



PRELIMINARY OPINION
**on the situation in Nagorno-Karabakh and on the need for the international
community to adopt measures to prevent atrocity crimes**

August 23, 2023

The preliminary opinion is provided following the request of the Permanent Representative of Armenia to the United Nations to elaborate on the questions related to the issues of humanitarian implication of the continued blockade of Nagorno-Karabakh, in violation of the legally binding orders of the International Court of Justice, as well as on the specific measures related to the prevention of atrocity crimes, in order to mobilize the preventive capacities of the United Nations.

1. The reasons that UN Secretary-General Kofi Annan considered creating the position of UN Special Adviser on the Prevention of Genocide.

The Office of the Special Advisor to the Secretary-General on the Prevention of Genocide was officially created on 12 July 2004, by way of a message from SG Kofi Annan to the Security Council. In fact, however, the idea had matured over a series of consultations and advocacy positions taking place in the previous years. Chief among them was the Carlsson report, entrusted by the Secretary-General to the former Prime Minister of Sweden, Ingvar Carlsson. That report focused on the reasons for the weak reaction by the international community to the genocides in Srebrenica (Former Yugoslavia) in 1993 and in Rwanda in 1994. The Carlsson report identified structural problems within the organization of the UN that were seen as key reasons for the hesitations and inadequate response by the Organization to both tragedies.

In the late 1990s and early 2000s there were several studies by academics and advocates that – with different emphasis – also identified weak spots in the structure of the Organization that deprived it from a more robust and timely response to the signs of impending developments even as some offices of the UN were aware of those signs. It is important to note that in both Srebrenica and Rwanda the



Security Council was already seized of the situations and the international community had deployed armed forces that were present at the site, albeit with ambiguous mandates and terms of reference for their missions. In 2001, the Security Council had passed Resolution 1366, in which it called on the Secretary General to “bring to its attention” situations that, if left unattended, might result in genocide or other mass atrocities, with the purpose of facilitating the timely and vigorous response by the Security Council in furtherance of its powers under Chapter VII of the UN Charter.

In the years prior to 2004 there were four conferences on prevention of genocide held in Stockholm with strong support from the Swedish government. The last of the four was held in January 2004 and made a strong call to the UN to develop a plan for prevention of genocide in the immediate future. Secretary General Kofi Annan responded with a public message announcing a Plan of Action to Prevent Genocide. As part of that Plan, he pledged to organize a mechanism within the Secretariat to implement the recommendations of the Stockholm conferences.

In the same note to the Security Council of 12 July 2004, the Secretary-General announced his intention to appoint a Special Advisor to the SG on the Prevention of Genocide. The note made reference to Resolution 1366 of 2001, and further outlined the mandate to be followed by the person named by Secretary-General Kofi Annan as his first Special Advisor. At the time the SAPG was hired at the level of Assistant Secretary and part-time (on a “while actually employed” mode of remuneration). He had two full-time officials to support him, one contributed by the Office of the High Commissioner on Human Rights and the other by the Department of Political Affairs. In 2006, the General Assembly made the position full-time and allocated further resources to it. The occupants of the office appointed later by SGs Ban Ki Moon and Antonio Guterres have been full time and with larger staff support.

In response to the 12 July 2004 note, the Security Council “took note” of the decision by the Secretary-General. Since there was no objection and no debate as to the mandate or terms of reference outlined in the July message, it was understood that the Security Council considered the note as a specific and practical way of compliance by the Secretariat with Resolution 1366. Given that Resolution, it was understood that the mandate of the Office of the Special Advisor (OSPAG) emanated from the Security Council and was tacitly approved by it.



2. The rationale to limit the mandate to “act as a mechanism of early warning” excluding the determination of whether genocide occurs in a particular situation.

The note to the Security Council seemed to identify lack of early action by the international community as a major contributing factor to the genocidal crises of the 1990s. In turn, it also attributed the lack of early action to insufficient information, presented on a timely basis, that could have made it possible to adopt effective and opportune measures that might have had a chance to avoid those catastrophes. It is for that reason that the 12 July 2004 note ordered the newly created office to gather information from the field, to analyze trends and identify factors that could accelerate negative trends as well as those that might be considered usefully as retardants if taken at appropriate moments. In that sense, the “early warning” component of the new office had to be coupled with suggestions for “early action,” and in both cases, obviously, with up-to-date information from the field. It was the task of the Special Advisor to bring that information before the Security Council together with arguments based on specific knowledge and experience relative to each specific conflict, that could be persuasive as to the soundness and possible success of the measures suggested.

