

The Special Adviser on the Prevention of Genocide and his Inscrutable Mandate

For publication in Roland Adjovi, Aatsa Atogho, Jean-Pelé Fomété and Charles R. Majinge, eds.,
Festschrift for Adama Dieng.

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Adama Dieng is the third Special Adviser on the Prevention of Genocide to be appointed by the United Nations Secretary-General. He follows two distinguished predecessors who, like Dieng, have very impressive records as activists and advocates for the protection and promotion of human rights. The first to hold the mandate, Juan Méndez, was Special Adviser from 2004 to 2007. He was followed by Francis Deng, who served until 2012.

The Convention on the Prevention and Punishment of the Crime of Genocide is the first human rights treaty of the United Nations system.¹ Adopted on 9 December 1948, a day before the Universal Declaration of Human Rights, it reflects the difficult debates of the time and in particular the challenge of implementation. The Convention contains an enduring and seemingly immutable definition of the crime of genocide but it deals inadequately with enforcement and related matters. Prosecution is reserved to the courts of the territorial state, while dispute settlement is assigned to the International Court of Justice. In contrast with future human rights treaties, adopted by the General Assembly in the 1960s and subsequently, there is no dedicated organ for implementation.

The insufficient mechanisms of the Genocide Convention have been frequently criticized, with a range of initiatives advanced over the years. As early as 1965, a proposal to set up a treaty body was made by Arcot Krishnaswami in the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.² The idea was pursued by Nicodème Ruhashyankiko in his study for the Sub-Commission, and

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¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277.

² UN Doc. E/CN.4/Sub.2/SR.456.

seems to have met with a favourable response from States.³ In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed the creation of a treaty body:

Requests the States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide . . . to encourage – or even undertake – the drafting and adoption of a control mechanism in the form of a treaty committee charged in particular with monitoring compliance of States Parties with the commitments which they undertook . . . through the assessment of the reports submitted by the States Parties and, on a preventive basis, to draw the attention of the High Commissioner for Human Rights to situations which may lead to genocide.⁴

A similar proposal was made by the Special Rapporteur on extra-judicial, summary and arbitrary executions of the Commission on Human Rights.⁵ Establishment of the Special Adviser on the Prevention of Genocide, in 2004, is an effort to fill the gap in the 1948 Convention concerning implementation.

Establishment of the Position of Special Adviser

Secretary-General Kofi Annan announced his intention to establish the position of ‘Special Rapporteur on the prevention of genocide’ at the Stockholm International Forum, hosted by the Swedish government in January 2004 on the theme of ‘preventing genocide: threats and responsibilities’. The mandate-holder was to be supported by the Office of the High Commissioner for Human Rights but would report directly to the Security Council in order to make the link ‘between massive and systematic violations of human rights and threats to international peace and security’. The Secretary-General spoke of ‘conspicuous gaps’ in the capacity of the United Nations to provide ‘early warning of genocide or comparable crimes’.⁶

³ Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr Nicodème Ruhashyankiko, Special Rapporteur, UN Doc. E/CN.4/Sub.2/416, paras. 479–96. See also: ‘Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide’, UN Doc. E/CN.4/Sub.2/1985/6, para. 85. See also the comments of Louis Joinet, UN Doc. E/CN.4/Sub.2/1984/SR.4, p.4, who urged the creation of an ‘international fact-finding body’.

⁴ UN Doc. E/CN.4/Sub.2/1994/L.4, para. 2.

⁵ UN Doc. E/CN.4/1997/60, para. 130; ‘Extrajudicial, Summary or Arbitrary Executions, Note by the Secretary-General’, UN Doc. A/51/457, para. 56.

⁶ United Nations Press Release, SG/SM/9126.

