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**Presentation by the Special Rapporteur on the independence of judges and
lawyers,
Leandro Despouy**

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As past and recent examples around the world show, impunity is one of the main root causes for the initial occurrence of massive, serious and systematic violations of human rights, crimes against humanity or genocide, but even more distinctive for their reoccurrence.

The fight against impunity is twofold: first, it attempts to bring justice to those who experienced serious abuses; and second, it is an important contributing element in the prevention of the reoccurrence of such violations. Halting impunity is thus one of the key tasks to break the “cyclone of violence”.

As measures at the international level have been extensively covered by the first session of this seminar¹, I will focus my attention on supporting national efforts in the prevention of genocide.

In the first instance, impunity violates the rights of victims to truth, justice and reparation. Impunity may be the result of political interference in the work of the judiciary, but also the investigation authorities, restrictions on the exercise of the right to defence, or of systemic and structural shortcomings which hamper that justice is being done properly and within a reasonable time.

Impunity inevitably reflects a dysfunction within the State that goes well beyond the judicial system. While situations undoubtedly vary, some of the

¹ Entitled “Legal & judicial systems and the prevention and punishment of genocide: Where are we today?”

main shortcomings in addressing impunity are the following:

- Peace-agreements, often drawn up hastily in the wake of violence, address only partly issues of justice and accountability;
- As a consequence, there are insufficient investigations against members of all belligerent parties, be it governmental, military, law enforcement and intelligence personnel on the one hand or non-State actors on the other, regarding both direct and command responsibility in committing atrocities;
- Besides the lack of bringing main violators to justice, those perpetrators at times manage to integrate themselves into the army and police forces, sometimes at high-level positions. The empowerment of those violators further deters the victims to seek judicial avenues for the experienced abuses.

As a consequence of these factors, impunity is persisting which may cause the violence to continue in an unbreakable spiral.

Principle 2 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity enshrines that the full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.²

A particular feature of the right to the truth,³ which is based on treaty and customary law, is that it is both an independent right and the means for the realization of other rights: to information, to identity, to mourning and, especially, the right to justice.

In the implementation of the right to the truth, the right to justice plays a particularly prominent part, since it ensures knowledge of the facts through

² “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations”, E/CN.4/2005/102/Add.1.

³ For details on the right to the truth, see E/CN.4/2006/52, paras. 14-39.

the action of the judicial authority, responsible for investigating, evaluating evidence and bringing those responsible to trial. The right to justice in turn implies the right to an effective remedy, which means the possibility of claiming rights before an impartial and independent tribunal established by law, while ensuring that perpetrators are tried and punished in the course of a fair trial, and it entails fair compensation for victims. So from the point of view of the right to justice, truth is both a requisite for determining responsibilities and the first step in the process of reparation. But even further, by bringing to light the facts and circumstances of the atrocities and their respective perpetrators, the right to the truth may also contribute to coming to grips with the root causes of violence.

As recent history shows, States' ways of meeting the requirement for truth, justice and reconciliation that they face in a period of transition may vary. The State may entrust responsibility for trying the main perpetrators of serious and massive human rights violations to the ordinary courts. It may also set up a para-judicial instance such as a truth and reconciliation commission. These measures may be taken simultaneously or consecutively.

The human rights machinery, including independent experts, can make sure that the following principles be upheld in any national effort of reconciliation and truth-finding:

1) No amnesty for gross violations and grave breaches

It is unfortunately not rare for new State authorities to find that they have inherited laws or decrees whereby those responsible for serious human rights violations have granted themselves amnesty. These new authorities then face the challenge of repealing that legislation without exposing the population to violence from those who stood to benefit from it. Therefore, the new authorities may themselves be tempted to seek immediate civil peace to the

detriment of the truth regarding serious human rights violations, and moral reparation and material compensation for the victims, with a consequent risk of institutionalising impunity.