The note referred to the tasks entrusted to the Special Advisor in the terms of early warning and suggestions for early action, understanding that it would be up to the Security Council, in exercise of its Chapter VII powers, actually to adopt the most appropriate measures. The note added that the gathering of information and analysis should be done “without undue publicity” and – more specifically – that the SAPG would “refrain from characterizing” situations as involving genocide but concentrate instead on early warning and suggestions for early action. From the beginning, it was understood that the restriction applied to ongoing violence and threats, not to historic genocides.

In the exercise of the mandate, the OSAPG understood these restrictions as an instruction not to engage in the complex evidentiary problem of determining if all the elements of the definition of genocide were present, including not only the five genocidal acts of Article 2 of the 1948 Convention, but also the specific intent constitutive of the *mens rea* of genocide: the deliberate intention to destroy, in whole or in part, a community designated by race, religion, ethnicity or national origin. Since the mandate of the new office was to alert the international community



to the possibility of genocide as well as of war crimes and crimes against humanity, the early warning should be exercised whether or not in the end the resulting catastrophe would be characterized as genocide. The focus on *prevention* assisted us in making sense of these restrictions. In other words, the SAPG would bring matters to the attention of the Security Council (through the Secretary-General, it must be stressed) if the trends identified in the dynamics on the ground indicated a high probability of deterioration to the point of genocide, war crimes or crimes against humanity. In that sense, the burden of showing that all the elements of genocide were already in place would be contradictory with the focus on prevention, since the totality of the elements in most cases can be proven after the fact, and therefore not at a moment when prevention is possible.

SG Kofi Annan encouraged me to speak publicly on these matters if I thought the purpose of prevention would thus be served. He also told me that the Secretariat would never censor me even if my suggestions were not all adopted. In fact, in my three years as Special Advisor I spoke publicly about conditions in various countries, taking care not to give my opinion as to whether they amounted to genocide but calling attention to the serious possibilities of deterioration to mass atrocities. And I was never censored.

Implicit in these restrictions is the recognition that early action depends on political will and that political will is never instantly present. Indeed, political will is built with information, analysis and advocacy for action that is science-based and rational. The task of building political will includes building consensus. To that end, emphasis on early warning and on well-developed suggestions for early action can be seen as steps toward creating consensus and political will to act.

3. A summary of the lessons learned during my mandate.

My End-of-Mission report to SG Ban Ki Moon includes references to the several situations in which the OSAPG was involved during my tenure (2004-2007). The first lesson learned was to attempt to follow those situations with good analysis of the dynamics on the ground. My colleagues and I were able to compile data bases for each situation on the basis of available information. SG Kofi Annan had specifically allowed us to have access to the flow of information that the UN produces every day, and to go outside UN channels if we thought it necessary. Because of Mr. Annan's commitment to prevention of genocide, all



offices of the UN that process information were very cooperative when we asked for access to their data. In addition, human rights and humanitarian organizations, and academics around the world who specialize in genocide prevention also assisted us in understanding the data on the basis of historical background.

A good point of departure is to identify “populations at risk,” communities that have long suffered discrimination and whose standing in the local environment is showing signs of deterioration beyond discrimination and towards more tragic occurrences.

With updated information of the changing realities on the ground, we made it our role to review the factors that could lead to deterioration as well as those that could serve to alter the course of events. In every situation, the early action to be proposed should focus on the following four areas:

a. Protection

In these situations there are always communities of innocent civilians that are at risk or under threat of violent action by State or non-State actors. It is urgent in those cases to deploy neutral forces to stand in the way of those crimes. Depending on the situation, a contingent of well-trained civilian monitors can provide enough protection; in others, the international community should stand ready to deploy police or military forces to protect camps, villages, the provision of humanitarian assistance, and so on. These forms of protection can be organized with the consent of the territorial State, but in some cases non-consensual protective deployment may be the only way to save lives.

b. Humanitarian assistance

Populations at risk are at risk in various ways, not only via physical attacks. Communities that have been forcibly displaced find themselves unable to provide for their own sustenance and health care. The international community must guarantee their immediate survival and their possibility of leading a dignified life. In addition, because of the manner in which humanitarian relief is provided in today’s world, the presence of aid organizations is in itself a measure of protection.

