governments do indeed try to adjust their conduct towards their citizens to the principles embodied in the UDHR. The UDHR is the inspiration for advanced human rights treaties, for decisions of courts and other organs that have indeed moved the standards forward, and for the creation of multilateral mechanisms that afford redress to victims of human rights abuses when remedies are unavailable in the domestic jurisdiction. More importantly, the Declaration is the ultimate source of legitimacy for collective action in the realm of human rights by States other than the territorial government, by the United Nations, and by other organs of the international community, as well as by a growing and ever more influential movement of international civil society. In that sense, perhaps the most important reason to celebrate its commemoration is that the Declaration has given birth to a movement across nations and cultures and has become an indispensable factor in policy formulation and decision-making. The human rights movement is now a rich and diverse network of government agencies and officials, multilateral organizations and units, and of civil society organizations that strive to promote, protect, defend, and fulfill human rights across the globe.

2. THE STAGES OF DEVELOPMENT IN THE HUMAN RIGHTS MOVEMENT

The human rights doctrine has developed extensively since 1948, keeping pace with the growth and richness of the human rights movement. Throughout the stages of that development, the UDHR has remained effective and current. In the 1950s and 1960s, emphasis was placed on the need to make the UDHR principles legally binding and to clarify their meaning in relation to State obligations. This "standard setting" stage culminated with the adoption and later extensive ratification of the two International Covenants: (1) the International Covenant on Civil and Political Rights ("ICCPR") and (2) the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"). The "standard setting" stage continued with important treaties such as the Convention

Against Torture and, most recently, a Convention on Enforced Disappearances, open for ratification only in the last year.

A second stage consisted of the effort to build mechanisms able to identify specific cases of non-compliance could bring them to the attention of international advisory, investigatory or adjudicatory bodies, which could provide an effective remedy to the victims. This "implementation" stage included efforts not only at the United Nations, but also through regional inter-governmental organizations. This stage, however, is not complete, because there is a vast discrepancy between mechanisms—in terms of effectiveness, geographic coverage and jurisprudential output. Nevertheless, progress in this area is unmistakable, even if also very uneven.

In recent decades, the human rights movement has shifted in its efforts to apply human rights principles to situations of armed conflict and political violence, stemming from the objective reality that much human suffering is caused not only by State agents but also by non-State actors that apply violence in order to achieve power. As a result, a third stage in the development of human rights law and practice is "international criminal justice"—an attempt to hold individuals criminally responsible for human rights violations of such widespread or systematic nature that they constitute genocide, war crimes, or crimes against humanity.

Of course, the foregoing identification of stages in the development of human rights is overly schematic. In practice, standard setting, implementation of State responsibility, and the international criminal justice regime all continue today in different forms and huge gaps and challenges affect each one of them. From the perspective of standard setting, the most recent trend is to apply universal principles to the particular circumstances of categories of victims like women, children, indigenous populations, discrete ethnic or religious minorities, and persons with disabilities. This trend does not negate the universal character of the rights enumerated in the UDHR, but rather fleshes out the particular ways in which such rights must be applied to persons and collectivities in special circumstances. In this sense, the most recent instruments enrich the human rights doctrine by giving special meaning to the cardinal principle of *equality and non-discrimination* in the exercise of rights.

In the realm of implementation of State responsibility, much could be said for the contributions of organs like the European and Inter-American Courts of Human Rights, the Inter-American and

African Commissions of Human Rights, and several of the U.N. treaty bodies and "special procedures" that are Charter-based. To highlight only one possible contribution of these bodies to the human rights canon, it deserves notice that their collective judgments, reports and commentaries have resulted in the creation of a very rich doctrine of due process of law—specifying what procedures States must establish to ensure that persons have a right to be heard and to defend their interests, not only in criminal proceedings instituted against them, but in all administrative or judicial instances that affect the enjoyment of rights.