In March 2004, the Secretary-General circulated the draft mandate to the Security Council. On 7 April 2004, he spoke in Geneva to the Commission on Human Rights on the occasion of the International Day of Reflection on the 1994 Genocide in Rwanda, unveiling his Action Plan to Prevent Genocide. The Action Plan had five components: (a) preventing armed conflict, which usually provides the context for genocide; (b) protection of civilians in armed conflict including a mandate for United Nations peacekeepers to protect civilians; (c) ending impunity through judicial action in both national and international courts; (d) early and clear warning of situations that could potentially degenerate into genocide and the development of a United Nations capacity to analyse and manage information; and (e) swift and decisive action along a continuum of steps, including military action. He reiterated his intention to establish what he was now calling the Special Adviser on the Prevention of Genocide.⁷

In July 2004, the Secretary-General announced the appointment of Juan Méndez to the position.⁸ Annan explained that the mandate was derived from Security Council Resolution 1366 (2001), in which the Council had acknowledged the lessons to be learned from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda and resolved to take appropriate action within its competence to prevent any recurrence. In Resolution 1366, the Security Council spoke of ‘the shared commitment to save people from the ravages of armed conflicts’, noting ‘the lessons to be learned for all concerned from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda [...] and the massacre in Srebrenica’. The Council resolved ‘to take appropriate action within its competence, combined with the efforts of Member States, to prevent the recurrence of such tragedies’.⁹ Two operative paragraphs of the Resolution provide support for establishment of the position. In operative paragraph 5, the Council

Expresses its willingness to give prompt consideration to early warning or prevention cases brought to its attention by the Secretary-General and in this regard, *encourages* the Secretary-General to convey to the Security Council his assessment of potential threats to international peace and security with due regard to relevant regional and sub-regional dimensions, as appropriate, in accordance with Article 99 of the Charter of the United Nations.

⁷ United Nations Press Release, SG/SM/9245.

⁸ Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2004/567. See also: Letter dated 13 July 2004 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2004/568.

⁹ UN Doc. S/RES/1366 (2001), PP 18.

In operative paragraph 10, the Security Council

Invites the Secretary-General to refer to the Council information and analysis from within the United Nations system on cases of serious violations of international law, including international humanitarian law and human rights law and on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development and expresses its determination to give serious consideration to such information and analysis regarding situations which it deems to represent a threat to international peace and security.

The mandate of the Special Adviser states:

The Special Adviser will (a) collect existing information, in particular from within the United Nations system, on massive and serious violations of human rights and international humanitarian law of ethnic and racial origin that, if not prevented or halted, might lead to genocide; (b) act as a mechanism of early warning to the Secretary-General, and through him to the Security Council, by bringing to their attention potential situations that could result in genocide; (c) make recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; (d) liaise with the United Nations system on activities for the prevention of genocide and work to enhance the United Nations capacity to analyse and manage information relating to genocide or related crimes. The methodology employed would entail a careful verification of facts and serious political analyses and consultations, without excessive publicity. This would help the Secretary-General define the steps necessary to prevent the deterioration of existing situations into genocide. The Special Adviser would not make a determination on whether genocide within the meaning of the Convention had occurred. The purpose of his activities, rather, would be practical and intended to enable the United Nations to act in a timely fashion.¹⁰

Elsewhere, the Secretary-General has explained the role of the Special Adviser:

The Special Adviser understands his mandate as that of a catalyst within the United Nations system, and more broadly within the international community, to increase awareness of the causes and dynamics of genocide, to warn of the potential of genocide in a particular country or region, and make recommendations towards preventing or halting it and to open up space for partners to undertake preventive action in accordance with their mandates and responsibilities under international law.¹¹

The ‘mission’ of the Special Adviser was endorsed by the Summit of Heads of State and Government in the ‘Outcome Document’.¹²

Almost immediately upon his appointment, the Special Adviser was being asked to make determinations about whether specific atrocities, some of them ongoing and

¹⁰ *Ibid.*, annex.

¹¹ Estimates in respect of special political missions, good offices and other political initiatives authorized by the General Assembly and/or the Security Council, Thematic cluster I: special and personal envoys and special advisers of the Secretary-General, Report of the Secretary-General, UN Doc. A/65/328/Add.1, para. 43.