The incompatibility of amnesty measures with States' obligation to punish serious crimes covered by international law have been confirmed by several national and regional judicial decisions.⁴ The Human Rights Committee, in the consideration of a number of amnesty laws of Member States,⁵ stated that measures contributing towards impunity for perpetrators of serious human rights violations or preventing such violations being investigated, the perpetrators being tried and sentenced and/or the victims and their families obtaining an effective remedy and reparation are incompatible with the obligations under the International Covenant of Civil and Political Rights. This view was already spelt out by the Committee in 1992, in its General Comment No 20, when it pronounced itself on the incompatibility of granting amnesty of acts of torture.⁶ Furthermore, it is now common understanding that article 6, paragraph 5, of Protocol II to the Geneva Conventions cannot be invoked for granting amnesty for serious international crimes committed in the context of internal conflicts.

When one looks back at the past, one realizes that developments in jurisprudence, which had gradually taking shape with regard to enforced disappearance, are now being applied to other gross human rights violations such as summary executions, which occur in the context of grave breaches of

⁴ See e.g. E/CN.4/2004/88 and E/CN.4/2005/60, para. 48.

⁵ Among the Member States are: Argentina, Chile, El Salvador, France, Haiti, Lebanon, Niger, Peru, the Republic of the Congo, the Republic of Croatia, Senegal, Uruguay and Yemen.

⁶ "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible" (para. 15).

international humanitarian law or genocide.

The human rights machinery, through independent advice and assistance, but also field work, needs to work together with State governments to ensure that amnesty measures are not granted for gross human rights violations in the aftermath of mass atrocities or genocide. It is thus important that we pay more focused attention to the issue of amnesty measures, in particular in the context of peace agreements. To this end, I look forward to working together in a more consistent way with UN country teams.

2) National commissions of inquiry or truth commissions to look into broad legal and judicial reform

Several special procedures have followed national efforts for truth finding and reconciliation. The legal basis, scope and duration of their mandate, the persons appointed to sit on them, the procedures applied and the material resources made available to them are decisive. The work of such commissions is no substitute for legal proceedings and should never prevent them. To that end, it is important to provide all possible guarantees to ensure that the commission operates with objectivity, independence and impartiality and that its procedures and final report are designed to facilitate - rather than hinder - future judicial action.

However, more than often, there are serious shortcomings in the establishment and conduct of such commissions. From the perspective of the mandate on the independence of judges and lawyers, the key concern is whether independence of the commission is secured. This implies foremost structural independence of the commission, i.e. the commission must be set up as a separate institution from the government. Beyond this formal independence, the commission must also be capable to function independently. This actual independence is much more difficult to enforce, in particular in the eyes of important interference

from the domestic executive branch. Third, the members of the commission must be individually independent. This means not only that they must be independent from the parties of the conflict, but also from any institution or person with a vested interest in the outcome of the commission.

My colleague rapporteur, Mr Phillip Alston, has analysed this and other shortcomings of commissions of inquiry at great length and detail in his most recent report to the Human Rights Council, drawing on country-specific examples which he and his predecessors have followed over more than 25 years.⁷

One key aspect on which we should put more emphasis is to ensure that the scope and mandate of such commissions of inquiry or truth commissions also extends to proposing structural reforms to the legal and judicial system to be designed to prevent the reoccurrence of similar atrocities in the future. The crucial task for new or 'renewed' governments is at times to dismantle the whole repressive legal and institutional arsenal put in place by the previous regime. This, by definition, is a difficult and very complex task. By approaching this task of developing reform proposals through a reconciliation and truth finding mechanism, the new government may gain much legitimacy from its own population, but also from international actors.

The international community, including the UN human rights machinery, must do more to support countries in such situations, through both independent advice and direct technical assistance. By advising in the process of the setting up of such commissions, including the determination of their scope, composition and procedural rules, one cannot only contribute to the truth finding and reconciliation efforts, but also further the reform of the regular criminal justice framework and the judicial system. This again, will greatly contribute to the prevention of any reoccurrence of similar acts as a

⁷ A/HRC/8/3, paras. 12 to 58.

functioning judicial system is the best deterrent for violations to take place in the first place.