The recent progress in international criminal justice deserves special mention. For years, the international human rights movement adhered to the notion that the UDHR and its progeny applied to the responsibility of States for actions of its agents that violated its standards. In that respect, the punishment of individuals who abused their authority as State agents was considered to fall within the realm of domestic law and was not included among the remedies demanded by international law. Likewise, crimes committed by armed and organized groups outside the control of the State were considered crimes of the domestic jurisdiction and therefore also outside the scope of concern of the international community. This interpretation was and is formally correct—and in the case of some inter-governmental bodies is strictly a matter of mandate—but it ignored the reality that non-State actors who challenge the State sometimes commit atrocities that are equally grave in their effects on human beings. In this misplaced orthodoxy, the human rights movement was offering a flank to those who accused it of "selective indignation," and a ready-made rhetorical excuse for governments who wished to ignore its denunciations and demands.

In the 1980s, human rights organizations monitoring and reporting in situations of armed conflict started applying the laws of war, or international humanitarian law, to all sides. In addition to preserving their impartiality and objectivity—both crucial to their credibility and effectiveness—this expansion amplified not only the universe of beneficiaries but also the legal and moral basis for human rights advocacy. Indeed, the laws of war have an even longer lineage than international human rights law and are better codified (most recently in the Geneva Conventions of 1949 and their two Additional Protocols of 1977). They contain the same main purpose as the UDHR and human rights treaties—the

protection of the human person from abuse and violence. In that sense, they constitute a code of conduct for armies and combatants and a set of fundamental rights for civilians caught in the special circumstance of an armed conflagration.

The Geneva Conventions squarely spell out the obligation to investigate, prosecute, and punish the most egregious violations of the laws of war. If at first it was thought that that obligation applied only to international wars, for the last two decades the norm has expanded to apply also to wars not of an international character. For that reason, the international human rights movement incorporated the “struggle against impunity” in its arsenal of demands for redress and remedies, as a consequence of establishing that a violation had indeed occurred. More or less contemporaneously, military dictatorships and authoritarian regimes were being replaced with elected governments in the most recent wave of democratization. The newly democratic societies confronted legacies of massive or systematic human rights violations and the open wounds they had left in the social fabric, and a powerful demand arose from victims, and from society at large, that those legacies should be dealt with appropriately. To the extent that many of those crimes were crimes against humanity under international law, they were equivalent to war crimes because they triggered an obligation to investigate, prosecute and punish them. Starting in the societies where these tectonic shifts were occurring, civil society turned its attention to advocacy for effective means to break the cycle of impunity. In due course, those demands were upheld by decisions of international judicial bodies. In this regard, a central tenet of human rights advocacy is now the “right to justice” – a legitimate demand by the victims and society to see justice done in accordance with principles of fair trial and due process.

In the 1990s the international community borrowed a page from these experiences and incorporated justice through international cooperation and specially created international courts, like those for the Former Yugoslavia and for Rwanda. Some saw the creation of these ad hoc courts by the Security Council as a poor substitute for more robust action to stop the killings, or as embarrassed *mea culpas* for not taking more timely action. In fact, the integrity, independence and professionalism of the jurists selected for the tribunals’ prominent positions soon turned them into formidable instruments of justice. As their credibility grew, the international community turned to the

creation of a permanent international criminal court. The debates sponsored by the United Nations enjoyed ample participation from member States and attracted the interest and activism of a strong movement of civil society. The adoption of the Rome Statute for an International Criminal Court ("ICC") in July 1998 is the turning point in the evolution of the human rights canon on two major grounds: (1) the international community gave itself an instrument to break the cycle of impunity when States more directly responsible are unwilling or unable to afford justice; and (2) participating States oblige themselves to cooperate with the ICC and in so doing acknowledge that genocide, war crimes, and crimes against humanity trigger an affirmative obligation to investigate, prosecute and punish those responsible.