¹² UN Doc. A/RES/60/1, para. 140.

some of them far in the past, should be described as genocide. Wisely, he refused to engage in such discussions, declaring that this was outside his mandate.¹³ ‘If I wait until all the elements of genocide are in place according to international law, then by definition I have not prevented it. From the start I have said I am not in a position to “certify” or not certify that genocide has happened’, he told one questioner.¹⁴

In September 2004, the Special Adviser visited Darfur accompanied by the High Commissioner for Human Rights. The two reported directly to the Security Council on their mission.¹⁵ A year later, he conducted a follow-up visit to the region.¹⁶ This time, his request to present the report to the Security Council was denied, dispelling a broad perception that the prestige of his position meant that he had more or less direct access to the body. In late 2005, the Special Adviser visited Côte d’Ivoire, preparing a report outlining a number of important human rights issues but making no reference to genocide.¹⁷ Much of the work of the Special Adviser has taken place behind the scenes, consisting of quiet diplomacy and the drafting of confidential notes containing recommendations for the Secretary-General and, ultimately, the Security Council. The Special Adviser also assisted units within the United Nations by counselling on issues relating to genocide prevention, such as guidelines on hate speech and incitement.¹⁸

Frustrated attempts to enlarge the mandate

An Advisory Committee on Genocide Prevention was appointed by the Secretary-General in May 2006 to assist the Special Adviser. Chaired by David Hamburg, President Emeritus of the Carnegie Corporation of New York, the Committee was composed of distinguished international personalities including Roméo Dallaire of Canada, Canadian Senator and former Force Commander of the United Nations Assistance Mission for

¹³ UN Doc. A/HRC/3/SR.2, para. 60. Also: UN Doc. CERD/C/SR.1665/Add.1, para. 19.

¹⁴ ‘Press Conference, Mr Juan Mendez, the Special Advisor of the Secretary-General on the Prevention of Genocide, 26th September 2005, UNMIS HQ, Khartoum.’

¹⁵ The meeting was held in private and there is no public record: UN Doc. S/PV.5046.

¹⁶ ‘Press Conference, Mr Juan Mendez, the Special Advisor of the Secretary-General on the Prevention of Genocide, 26th September 2005, UNMIS HQ, Khartoum.’

¹⁷ ‘Press Conference Briefing, Visit to Côte d’Ivoire by the Special Adviser to the Secretary-General on the Prevention of Genocide, Abidjan, 3 December 2005.’

¹⁸ Report of the Secretary-General on the implementation of the Five Point Action Plan and the activities of the Special Adviser on the Prevention of Genocide, UN Doc. E/CN.4/2006/84, para. 32.

Rwanda, Gareth Evans of Australia, President of the International Crisis Group and former Minister for Foreign Affairs of Australia, Sadako Ogata of Japan, co-Chair of the Commission on Human Security and former High Commissioner for Refugees, and Archbishop Desmond Tutu of South Africa, winner of the Nobel Peace Prize and former Chairman of the Truth and Reconciliation Commission of South Africa. The Advisory Committee recommended that the title of the Special Adviser be changed by adding the words ‘mass atrocities’, so as ‘to make it broader in scope without the need to determine first whether a specific situation has a “genocidal” character’.¹⁹

The Secretary-General proposed to adjust the title slightly, to ‘Special Representative’, ‘to better reflect the role and scope of his mandate’, to upgrade the position to the rank of Under-Secretary-General from Assistant Secretary-General, and to make it a full-time job.²⁰ When Francis Deng was appointed to succeed Juan Méndez in 2007, he was described by the Secretary-General as his Special Adviser on the Prevention of Genocide and Mass Atrocity. In August 2007, the Security Council indicated its support for the ‘crucial role’ played by the Special Adviser.²¹ However, the Security Council took several months to respond the Secretary-General with respect to the changes he was proposing.²² Eventually, it requested ‘further details from you on the implications of the change in title for Mr Deng’s post set out in your letter’.²³ Reporting to the Fifth Committee of the General Assembly in December 2007, the Advisory Committee on Administrative and Budgetary Questions said that ‘the Secretary-General’s proposals concerning the Office of the Special Adviser on the Prevention of Genocide and Mass Atrocities amounted to a policy matter that should be decided upon by the General Assembly’.²⁴ A number of States indicated that they shared this view.²⁵ In February 2008, the General Assembly authorized the upgrading of the position to that of Under-

¹⁹ Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/721.

