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"International Law and Peacemaking"

Ladies and Gentlemen,

I.

For at least two reasons, I am very grateful that the representatives of the Liberation War Museum have again invited me to Dhaka. First, they have given me the opportunity to contribute to the framework of the 2nd Genocide Conference.

Secondly, Bangladesh has changed quite drastically in the past year. I hope that while I am here I can experience the results of many of these changes, and what they mean to you, firsthand. The elections have revived significant debates about the history, identity and the future of Bangladesh. A new window is open for social reconciliation and for the legal prosecution and conviction of the crimes of 1971. The chances have grown that the "International Crime Tribunal Act of 1973" can resume its work. The hopes of the people lie with the support of the UN and the EU as they undertake this process. With the 2nd Genocide conference, they deliberately place their historical recovery in an international context.

The standards of transparency and independence for international legal processes have grown enormously. The 20th Century began with two World Wars and ended and unfortunately turned to the XXIst century with the war in Yugoslavia, the first and second Gulf wars, the crimes in Rwanda, a Middle East without a solution for peace and many more secret, forgotten violent conflicts. Although in 1948 - with the United Nations - a new chapter was opened for international law, there are still many questions about the peacemaking role of international law which we have yet to resolve.

The relationship between international law and power politics in international relations - especially in view of ongoing violent conflicts, in view of imminent resource wars – are becoming increasingly central issues. The consequences of growing economic inequality, the unresolved North-South conflict and politically exploited conflicts put the the previous functions of international law to the test.

The voting-out of the Bush administration is closely tied with the world's hope for a multilateral foreign policy of the United States. This also poses a new challenge for European foreign and security policy and the principles of international trade. We can only achieve an internationally-oriented economic system and more opportunities for social justice if the process of decolonization continues to progress. Only a multilateral United States foreign policy would be a guarantee against the perpetuation of the current power and wealth disparities. That is why international law should be developed further, so that relations can be actually and permanently be maintained on equal grounds. (see Paech, Stuby 2001, 30)¹

On the one hand - as I said - the change of administration the U.S. puts the international debate about the relationship between peacemaking organizations and the globalization of legal principles, which claim to guarantee the indivisibility and universality of international law, in a new light. On the other hand, this change has not only come about because of the speeches of Barack Obama - for example his speech in Accra, Ghana's capital city.² Many practical processes around the world have affected the thinking of the new President of the United States. This definitely includes the gradual replacement of the G8 by the Panel meetings of the G20. Challenges such as stopping climate change or managing the financial crisis have long failed to be met the G8 forum.

¹ see Peach, Norman / Stuby, Gerhard: Law and Power Politics in International Relations, Hamburg 2001, p. 30 The authors describe social function of international law, which is often underestimated by lawyers, namely to maintain power relationships in more "humane" ways. Therefore, the authors focus on the history of normative international law and the finding that the standards are neither neutral nor impartial value orientations. With this perspective, we can only ever question the relationship between power politics and international law, and must assess the results of agreements on the peaceful resignation of conflicts from several different viewpoints.

² If here examples of a multilateral changes should be listed, then better here in a footnote so that the stream of though is not interrupted- KK

Even if the G20 meeting is as of yet not much more than a symbolic step toward a fairer world, its formation is in itself a rebuke of the outstanding problems of equality in international relations and the urgent need for reform in the UN.

When I was here in Dhaka in 2008 for a visit, I chose Europe's history after 1945 as the starting point for my reflections. At that point, Europe just recently buried its own traditions and cultures under the ashes of war and genocide. I addressed the Nuremberg trials as the beginning of a collective European memory regarding international criminal justice, which shaped the history of modern international law far beyond just the European continent.

A new chapter in the history of international law began in 1998, with the Rome Statute and the creation of the ICC. Ironically, even though the USA played a crucial role in the Nuremberg trials, it has rejected the International Criminal Court even to this day. The International Criminal Court -independent of historical events - cannot indict any crimes against humanity that happened before 2002. Yet its establishment, its statute, brought one decisive, crucial question back into play. It is - in my opinion - the question of the ICC's peacemaking role in bringing about the nonviolent organization of societies after violent conflict, even after genocide. Thus the history of the ICC is also of enormous importance for the creation of a legal environment in which we can prosecute past crimes against humanity.

Allow me, therefore, to describe the three key factors that would produce an environment where the peacemaking function of modern international law is realistic.

II

The first key factor is this: the social and legal processing of war crimes and crimes against humanity will continue to be effective if and only if a high degree of transparency and accessibility to information for the general public is guaranteed. Investigative work,

research and investigative journalism must be given broad entitlement to create an educational climate in public debates.