3. NEW HORIZONS OF HUMAN RIGHTS PROTECTION

Accountability for massive or systematic crimes is one of the new horizons of human rights protection. There are others, of course. Chief among them is the challenge to implement *economic, social, and cultural rights* with the same level of effectiveness and success that the movement has achieved with respect to civil and political rights. At bottom, this challenge reflects the need to remain faithful to the broad agreement across cultures and ideologies that gave rise to the UDHR in 1948. It is also a way to abandon the idea of "generations of rights" which, whatever the original intent of the authors, has resulted in practice of considering economic, social, and cultural rights as "second category" rights. The challenge consists in finding ways to make "progressive realization" (the standard used in the ICESCR) more than a platitude or aspiration, through effective public policy measures. It also demands an effort of imagination and legal thinking to devise formulas by which these rights can be "justiciable," i.e., subject to specific court-ordered redress in case of violation. But it cannot be denied that the difficulty does not stem simply from an ideological preference for civil and political rights and a neglect of social justice concerns. There are objective reasons why economic, social, and cultural rights are more difficult to implement and fulfill than civil and political rights, or that their implementation requires a different path. The refinement of the principle of equality and non-discrimination possibly offers some clues to make these rights justiciable, and constitutional courts in

young democracies (South Africa, Colombia, Argentina) are showing the way to their effective realization.

Another "new horizon" of human rights protection is related to the struggle against impunity, and more broadly to the idea of the right to a remedy as a dominating principle in current human rights law. It is generally called "transitional justice" and it concentrates on the appropriate response societies and States owe to their citizens in the face of a legacy of massive or systematic abuses. It comprises, of course, the various forms of international criminal justice mentioned earlier. But it goes further to focus also on efforts of domestic courts to live up to the States' obligation not to let those crimes go unpunished. In addition, transitional justice attempts to bridge the inevitable "impunity gaps" left by the impossibility to cover all potential events, all potential defendants and all potential victims of crimes that, by definition, are massive or systematic. In this regard, transitional justice learns from the practices and policies of societies that have recently experienced transitions from dictatorship to democracy or from conflict to peace, and offers suggestions to adapt those experiences to new challenges, particularly in the areas of truth-seeking, prosecutions, reparations for the victims, and institutional reform.

Transitional justice is sometimes mistakenly accused of promoting a token form of justice or of settling for "justice light" or for "soft" versions of accountability. It is true that some government leaders promote their version of a false and forced "reconciliation" or argue in favor of vague notions of "restorative justice" as alternatives for what they consider retributive justice. When they do so by invoking transitional justice they are not acting in good faith to comply with legal and moral obligations; their proposals are window dressing for policies of impunity. Serious practitioners of transitional justice insist on good faith understanding of the State's obligations in the face of massive or systematic crimes. They make it clear that criminal prosecutions, at least those bearing the highest responsibility, have to be central to any program to restore faith in institutions and give victims access to justice. Of course, transitional justice does not end there because it stresses a comprehensive, balanced, integrated approach to justice, to truth, to reparations and to institutional reform.

In this context, it is worth dwelling on the concept of "reconciliation," especially because it has so frequently been misused or misunderstood. In some countries, notably in Latin America, proponents of impunity have frequently cloaked their

arguments in the euphemism of reconciliation. This has been the justification for blanket amnesties and for refusals to cooperate with truth commissions. Under the guise of reconciliation, clearly identified perpetrators of egregious crimes are allowed to retain their positions of power and influence in the same institutions that were the instruments of their atrocities. It is no wonder then that Latin American victims and human rights activists react to the word "reconciliation" with rejection. Nevertheless, it is imperative to distinguish between this false reconciliation imposed between victims and perpetrators, and the reconciliation between factions in a political or ideological battle that is necessary to set the country toward a new, more humane and democratic way of settling political differences. The latter version of reconciliation is the ultimate objective of a policy of transitional justice, and it can only be achieved if the country embarks on an honest, courageous effort to reckon with the past through truth, justice, reparations and institutional reform.