²⁰ *Ibid.*

²¹ UN Doc. S/PRST/2007/31.

²² Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/721.

²³ Letter dated 7 December 2007 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2007/722.

²⁴ A/C.5/62/SR.23, para. 6.

²⁵ A/C.5/62/SR.23, paras. 21, 23 (Cuba); *ibid.*, para. 33 (Pakistan); *ibid.*, para. 52 (Egypt); *ibid.*, para. 55 (India); *ibid.*, para. 57 (Nicaragua).

Secretary-General level, but continued to refer to it as ‘Special Adviser on the Prevention of Genocide’.²⁶ Interpreting this as discomfort with his initial proposal, the Secretary-General withdrew to the initial title of ‘Special Adviser on the Prevention of Genocide’ that had been adopted in 2004.

A cognate mandate on the responsibility to protect

At the same time as the Secretary-General appointed Francis Deng, he announced that he would establish a complementary position within the Secretariat of ‘Special Adviser on the Responsibility to Protect’.²⁷ The mandate was closely related to that of the Special Adviser on the Prevention of Genocide. The concept of the responsibility to protect had been set out and accepted in paragraphs 138 and 139 of the 2005 Outcome Document, adopted at the Summit of Heads of State and Government on the occasion of the sixtieth anniversary of the Charter of the United Nations. The two paragraphs describe a responsibility to protect vulnerable populations from threats of genocide, crimes against humanity, war crimes and ethnic cleansing. The position of Special Adviser on the Prevention of Genocide is endorsed in paragraph 140 of the Outcome Document. The three paragraphs are grouped under a sub-heading: ‘Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’²⁸

The Security Council ‘took note’ of the Secretary-General’s intent to establish the position,²⁹ but the Fifth Committee of the General Assembly did not confirm the budget requisition for this position. In February 2008, the Secretary-General announced the appointment of Edward Luck as ‘Special Adviser’ but with no reference to the responsibility to protect in the title. As Gareth Evans commented, ‘the 38th floor decided to abandon the unequal struggle and accept Mr Luck as an adviser without either a job

²⁶ Special Subjects Relating to the Proposed Programme Budget for the Biennium 2008-2009, UN Doc. A/RES/62/238, Part V, para. 10.

²⁷ Letter dated 7 December 2007 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2007/722.

²⁸ 2005 World Summit Outcome, UN Doc. A/RES/60/1, paras. 138-140.

²⁹ Letter dated 7 December 2007 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2007/722.

description or much prospect of tenure longevity’.³⁰ The Secretary-General indicated that the Special Adviser would ‘focus on the responsibility to protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity’.³¹

The Secretary-General reported to the General Assembly on the responsibility to protect in early 2009. He explained that ‘[i]n the interests of both efficiency and effectiveness, it should be noted that the Special Adviser on the Prevention of Genocide and the Special Adviser to the Secretary-General, whose work includes the responsibility to protect, have distinct but closely related mandates’.³² He proposed a ‘joint office’ to house the two Special Advisers:

The work of the joint office will preserve and enhance existing arrangements, including for capacity-building and for the gathering and analysis of information from the field, while adding value of its own in terms of new arrangements for advocacy, cross-sectoral assessment, common policy, and cumulative learning on how to anticipate, prevent and respond to crises relating to the responsibility to protect. Proposals for the small joint office, to be headed by the Special Adviser on the Prevention of Genocide, will be submitted to the General Assembly once it has had an opportunity to consider the larger policy issues addressed in the present report.³³

The proposal was further explained in a report by the Secretary-General on early warning, assessment and the responsibility to protect:

15. My Special Adviser on the Prevention of Genocide, Francis M. Deng, and my Special Adviser responsible for the conceptual, political and institutional development of the responsibility to protect, Edward C. Luck, have distinct but closely related responsibilities. Both sets of tasks need to be pursued with vigour.