As for the second factor, the necessity of international legal punishment for crimes against humanity can be only one part of a comprehensive historical analysis and cultural debate. The peacekeeping role of international law will only be successful if the legal processes are supported by society and protected against false judgments, such as being cast aside as worthless debates or being used to justify historical amnesia as a more preferable alternative. Reconciliation is more than just necessary legal confrontation. Reconciliation must create a climate of dialogue and understanding, a climate that produces cross-generational interest, so that the complex motives and societal causes of violence and crime can be processed. This does not mean avoiding uncomfortable questions - on the contrary, in some sense a public debate would not create a legal, but instead a cultural climate of absolution, in which the chance exists for the historical understanding of both perpetrators and victims to grow. As long as the complex social causes and consequences of conflict remain in the dark, legal actions which attempt only to cast blame on individuals is pointless. Without corresponding support and change from society itself, punishment and atonement only continue the cycle of revenge and the martyr mentality that allows concepts of justice to be ideologically abused.

No case of reconciliation can be relativized, but instead must always serve as part of the struggle to understand how violence, war and crime happen in the first place. Only with a mentality open to learning lessons from the past can the lessons for future generations be formed and kept in remembrance.

Thus not only the legal but also the historical and social analysis of crimes against humanity must be protected from political exploitation - which is the third factor. This means that procedures must be installed which guarantee an independent exercise of international criminal processes. In this respect, the admission procedure mechanism, as stated in article 13 of the Rome Statute for the Prosecutors of the ICC, constitutes an

important step for the independence of future international tribunals. The so-called trigger mechanism for the beginning of a procedure provides three independent means by which proceedings can be accepted and commenced: a referral by the Contracting States, a referral by the UN Security Council, and an authorization by the prosecutor - on the basis of "contextually prevailing evidence" and then only with oversight by a Pre-Trial Chamber *ex officio*.³ This law served in the ad hoc -criminal courts from Nuremberg, Tokyo, Yugoslavia and Rwanda as a basic defense mechanism against political exploitation by the UN Security Council or the Assembly of Charter States, meeting a new standard of independence and universality in international law jurisdiction.

To create a law of the 21st Century, an international law that would serve to secure the equitable and peaceful coexistence of all nations - I would like to briefly summarize what we have discussed so far- we must guarantee or strive for,

- extensive requirements for transparency and education
- equal and concurrent legal and social analysis
- and protection against political exploitation.

In order to better support my theory about these three requirements for the peacemaking role of international legal processes, I would like to discuss a bitter European experience at the end of the 20th Century, the war in Yugoslavia in the early 90s after the end of the East-West confrontation in 1989/90. But my story will ultimately lead us back to the history of the Holocaust and its reconciliation process, back to the lessons of the Second World War, which first led to the recognition of a universal law which condemned violence between states.

³ Article 16 lists one exception, the right of a 12 month suspension of prosecution, if the Security Council had made the request as allowed under Article VII of the UN Charter. (see, Stoll, Andreas: milestone of international law: The International Criminal Court. In: Mainzer Zeitschrift für Jurisprudenz, 1 / 2001 (www.bummel.org/texte/2001 - strafgerichtshof.php; last accessed 7.7.2009)

On June 30th 1995, the Federal Republic of Germany, as the last member of NATO, agreed on the first combat operations for the Bundeswehr, the German defensive army. Politicians of the Left, as well as principally the Greens in my country, voted against this initiative. Also, Joseph Fischer, who was later Foreign Minister of the Federal Republic from 1998 - 2002, voted against the deployment of the Bundeswehr abroad.⁴ But two weeks later, Joseph Fischer justified the agreement to participate in the war in Yugoslavia in 1995 - like others – because of the massacres of Srebrenica, those which occurred after July 11th, 1995. Neither a demand for transparency nor an appeal for reconciliation and repudiation were the focus of public interest. Instead, the many deaths in Srebrenica were immediately exploited and used as political justification for the coming war. This approach also shaped the following years right up until the records were closed- under pressure from the United States.

The German decision to support the NATO mission in Bosnia against the Bosnian Serbs on June 30th, 1995, once and for all terminated the de facto neutrality of UN forces. The UN mission with the mandate to remain neutral transformed itself into a united front of the Western powers, fighting against the Bosnian Serbs. A week later, the soldiers of the Bosnian Serb attacked Srebrenica. The reasons for the escalating violence, the involvement in and complicity to the events in Srebrenica remain obscured to this day.

Even now, the Hague Tribunal claims that the escalating violence in Srebrenica was not part of the plan of action. The plan was "only" to overtake the UN protected zone, not to systematically exterminate an entire people. This would be an important criteria in order to classify and condemn such violence- violence that goes far beyond "acceptable" fighting in wars and beyond international law regarding crimes against humanity - as genocide.

⁴ German soldiers in Yugoslavia were difficult to place, not only due to basic peace-political considerations, but also because of the history of relations between Yugoslavia and Germany in the 1st and the 2nd World Wars.

Immediately after the massacres in Srebrenica, the later Foreign Minister of Germany charged NATO with responsibility for the military intervention in Yugoslavia, in which he, at least in subtext, tried to weaken the notion that the Holocaust was a one-time aberration and also spoke of a new form of fascism. This reasoning goes back to the ideas of Social Democrat Freimut Duwe who spoke of the "Ramp of Srebrenica."⁵ Duwe used a symbol of *barbarism (Kulturbruch)* -, which up until that point had been used solely in the context of the crimes at Auschwitz.

