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DUTY OF MEMORY AND NEED FOR ACCOUNTABILITY

Ted Moses

Here we begin to respectfully examine a most painful and sensitive subject relating to the politics and policies of forgiveness. We are recalling, reflecting upon, and considering how we might better address the massive human suffering and resulting trauma that have been inflicted on individuals and groups. As a result of grave, repeated or systematic violations of human rights, both Indigenous and non-Indigenous peoples have been severely impacted throughout the world.

In this context, the atrocities and crimes that have been committed include: slavery, the slave trade, apartheid, colonialism, enforced disappearance of persons, genocide, and torture. In many instances, these prohibited and condemned forms of conduct continue to occur today. Clearly, we must find more effective means to eliminate them and prevent them from recurring. Within safe and secure environments, individuals and communities could then truly advance the process of healing.

For example, slavery or slavery-like practices (such as "debt bondage" or "serfdom") continue to afflict Indigenous peoples in such areas as Amazonia, Brazil; Chiapas, Mexico; Amazonian Peru; Bolivia; the Central African Republic; Botswana; Indonesia; India; and Nepal. These dehumanizing practices result in or perpetuate a vicious cycle of debilitating impoverishment, denial of human rights and racial discrimination.

Even where such behaviour has not recurred, the consequences of these horrific actions profoundly affect both present and future generations. For example, in North America, the abusive experiences of Indigenous youth and children in residential schools have left deep intergenerational scars that have not healed. The legacy of physical and sexual abuse and cultural genocide continues to adversely impact our communities and nations. Also, in Australia, thousands of Aboriginal and Torres Strait Islander people are still profoundly affected by the forcible removal of their children for roughly 100 years. Those "stolen generations" of children must not be forgotten or simply ignored.

When grave human rights violations take place, it is essential to highlight that often women or girls are severely affected in disproportionate and different ways. To some extent, this is recognized in the *Rome Statute of the International Criminal Court*, which includes gender-related crimes and crimes of sexual violence. The *Rome Statute* affirms that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence constitute, in defined circumstances, a crime against humanity and/or a war crime. Also, acts of sexual violence in situations of armed conflict can constitute grave breaches of international humanitarian law.

Similarly, through prosecution, efforts to eliminate impunity for violence against women and girls are included in the International Criminal Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, and the Special Court for Sierra Leone.

DUTY OF MEMORY AND NEED FOR ACCOUNTABILITY

I have initiated my presentation with a bleak description of the wide range of victims of unimaginable atrocities that deeply shock the conscience of humanity. In reality, my brief depiction of global suffering merely scratches the surface. The urgent and diverse international challenges that need to be confronted are extensive and far-reaching.

At the same time, it is imperative that we pay tribute to all those survivors who continue to seek justice with determination and honour. Their tenacity and perseverance under extremely difficult conditions are an inspiration to us all. In fairness to those persons who have greatly suffered, their unresolved situations must be fully acknowledged and satisfactorily addressed. This is what the "duty of memory" is all about.

In the English version of the title of this Conference, only the term "memory" is used. I much prefer the French version of the title, where the "duty of memory," "*le devoir de mémoire,*" is highlighted. It is more appropriate. It captures a critical element that is too often omitted, if not evaded or denied. It should be a natural starting point in considering past atrocities.

The duty of memory reminds us of our collective and individual responsibility. We have a duty to speak out for voices that have been forever silenced or are otherwise unheard. It is our obligation to establish the truth and embrace it. Truth is our common reference point and it must be sought out.

Memory and truth are key elements in ensuring accountability. Depending on the type of process that is chosen, accountability may serve a number of useful purposes. These purposes include:

- affirming the dignity of victims who were subjected to violent and unconscionable acts;
- punishing or rehabilitating offenders;
- providing a sense of justice or closure for victims and their families and friends;
- repairing the damage caused by human rights abuses;
- fostering reconciliation;
- deterring future violations;
- promoting institutional and legislative reforms.

In my view, States have a special responsibility to act as a positive catalyst. This is much more than moral, political or ethical responsibility, which are all important in their own right. Human rights are an international concern. According to the Purposes and Principles of the *Charter of the United Nations*, the UN has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion" (Art. 55(c)). All members of the United Nations have pledged to "take joint and separate action" (Art. 56), in cooperation with the UN for the achievement of these values and purposes.

Under Article 2 of both international human rights covenants, State Parties have a duty to guarantee respect for human rights. According to international treaty law, this obligation of any State Party is owed in good faith to every other State Party under the same Covenant.

For certain grave human rights offences, such as crimes against humanity, war crimes, the slave trade, genocide, and torture, States are *permitted* to exercise "universal jurisdiction" in punishing individual offenders. This means that States would have the power to prosecute, regardless in which country the atrocities were allegedly committed. A prosecuting State need not have any connection with either the offender or victim.

Under the Apartheid Convention and the 1956 slavery Convention, States may actually be *required* to punish offenders according to universal jurisdiction. However, it would be more appropriate for States with a greater interest in exercising jurisdiction to seek justice.

Despite these advances in international law, many of us are well aware that States are often reluctant to seek the truth when atrocities have been committed. In many instances, this may be due to the fact that a State was

at least partially responsible for the grave or systematic human rights violations. In other cases, States hesitate to use the term "genocide", since they may simply not wish to acknowledge their moral or legal responsibility to take effective action.