16. I believe that it is essential both to maintain the distinct elements of these two sets of responsibilities and to ensure the close working relationship of the two Special Advisers on the common elements of their operational activities, for example, by employing common methodologies whenever possible. To date, their efforts have embodied the spirit and practice of system-wide coherence. This spirit of collaboration was anticipated by the decision of the Heads of State and Government, in adopting the 2005 World Summit Outcome, to include their support for the mission of the Special Adviser on the Prevention of Genocide in the section on the responsibility to protect.

17. In order to save resources, eliminate redundancy and maximize synergies and effectiveness, we should consider ways to institutionalize the collaboration between the two Special Advisers, including options for a joint office. As noted in the annex to my report to the General Assembly, a joint office could “preserve and enhance existing arrangements, including for capacity-building and for the gathering and analysis of

³⁰ Gareth Evans, ‘The Responsibility to Protect: An Idea Whose Time Has Come □□□□and Gone?’, (2008) 22 *International Relations* 283, at p. 288.

³¹ ‘Secretary-General Appoints Special Adviser to Focus on Responsibility to Protect’, UN News Service, 21 February 2008.

³² Implementing the responsibility to protect, Report of the Secretary-General, UN Doc. A/63/677, Annex. Early warning and assessment, para. 6.

³³ *Ibid.*, para. 7.

information from the field, while adding value on its own in terms of new arrangements for advocacy, cross-sectoral assessment, common policy, and cumulative learning on how to anticipate, prevent and respond to crises relating to the responsibility to protect” (A/63/677, annex, para. 7). Proposals in this regard will be submitted to the Assembly later in 2010. They will take into account the wider range of crimes and violations covered by the responsibility to protect, the broad interest in the responsibility to protect among Governments, parliaments and civil society and the Assembly’s continuing consideration of the concept.³⁴

The Secretary-General’s detailed proposal of the joint office was submitted to the General Assembly in 2010. He explained that the ‘Special Adviser’, that is, Edward Luck, would have the status of Under-Secretary-General but that he would be paid only \$1 a year.³⁵ The proposal was accepted by the Fifth Committee and subsequently adopted by the plenary General Assembly, but only after some opposition. Cuba and Bolivia took the floor in the General Assembly to complain that there had never been general acceptance of ‘the idea that the concept of the responsibility to protect is part of the main mandates of the Special Adviser for the Prevention of Genocide’ or that ‘the Special Adviser to the Secretary-General for the Responsibility to Protect is part of the office in question’.³⁶ Following the establishment of the joint office, in 2011, the Special Advisers operated very visibly as a two-person team.

The Office of the Special Adviser has devoted great attention to the development of a capacity to anticipate developments of concern. These have included conception of a ‘framework of analysis’ intended to assist in forecasting areas of concern.³⁷ The Special Adviser has manifested such concerns publicly, through the issuance of statements from time to time concerning country situations in the Democratic Republic of the Congo³⁸ and Sri Lanka,³⁹ and a report on Guinea.⁴⁰ In 2010, even before the ‘joint office’ had

³⁴ Early warning, assessment and the responsibility to protect, Report of the Secretary-General, UN Doc. A/64/864 (reference omitted).

³⁵ Estimates in respect of special political missions, good offices and other political initiatives authorized by the General Assembly and/or the Security Council, Thematic cluster I: special and personal envoys and special advisers of the Secretary-General, Report of the Secretary-General, UN Doc. A/65/328/Add.1, para. 61.

³⁶ A/65/PV.73, p. 18.

³⁷ Estimates in respect of special political missions, good offices and other political initiatives authorized by the General Assembly and/or the Security Council, Thematic cluster I: special and personal envoys and special advisers of the Secretary-General, Report of the Secretary-General, UN Doc. A/65/328/Add.1, paras. 47.

³⁸ Statement by the Special Adviser of the Secretary General on the Prevention of Genocide, Mr. Francis Deng, on the situation in the Democratic Republic of Congo, 12 December 2008.