c. Accountability

At this stage of the development of crises, there have already been severe human rights violations that need to be redressed. Insistence on investigation of



crimes, on truth-seeking and truth-telling, on reparations and guarantees of non-repetition is obviously based on legitimate demands of justice. It is also a requirement for stability, as the affected communities cannot organize their activities with autonomy if they see their victimizers are still around and enjoying impunity. Full justice for those crimes may have to wait for a time of transition; but at this early stage the international community should insist on breaking the cycle of impunity and not closing the doors on justice in the future.

d. Peace negotiations

The international community must encourage the political actors in the conflict to start negotiations to resolve the underlying issues that are the background to the crisis. The peace talks can take different forms, but the initiation itself of those talks will tend to stabilize the situation and prevent deterioration, as well as to serve the need for immediate arrangements on protection and humanitarian assistance.

The previous points have been validated by other normative developments that took place after 2004, chief among them the adoption of the doctrine of Responsibility to Protect at the World Summit of 2005, and the several times in which the General Assembly has reaffirmed that doctrine in later years.

4. My assessment as an early warning indication of the lack of implementation of the binding order of the International Court of Justice adopted in the case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*.

In the current situation in Nagorno-Karabakh I wish to point out the lack of compliance with the International Court of Justice binding order as an indicator that require early warning and offer opportunities to prevent a genocide. I focus my analysis in the prevention duty of the international community.

The deliberate blockade of the Lachin Corridor, against the binding order of the International Court of Justice signal the high probability that the members of the group of Armenian living in Nagorno-Karabakh may in the near future suffer “serious bodily or mental harm to members of the group” (Article 2, paragraph b of the Convention on the Prevention and Punishment of Genocide).



The excuses offered, the denial of the blockade and the offer of alternative roads to eventually provide food confirm Azerbaijan's defiance of the ICJ order.

As I understand them, the facts are:

On November 9, 2020, Azerbaijan, Armenia, and Russia signed the Trilateral Statement ending the war between the first two countries and establishing special agreements regarding Nagorno-Karabakh. "The Lachin corridor (5 km wide), which will ensure the communication between Nagorno-Karabakh and Armenia...shall remain under the control of the peacekeeping contingent of the Russian Federation" for five years. "The Republic of Azerbaijan shall guarantee the safe movement of citizens, vehicles, and cargo in both directions along the Lachin corridor."

On February 22, 2023, the International Court of Justice ordered: "The Republic of Azerbaijan shall, pending the final decision in the case and accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all measures at its disposal to ensure unimpeded movement of persons, vehicles, and cargo along the Lachin Corridor in both directions." The order was reaffirmed on July 6, 2023.

Instead of complying with the ICJ order Azerbaijan security forces have blocked the Lachin Corridor since March and since June have sealed off any channel connecting a group of Armenians living in Nagorno-Karabakh with Armenia.

The ICJ order put Azerbaijan on notice about the "real and imminent risk" created by the blockade to an Armenian group's "health and life."

Azerbaijan has ignored calls from the UN Secretary General, the US Secretary of State and the President of France to comply with the ICJ binding order and open the Lachin Corridor.

In addition, Azerbaijan officers and experts are denying the facts and offering alternative roads to provide humanitarian assistance, thus confirming their refusal to comply with the ICJ orders.



Under the circumstances, it is my considered opinion that the facts outlined above constitute sufficient reason to proffer an early warning to the international community that the population of Nagorno-Karabakh is at risk of suffering “serious bodily or mental harm to members of the group” (Article 2, paragraph b of the Convention on the Prevention and Punishment of Genocide). The state parties of the Genocide Convention are committed to prevent the crime, and the international community should exercise its responsibilities to protect that population.

I am guided in this conclusion by the jurisprudential precedent adopted by the International Court of Justice in *Bosnia v. Serbia* regarding the obligation to prevent genocide under the 1948 Convention. In that case, the ICJ established that all States have responsibilities to prevent genocide. Those responsibilities are highest in cases where a State is in a position to influence the situation decisively, because of geographic proximity, cultural or political links to the actors on the ground, control of territory and means of communication and transportation, and so on. In the case of Srebrenica, the ICJ found that Serbia had violated its obligation to prevent genocide, among other factors, because it had refused to cooperate with judicial inquiries. By way of analogy, lack of compliance with a binding interim measure issued by the ICJ precisely to protect a population at risk is at least as severe an early warning than refusal to cooperate with judicial investigations.

A handwritten signature in black ink, appearing to read 'J. Mendez'.

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