The so-called *Old Ramp* at the doorstep of Auschwitz was the point of arrival for the prisoners between 1942-44. Here the incomers were torn apart, those able to work ruthlessly separated from their families, the elderly, and their children. Those unable to work were immediately removed from that place of horror, killed in gas chambers. The names of these victims were never recorded by the SS and even now they can now only be guessed at.

In 1999, the last chapter in the dismantling of Yugoslavia was completed, and, indeed, as the NATO countries directly attacked again, it was again the dead of Srebrenica who were used to justify an illegal war. History, however, now refers only to three parties who caused a civil war, all three of which committed war crimes and violated human rights. Countless civilians have been killed on all sides, countless women were raped.

Instead of questioning the escalation of violence, or the failure of the UN troops to provide real help, or the complicity of everyone from Kofi Annan to M. Albright on the eve of the July 11th 1995 decisions, this appalling massacre served only to justify even more new wars, supporting a U.S. foreign policy doctrine which tried to sell world military intervention - beyond lawful international involvement- as "humanitarian" intervention. "The conquest of the east Bosnian UN protection in July 1995 came as no surprise to world organizations and several NATO countries. However, concrete plans

⁵ The term was actually used in 1995, immediately after the crimes in Srebrenica, by the SPD politician Freimut Duwe, who coined it to refer to a history of racial divisions and the subsequent flight and expulsion- not in regard to justification of the invasion in 1999 in Kosovo. That same year he was elected as Chairman of the Commission on Human Rights of the OSCE meeting. See: Duwe, Freimut "The ramp of Srebrenica", DIE ZEIT, weekly magazine, 30/1995

to reinforce their military protective capabilities were stopped by the USA," writes the journalist Andreas Zumach⁶ in 2002, in the green-oriented daily newspaper TAZ. The uncomfortable question remains, whether a scholarly examination of the UN mission would substantiate such "robust" mandates.

The crime in Srebrenica, without any offer of clarification (hypothesis 1), when viewed in light of the concept of the ramp at Auschwitz, borders on a kind of historical amnesia that is simply not acceptable.⁷ Since then - beginning in 1995 - the German Bundeswehr has been used in many places around the world, most notably now in Afghanistan. The militarization of foreign policy, as we learned from the 2nd World War is diametrically and unequivocally opposed to the desire for peace that led to the founding of the EU. (This lesson applies to the entire western world.)

Given these daunting developments, the question remains whether we can actually achieve a universal, independent, and neutral law in international relations, a law with a claim of securing peace, a law with respect for the teachings of the 2nd World War in the 21st Century. I think the steps taken by the Rome Statute and the ICC have been very important. They do not, however, replace a social debate, a difficult cultural confrontation, in each case, the processing of international law violations and crimes against humanity. Securing peace in Europe was and is always successful if cultural diversity - including the ever different historical experiences and perceptions - are exchanged and incorporated into our learning processes.

⁶ See "No salvation for Srebrenica" by Andreas Zumach, taz, 11.4.2002: The UN as well as the military leadership and governments of several NATO countries had very specific information about the preparations for attack and conquest plans of the Bosnian Serbs at least four months before the fall of the UN east Bosnian zone of Srebrenica in July 1995. But considerations in New York's UN headquarters about strengthening the military protection of Srebrenica were halted after an intervention of the Clinton administration in early April 1995. These new findings, which contradict the November 1999 Srebrenica investigation report by UN Secretary-General Kofi Annan, corroborate research done by TAZ and the Dutch radio station VPRO ... Annan declined requests from both TAZ and VPRO to discuss his meeting Albright. "The Srebrenica file is closed," said the spokesman of the UN Secretary-General and referred to the "definitive" investigation report.

⁷ Perhaps against this background one can also better understand the bitter comment in 2007 made by the late Honorary President of the International Auschwitz Committee, Kurt Julius Goldstein, at the age of 93. He kept his distance from the 60th Memorial of Holocaust at Auschwitz and justified his decision by saying: "I had no desire, to stand by the speakers on that ramp in the freezing cold, surrounded by Germans, listening to how well they all do with evading the past. I find it sickening. "

In my opinion, Bangladesh now has a similar task before it in handling the crimes of 1971. Each path open to reconciliation is a gift for the whole international community, for democracy and peace on our common globe. For the crimes in Bangladesh, a legal analysis similar to the Cambodian model, combined with international support, is highly recommendable. A mix of national and international courts can focus on the standards of independence and transparency, and also protect against political exploitation. What is important is the accompanying debate in society, keeping in mind the scale of their responsibilities toward future generations. Here, in addition the demand for legal reparations, the question of the origins of violence and reconciliation must also be allowed to be openly debated. Politics of history is a task for civil society. Violence must be banished by getting rid of its causes. This cannot simply be ordered by the state, but only comes through discussion and learning to organize. It is the state's job to secure the structures which allow for open cultural reconciliation, such as here, in the Liberation War Museum.