³⁹ Statement on Sri Lanka of the Special Advisor of the Secretary-General on the Prevention of Genocide Mr. Francis Deng, 15 May 2009.

been formally approved by the General Assembly, the two Special Advisers issued a joint statement on Kyrgyzstan.⁴¹ Since then, there have been joint statements on Côte d'Ivoire,⁴² Libya⁴³ and Sudan⁴⁴ Beginning in June 2011, the two Special Advisers issued no fewer than five joint statements concerning Syria.⁴⁵

Although a close relationship exists between the mandates of the two Special Advisers, an expression of concern about the danger of 'genocide, crimes against humanity, war crimes and ethnic cleansing' does not necessarily mean the same thing as one about 'genocide' *tout court*. For example, in January 2011, the two Special Advisers issued a statement in which they said they 'remain gravely concerned about the possibility of genocide, crimes against humanity, war crimes and ethnic cleansing in Côte d'Ivoire. We believe that urgent steps should be taken, in line with the "responsibility to protect", to avert the risk of genocide and ensure the protection of all those at risk of mass atrocities'. In reality, there was no plausible threat of genocide, although the term had been bandied about by both camps in the country's post-election conflict. By contrast, a brief statement in February 2011 concerning Libya spoke about the responsibility to protect more generally, and prudently did not mention any particular concern about genocide. Rather, it expressed concern about the perpetration of crimes against humanity.⁴⁶ The five statements concerning Syria have never invoked the threat of

⁴⁰ Report of the Special Adviser to the Secretary-General on the Prevention of Genocide on his Mission to Guinea from 7 to 22 March 2010; Estimates in respect of special political missions, good offices and other political initiatives authorized by the General Assembly and/or the Security Council, Thematic cluster I: special and personal envoys and special advisers of the Secretary-General, Report of the Secretary-General, UN Doc. A/65/328/Add.1, para. 49.

⁴¹ 'UN Special Advisers of the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect on the Situation in Kyrgyzstan, 15 June 2010.'

⁴² 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire, 29 December 2010'; 'Statement attributed to the UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Côte d'Ivoire, 19 January 2011.'

⁴³ 'UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya, 22 February 2011.'

⁴⁴ 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Abyei Region of Sudan, 16 March 2011'; 'UN Secretary-General's Special Advisers on the Prevention of Genocide and on the Responsibility to Protect on the Situation in South Kordofan State, Sudan, 7 September 2011.'

⁴⁵ Statement on Syria, 2 June 2011; Statement on Syria, 21 July 2011; Statement on Syria, 10 February 2012; Statement on Syria, 15 March 2012; 'Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect on the situation in Syria, New York, 14 June 2012.'

⁴⁶ 'UN Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special

genocide, although they too have warned of the possibility of crimes against humanity⁴⁷ or of ‘atrocity crimes’.⁴⁸ Indeed, since the extravagant reference to genocide in Côte d’Ivoire in January 2010, the Special Adviser on the Prevention of Genocide does not appear to have used the term in any of his statements.

A confused vision, and thoughts on the future

The development of the position of Special Adviser on the Prevention of Genocide has gone through three phases, as described above. The first responded to profound dissatisfaction with the performance of the United Nations in Rwanda in 1994 and Srebrenica in 1995, both of which have been recognized as acts of genocide in important judicial decisions.⁴⁹ It also emerged from a lengthy discussion about establishing some form of enforcement mechanism for the 1948 Genocide Convention. The ability of the Secretary-General to establish the mandate was certainly due to international consensus about a response to the crime of genocide which is, it should be recalled, defined narrowly. Indeed, a rather strict interpretation of article 2 of the Genocide Convention has been affirmed again and again, in the case law of the International Court of Justice and the *ad hoc* international criminal tribunals. According to Payam Akhavan, who prepared a study on the Special Adviser published in 2005, the limitations of the mandate were its great strength, distinguishing it from broader functions like the High Commissioner for Human Rights. In particular, this warranted privileged access to the Security Council.⁵⁰

It became immediately apparent that the confined scope of the notion of genocide, which had been so useful in facilitating creation of this unprecedented position, would also be a source of great frustration to the mandate-holder and his or her team. The

Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya, 22 February 2011.’