In 1994 in Rwanda, where about 800,000 people (mostly Tutsis) were killed, the genocide could have been prevented had the UN or any of the major powers intervened. The United States, for example, refused to label the killings as genocide and opposed any effective action in the UN Security Council until it was too late. Recently, in the case of Darfur, Sudan, the US and others have called the atrocities genocide but timely, preventive interventions have not taken place.

All of these issues demonstrate that we still have a lot to learn. The truth of past or ongoing events must be acknowledged and dealt with. In regard to forgiveness, the duty of memory and accountability for human rights atrocities remain crucial elements.

In regard to Indigenous peoples globally, it is generally acknowledged that we have suffered horrendous wrongdoings in historical and contemporary times. Yet there is often a strong denial that these diverse human rights violations constitute genocide. A principal reason given is that, in the many different circumstances, there was not the requisite specific intent to destroy us as a group. We take issue with these blanket claims. While genocidal intent remains a most difficult element to prove, there exist a variety of means of establishing this evidence. Urgent examination of the issue of genocide of Indigenous peoples is long overdue and should be carefully undertaken in close collaboration with the peoples concerned.

SIGNIFICANCE OF ETHNOCIDE OR CULTURAL GENOCIDE

At the international level, Indigenous peoples and States are involved in elaborating human rights standards on a wide range of matters of fundamental importance to Indigenous peoples. Hopefully, the norms being included in draft declarations at both the United Nations and the Organization of American States will help prevent human rights abuses in the future.

However, to date, a number of States are seeking to eliminate the terms "ethnocide" and "cultural genocide" from the draft *UN Declaration on the Rights of Indigenous Peoples.* These States continue to insist that these are "not terms generally accepted in international law."

The Grand Council of the Crees emphatically disagrees. As we and other Indigenous organizations and nations have stated elsewhere, these State positions are neither accurate nor helpful in addressing horrific acts committed against Indigenous peoples. First, the various elements identified as constituting cultural genocide or ethnocide are considered as violating international and domestic human rights standards.

Second, evidence of cultural genocide or ethnocide can and does play an important role in establishing the intent to commit genocide under international law. The decisions of the International Criminal Tribunal for the former Yugoslavia have repeatedly confirmed the legal relevance of these terms in this critical context. Third, grave acts of cultural genocide could well constitute the causing of "serious [...] mental harm" to members of a group under Article II(b) of the Genocide Convention.

Thus, in various situations, there can be significant connections between acts of cultural genocide and those of genocide. In our respectful view, there is no justification for States seeking to eliminate the term "cultural genocide" or "ethnocide" from the draft *UN Declaration.*

The terms "cultural genocide" and "ethnocide" will continue to evolve in both content and application under international law. Indigenous peoples have a right to benefit from these legal developments on an equal footing and with the same emphasis as other peoples. In this context, it would be unconscionable for States to seek either more restrictive or less graphic legal terminology to describe the atrocities committed by many of them, among others, against Indigenous peoples worldwide.

Any attempts to "sanitize" legal terminology relating to grave human rights violations against Indigenous peoples – or to otherwise diminish its impact – is inconsistent with the basic objectives of adopting a strong and uplifting declaration on the rights of Indigenous peoples. Such attempts are also incompatible with establishing the truth about past atrocities and preventing their recurrence in the future.

In both Canada and the United States, we are still confronting the far-reaching effects of cultural genocide that is the legacy of abusive, misguided and negligent government and church policies and practices. Searching for nicer terms to describe these painful and traumatic acts will clearly not bring us closer to forgiveness.

"MENDING THE PAST"

Let us now turn to another key aspect. The English version of the title of this conference speaks of "Mending the Past." This strongly implies that additional measures, such as redress for unconscionable violations, should be taken.

While in some cases symbolic reparations might perhaps suffice, there is generally a need to go beyond commemorating the victims of grave offences of the past. In my view, some form of reparation or redress would most often be a necessary aspect of forgiveness. Although some things in the past can never be made right, every effort should be made to do so.

An apology, if sincere, can be an essential element if forgiveness is to be attained. Yet it is clear that apologies alone are generally inadequate. Clearly apologies must not be only symbolic. There must also be a clear plan to positively alter the present and future of survivors of appalling human rights offences.

If we are to ensure healing, reconciliation, and a promising future, we must effectively deal with root causes. In the case of Indigenous peoples, it would be insufficient to simply eradicate policies or practices of dispossession, discrimination, cultural genocide, slavery, and other human rights abuses or international crimes.

For the more than 300 million Indigenous people globally, we must be guaranteed our status as peoples and our collective human rights, including the right of self-determination. This necessarily includes control over our natural resources and the right not to be deprived of our means of subsistence.

In regard to all victims worldwide, Judge Richard Goldstone of the Constitutional Court of South Africa has commented on the various choices that States have made in dealing with massive violence and injustices of the past. In this regard, he states:

- Some countries simply forget the past and attempt to induce a national amnesia in their people. Of course that is bound to fail – the victims do not, indeed cannot, forget.
- In other countries wiser leaders have recognized that in order to lay a foundation for an enduring peace, measures had to be taken to manage the past. It has been acknowledged that history has to be recorded, calls for justice heeded, and perpetrators called to account.

In my respectful view, these latter approaches take us from a mindset of helplessness and despondence to real possibilities for forgiveness and new beginnings. They also can help create a lasting culture of peace, truth, and respect for human rights, as well as a genuine hope for the future.