In addition, it must be recognized that in some places the atrocities had a distinct ethnic, racial or religious dimension, like in the Former Yugoslavia, Rwanda and now Darfur. In those cases, a comprehensive policy of transitional justice will have to deal with all four avenues of accountability, but in addition it will be necessary to establish certain other initiatives that can fairly be labeled "reconciliation." By these initiatives, I allude to the need for talks and arrangements between ethnic groups for purposes of property restitution, land rights, water rights, grazing rights and the right to return to original places of abode. These very specific reconciliation initiatives are necessary—together with the classic transitional justice mechanisms—if we are to build a future in which the next generations of a certain ethnicity are not to be blamed for the crimes committed in the past by those who claimed to act on its behalf.

Transitional justice thus encompasses most of the actions and operations that are necessary to bring a country back from the effects of indiscriminate violence and civilian victimization that so frequently characterize modern day wars. Institutions and procedures devised to discover and disclose the truth, as well as to organize effective prosecutions that are impartial, independent and fundamentally fair to the defendant as well as to the victims are central to the effort to reorganize the State after conflict. The same can be said of policy decisions to offer reparations to victims that are non-discriminatory and whose scope and quantum recognizes

their plight and their dignity, and of the necessary rebuilding of armed and security forces, the judiciary and other institutions of the State so that in the future citizens can be expected to trust them. In this sense, through transitional justice practices the human rights movement enters the realm of post-conflict reconstruction and contributes from its unique perspective to evolving notions of human development. Furthermore, because the debate about transitional justice usually begins well before the end of the conflict, human rights activists now work constructively with conflict resolution specialists and humanitarian relief organizations. The substance of such conversations can help ensure that peace negotiations incorporate the legitimate demands of victims for justice without provoking more conflict and more human rights abuse. Justice is, in this concept, an ingredient of a peace that has a better chance to be durable, precisely because it consults the interests of those affected by both war and peace.

4. CHALLENGES TO THE HUMAN RIGHTS MOVEMENT

For all the progress that has been accomplished since the enactment of the UDHR, there are still challenges that continue to bedevil the human rights movement. Prevention of violations is perhaps the most important one. Based on the UDHR and other instruments, the international human rights movement has devised a very effective way to respond to violations as they happen, through permanent monitoring and reporting and, more recently, by paying special attention to remedies. Even as the movement was in its infancy, the idea that there should be a way to prevent violations from happening in the first place was a focal point, especially in the wake of the tremendous—and generally irreparable—human suffering caused by violations of human rights. As the movement perfected a methodology of monitoring and reporting that relied on impartiality and objectivity, predictions of bad behavior by governments and regimes had to be avoided, lest it be accused of bias against them. This trend undoubtedly resulted in the professionalism and credibility of human rights organizations, but it did little to equip them to engage in effective prevention.

There is no question that reliability and timeliness in reporting human rights violations as they happen does contribute to awareness and reaction, and in this fashion can be turned into effective preventive tools. But prevention requires two or three

additional steps beyond accurate analysis of facts on the ground. It requires careful research of trends toward deterioration and deep familiarity with the background to each conflict. With these tools effective early warning can be accomplished, assuming that such warning can be directed to organs and authorities that are in fact in a position to address deteriorating situations. Yet, even early warning is not sufficient to prevent mass atrocities; it is also necessary to bring forward suggestions for early action that are reasonably tailored to alter the course of events so that impending atrocities may be averted.

The inability of the international community to prevent the catastrophes in Rwanda and Srebrenica in the 1990s, its helplessness in the face of millions of deaths in the Democratic Republic of Congo in the late 1990s, and the tepid and inconsistent response to the ongoing massacres in Darfur in this decade have given rise to a new preoccupation with prevention, at least with prevention of genocide and mass atrocity. Some democratic States like Sweden and Switzerland have championed the idea that genocide can and should be prevented, and have fostered rigorous thinking among academics and activists and initial steps within the United Nations to incorporate prevention of genocide and mass atrocity into the regular operations of the Secretariat. I was privileged to be asked by Kofi Annan to be his first Special Advisor on the Prevention of Genocide, a task that I discharged on a part-time basis between 2004 and 2007. It is gratifying to report that the recommendations arising from my experiment in genocide prevention have been implemented, and now the office has a full-time Special Representative, a better-defined mandate and more human and material resources.