⁴⁷ Statement on Syria, 21 July 2011; Statement on Syria, 15 March 2012; ‘Statement of the Special Advisers of the Secretary-General on the Prevention of Genocide and on the Responsibility to Protect on the situation in Syria, 14 June 2012.’

⁴⁸ Statement on Syria, 10 February 2012

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Reports 43.; *Prosecutor v. Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998; *Prosecutor v. Krstić* (IT-98-33-A), Judgment, 19 April 2004.

⁵⁰ Payam Akhavan, ‘Report on the Work of the Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide’, (2006) 8 *Human Rights Quarterly* 1043, at p. 1050.

Special Adviser would be confronted by various constituencies seeking endorsement of historical as well as contemporary facts. Speaking at the bi-annual conference of the International Association of Genocide Scholars, in 2005, Juan Méndez found himself harshly criticized because of his reluctance to declare that specific situations should be labelled as genocide. The audience was hardly consoled when he reminded them that his mandate prevented him from making ‘a determination on whether genocide within the meaning of the Convention had occurred’. The Special Adviser also confronted great difficulty in his interaction with States, who shrunk at the mildest association with him because of the stigma that accompanied the term genocide. They might even tolerate a visit from a special rapporteur on extra-judicial executions or torture but a mission on genocide was simply too toxic.

But the greatest difficulty was establishing the boundaries of the mandate itself. If the notion of genocide was applied restrictively, and in a manner consistent with the mainstream of judicial interpretation, the Special Adviser would have little to keep himself occupied. He would be like the firefighters at an airport, dutifully reporting for work every morning and then standing by waiting for a plane crash. Presumably some airport firefighters have spent a lifetime playing cards and doing crossword puzzles waiting for the event that never happens. And yet nobody would want to fly at an airport that did not have such a service. If genocide is a crime of which we say ‘never again’, is it so misplaced to have a watchdog standing by to make sure that such a pledge is fulfilled, and sound the alarm if ever there is a suggestion of another Rwanda or Srebrenica?

There was an enormous temptation to expand the mandate. One way of so doing was to affirm that the task of the Special Adviser was to intervene prior to a genocide. This meant he would engage with situations that were not yet genocidal, but for which there were warning signs.. Various efforts have been made to identify the pre-cursors of genocide. Such an exercise resembles that of looking for the origins of fatal respiratory disease. The illness begins with a sniffle or a sneeze. But it would be absurd to treat mild colds as life-threatening. So it is with genocide. Tasteless, bigoted jokes may indicate an underlying malaise, and there is much evidence of racist ‘humour’ in the build-up to genocide in Nazi Germany or Rwanda. But it would be absurd to suggest that this begins the slippery slope to the extermination camps. At what point does genocide being a

reasonable possibility? Even ethnic conflict leading to killings can hardly be a tipping point. History provides no shortage of such situations that never lead to genocide. The real enigma of genocide is why the vast majority of violent ethnic conflicts do not lead to the intentional extermination of one of the groups involved.

An alternative approach is to redefine genocide so as to broaden it. Professor David Scheffer, who served as United States Ambassador for War Crimes Issues during the 1990s, advanced the concept of ‘atrocity crimes’ as a replacement for the term genocide.⁵¹ His ideas influenced the report of a prestigious American task force. However, rather than adopt Professor Scheffer’s innovative concept, the task force insisted on re-defining the notion of genocide so as to cover crimes against humanity and war crimes as well. ‘To avoid the legalistic arguments that have repeatedly impeded timely and effective action, *the task force has defined its scope in this report as the prevention of “genocide and mass atrocities”...*’, the report, entitled *Preventing Genocide* (and not ‘Preventing Genocide and Mass Atrocity’), explained.⁵²

Something similar was first mooted by the Advisory Committee in its report to the Secretary-General on the Special Adviser. But the attempt in 2007 to enlarge the mandate to encompass ‘genocide and mass atrocity’ was rebuffed by the Security Council and the General Assembly. The Secretary-General had a second arrow in his quiver in the related position of Special Adviser on the Responsibility to Protect, but it too initially met with rejection. Later, the Secretary-General managed to associate his ‘Special Adviser’ with the so-called ‘joint’ Office of the Special Adviser on the Prevention of Genocide.

Since then, despite the insistence of the Secretary-General that ‘it is essential ... to maintain the distinct elements of these two sets of responsibilities’, in practice the two mandates have become blurred. The public statements of the Special Adviser on the Prevention of Genocide have dealt with Syria and Libya, neither of which can reasonably be described as genocidal. The statements have referred to crimes against humanity, not genocide. Why should this fall within the ambit of the Special Adviser on the Prevention of Genocide at all? For that matter, if the Special Adviser on the Responsibility Protect

⁵¹ David Scheffer, ‘Genocide and Atrocity Crimes’, (2006) 1 *Genocide Studies and Prevention* 229–250.

⁵² Madeleine K. Albright and William S. Cohen, *Preventing Genocide, A Blueprint for U.S. Policymakers*, Washington: American Academy of Diplomacy, United States Holocaust Memorial Museum and United States Institute of Peace, 2008, pp. xxi-xxii.

can intervene in more situations yet otherwise do essentially the same thing as the Special Adviser on the Prevention of Genocide, it will not be long before the *raison d'être* of the latter is questioned.

The evolution in the mandate of the Special Adviser, and the challenges to its definition, reflects a more general legal development towards an understanding of the centrality of crimes against humanity within the landscape of atrocity crimes. Crimes against humanity is a notion that is broader than genocide in a number of respects. It is closely aligned with gross and systematic violations of human rights. Crimes against humanity lie at the core of prosecutions of the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court.

Historically, the focus of international justice was on genocide rather than crimes against humanity because of dissatisfaction with limitations upon the latter that had been imposed at Nuremberg. Yet it was impossible to reach agreement with States on robust measures to deal with atrocities if they were defined broadly. In the 1940s, the major powers – the United Kingdom, the United States, France and the Soviet Union – were all concerned that they too might be found liable if an expansive notion of crimes against humanity perpetrated in time of peace was recognized. In such an environment, it was only possible to adopt a convention dealing with genocide. To this day there is nothing similar for crimes against humanity.

International law has made enormous strides since the Genocide Convention was adopted in 1948. The definition of crimes against humanity has been freed from the conservative restrictions imposed at Nuremberg. At the International Criminal Court, both genocide and crimes against humanity are considered to be core crimes. The responsibility to protect applies when either crime is being committed. A treaty intended to replicate the obligations of the Genocide Convention with respect to crimes against humanity is being prepared.⁵³ At the practical level, there remain very few distinctions between genocide and crimes against humanity in terms of legal consequences. Nevertheless, some tension persists. There remain States that are prepared to accept

⁵³ Leila Nadya Sadat, ed., *Forging a Convention for Crimes Against Humanity*, New York: Cambridge University Press, 2011.

international initiatives aimed at addressing genocide, to the extent that it is defined narrowly, who will continue to resist similar measures if they are framed by crimes against humanity. But other constituencies are also involved. Some groups of victims, as well as their descendants, insist upon atrocity being described as genocide, dismissing anything else as ‘denial’.

This is the environment from which the Secretary-General’s proposal for a Special Adviser on the Prevention of Genocide emerged. In an ideal world, the Secretary-General would have established, in 2004, a Special Adviser on Crimes Against Humanity or a Special Adviser on Atrocity Crimes. His choice was based upon complex reasons, some of them driven by hostility to the protection of human rights but others animated by a desire to cherish the specificity of ‘the crime of crimes’. As the debate has evolved, we now find ourselves with two Special Advisers who are about as distinct as fraternal twins. The challenge for the Special Adviser in the years to come will be to protect his unique and precious mandate without arresting the progressive legal development quickly unfolding before our eyes.