The ideas about an operative concept of prevention of genocide have immediate precedent in two parallel trends in the 1990s and in the present decade. One is the promotion of a "culture of prevention" within the United Nations. Although the early focus was on prevention of conflict, the principles developed in those early studies have been immensely helpful in their application to impending mass atrocities. The other trend is the growth of a network of genocide scholars who are erudite experts on past genocides but also are intent on drawing lessons learned from the study of those human catastrophes. These genocide scholars have worked with governments and international organizations in promoting a better interpretation of unfolding events. They are to be credited with drafting indicators, predictable stages of genocide,

and accelerating or containing factors drawn from those experiences. There is ample debate about whether early warning is crucial to effective action, as many scholars maintain that factors leading to genocide develop slowly and at plain sight. They demonstrate that most recent genocides or genocide-like situations were predictable, and in fact predicted, and that the lack of warning was not a factor in the inability to respond effectively to those signals.

Nevertheless, early warning remains a central theme of preventive action, and the indicators and signs gleaned from past experiences are an indispensable tool in the arsenal of prevention. Lack of political will to act is almost always the main reason for genocides to happen before our eyes. But early warning and early action can contribute to form the political will that fails to exist in the abstract.

Experience also shows that it is unwise to engage in endless debates about whether events unfolding in a corner of the world constitute genocide or something different, as in the discussions that have precluded more effective responses to the Darfur crisis. The determination of whether some killings constitute genocide depends largely on the perpetrators' intent to destroy an ethnic, religious, racial or national-origin community in whole or in part. It is legitimate to distill that intent from the facts on the ground, but that task should be left to courts of law that can act after the fact to impose punishment. It is completely unhelpful to the effort to prevent some events from deteriorating into genocide. Waiting to act until all elements of genocide are in place disallows the prevention of genocide in the first Place. The Secretary-General's instructions to the Special Advisor specifically ordered me to refrain from qualifying a situation as genocide. Instead, my successor and I were instructed to act to prevent mass atrocities before we can tell whether they will ultimately be genocide, war crimes, crimes against humanity or other forms of serious and massive human rights violations.

Prevention of mass atrocities has been given a large boost by the emerging norm of "Responsibility to Protect," embodied in the outcome document of the U.N. Summit Conference of 2005, which was approved by a large number of heads of State and of government. That document was later ratified by a General Assembly resolution, and it was preceded by seminal documents by highly respected experts, all of which was sponsored by many democratic governments in the first half of this decade.

Unfortunately, the doctrine is under serious pushback from some States' representations in the United Nations, based on the perspective of near-absolute notions of sovereignty. The dispute over the meaning of the outcome document is fueled by distrust of the organs that will make decisions when the responsibility to protect triggers international action. The debate about the contours and scope of the Responsibility to Protect doctrine is ongoing and unfortunately it has delayed efforts to make the doctrine operational in the workings of the United Nations Secretariat and its field missions. But Secretary-General Ban Ki-Moon has created an office of a Special Advisor on this matter, who works closely with the office of Prevention of Genocide and leads the ongoing discussions among member States, civil society and U.N. officials. The doctrine has attracted the interest of the human rights movement and the development of new advocacy and research organizations that hold great promise for an effective use of this evolving norm in the near future.

In the meantime, these early experiences in the prevention of mass atrocities are yielding some lessons, even if they should be subject to further study and corroboration with facts on the ground. In my experience, the international community must engage in a sustained, unified diplomatic effort to contain the damage of ongoing conflict and stabilize each situation with a view to more long-term solutions. This means that coordinated and simultaneous efforts have to be displayed in four distinct areas: (1) protection; (2) humanitarian assistance; (3) accountability; and (4) peace talks. I stress that measures in each area must be dynamically and flexibly adapted, tailored to shifting situations on the ground, and coordinated so that they are not subordinated to each other. Effective action in each of them should not be held hostage to conditions imposed by recalcitrant governments, such as was the case in Darfur where the Khartoum regime has managed to delay progress in each while holding out for concessions in another.

In this context, protection means the deployment of armed neutral contingents capable of standing in the path of those who would attack defenseless civilians. It also means that civilian observers and advisers must accompany those forces with the capacity to document violations, bring them to the attention of local interlocutors and report them up the chain of U.N. representatives on the ground and at headquarters. Humanitarian assistance not only reverses the trend towards loss of life but also

constitutes a measure of protection because of the presence of specialized civilian personnel that are witness to the facts on the ground. Accountability is necessary to break the cycle of impunity for the abuses already committed, because impunity breeds distrust in the target population and constitutes an incentive for perpetrators to commit atrocities again. Finally, the underlying conflict that gave occasion to the situation of impending genocide must be addressed not only to achieve a fragile cease-fire or truce, but also to look for solutions to its root causes.

If in the past it was generally believed that peace agreements always trumped any demands for justice, there is now a clear trend to find ways in which justice *and* peace can be integrated to solutions that certainly will be more complex, but that have a better chance to achieve a lasting peace. This trend has been fueled by the normative developments in international justice mentioned earlier, with the tipping point being the Rome Statute for an International Criminal Court. The recognition of an obligation to prosecute mass atrocities and the creation of an institutional instrument to implement it when States are unwilling or unable to do so has resulted in a veritable paradigm shift in the efforts to bring conflicts to a peaceful resolution. Justice is no longer the poor cousin of peace, to be left behind in order to yield to the blackmail of perpetrators who will not stop committing atrocities unless assured of impunity. Justice is now considered a value to be pursued for its own worth and out of respect for the dignity of victims, as well as an essential element of peace arrangements designed with all stakeholders in mind. Undoubtedly, the task of peacemakers is thus made more complicated, but peacemakers themselves recognize that conflicts that seem to lend themselves to apparently easy solutions are precisely the conflicts that are resumed, perhaps even more savagely, after a brief interlude. These dilemmas of peace and justice have attracted the human rights community and have put them in frequent and ongoing dialogue with humanitarian organizations and with specialists in conflict resolution and mediation. At the same time, the realization that full measures of justice will be very difficult to realize under the best of circumstances have resulted in the need to explore transitional justice mechanisms to apply a notion of justice that integrates judicial and non-judicial initiatives with a better chance to bridge the impunity gap and satisfy the demands of larger circles of victims.

5. CONCLUSION

In this evolution of the normative framework of international law relating to human rights and in the growth of the multi-cultural international movement that applies it on an ongoing basis, the Universal Declaration of Human Rights has played a large, indeed immeasurable role. It is significant that a sixty year-old document has lost nothing of its vitality or significance to current events and new challenges. Contemporary instruments like the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions on the laws of war are also live instruments of precious force and utility in the times we live in. Unlike the Genocide Convention, the UDHR is a comprehensive document designed to deal with every aspect of life, and freedom of individual and collectivities in peacetime as well as in states of emergency. The Geneva Conventions are a codification of previous instruments, and uses and customs of war developed over centuries, whereas the UDHR is a seminal instrument that inaugurated a whole new field of international law about the relationship of the human person to the authority of the State. Because of these differences, it is remarkable that the UDHR has not been eclipsed by the subsequent elaboration of its norms by new treaties. On the contrary, the binding instruments in the universal as well as in the regional realms have only highlighted the wisdom of the norms contained in the UDHR.

For this very reason, it is to be expected that the UDHR will continue for years to come to be a guiding light as we face the challenges ahead. It will be not only an inspiration but also a source of authoritative normative force as we build more effective machineries of redress and protection of human rights, as we embark on more aggressive promotion of standards through human rights education, and as we deliver on the promise of prevention of violations before they occur.