Many may find it easy, from the outside, to conclude that after more than a decade of operation by the Ad Hoc Tribunals for Rwanda and the Former Yugoslavia, the creation of the Special Court for Sierra Leone as well as the Tribunals for East Timor and Cambodia, the Special Court in Iraq to try Saddam Hussein and the unresolved concerns for crimes against humanity in the DRC, Northern Uganda and Darfur, that the struggle against impunity is not progressing, that too few cases are being handled, that they take too long to complete – in short, that the war against impunity is not being won.

Whilst one must understand these sentiments as they reflect the concerns of the consumers of international criminal justice it is nonetheless safe to say that such a conclusion would be unwarranted. An objective analysis is called for at all times to appreciate the reasons behind the creation of international courts and tribunals in the context of world politics and governance systems at this juncture in history and to assess the relevance and impact of tribunals such as the ICTR in the context of good governance, democracy and respect for human rights by states and their officials. One hopes that such an approach will create the context necessary for a meaningful discussion at both international and national levels on the issue of impunity for breaches of international criminal law and the abuse of human rights.

The struggle against impunity is firstly about accountability, about ensuring that persons – particularly those who occupy positions of leadership – and who commit crimes against their own people are not able to walk away without any judicial accountability because of their power or influence – or because of the weakness of national systems. Crimes against humanity are a concern for the whole of humanity and not just those directly affected by such horrendous crimes. The international community under an international jurisdiction has a real interest in the matter. It must act, as it has done in the few cases mentioned above.

Crime prevention remains the ideal; particularly for the kinds of egregious violations we are dealing with. But we must recall that even in the most efficient and best organised national systems crime prevention/elimination remains the ideally; we remain guided by the principle that the certainty of detection and of punishment remain the best weapons for deterrence.
The International Criminal Justice System may have its challenges and difficulties. But certain features of it also make it can eminently suitable mechanism for combating impunity. The primacy of the current Ad Hoc system lends it an authority to bind all Member States of the United Nations and to require them to require them to cooperate in all areas of its mandate; that authority has facilitated the development of a uniform body of jurisprudence of international criminal law binding on all states and avoided the proliferation of differing national jurisprudence; the reach of the system has also made it possible through its unique system of arrest and transfer of prisoners to ensure the accountability of very senior people whose arrest and transfer under traditional extradition arrangements might have been exceedingly difficult; the system is able to resolve even factual issues universally and conclusively – for instance the ICTR Appeals Chamber Decision in Prosecutor vs Karemera requiring judicial notice to be taken of the occurrence of the genocide against the Tutsi population of Rwanda in 1994. No national legal system is capable of exercising such authority and decisiveness.

The emergent system of international criminal justice has recorded significant successes in bringing to account persons who barely a decade ago would not have believed that the term “accountability for their actions whilst in office” could remotely apply to them as individuals. They hid behind the corporate veils of ‘sovereignty’ and ‘diplomatic immunity’. Today Heads of state, Heads of government, former Cabinet ministers, senior military and political leaders have faced trial and been convicted and jailed by the international courts. The ICTR alone has concluded the cases of senior figures including a former Prime Minister, five former Cabinet ministers, eleven senior administrators and three senior military officers amongst others. Currently on trial are six former Cabinet ministers, eight senior military officers, three leaders of the former ruling political party and three senior administrators amongst others. Leaders of similar rank have also occupied detention cells of the ICTY and the Special Court for Sierra Leone. Former President Milosevich and Former President Charles Taylor are striking examples. Fears of a similar tribunal in Darfur and Somalia must occupy the minds of many a warlord and genocidaire as they fight a losing battle to avoid accountability for their actions before an international tribunal.

The success of the ad hoc tribunals can be seen from the fact that more and more countries are signing up to the Rome Treaty in support of the International Criminal Court in the Hague; some countries are considering national legislation that will allow their respective courts to exercise jurisdiction over offences committed abroad; regional cooperation mechanisms such as the African Union and many others are incorporating the legal standards into their Human Rights charters and agreements and many countries are actively cooperating with each other by assisting in the arrest and transfer of indictees and fugitives from international justice. The Rule of Law is increasingly becoming a more active and real construct in the development of a global peace and justice regime. The cases of Pinochet, Hissene Habre, Charles Taylor, Milosevich, Jean Kambanda are major
milestones in the fight against impunity. Heads of State of the African Union member states have moved away from the restrictive concept of national sovereignty and sovereign immunity for crimes against humanity. They do not ask whether African leaders should be shielded from prosecution; rather they ask, as in the case of Hissen Habre, what should be the locus for trial of such a leader – whether in Africa or elsewhere outside. This is a major victory for governance in Africa and for the African people struggles for democracy and accountability of leaders.

The international criminal justice system is still relatively young and both the international policy approach to it as well as the law and jurisprudence of it in practice developing. It uses a methodology of fusing common law and civil law jurisdictions and brings together jurists, lawyers and judges as well as politicians and social scientists from across the globe to bear upon the problem of crimes against humanity. The system may have its shortcomings; but we realize that barely two decades ago there was no international criminal justice system to deal with any situation of genocide, crimes against humanity or war crimes. Today, there are four ad hoc tribunals and the International Criminal Court dealing with a variety of such situations. We look forward to the day – and it will come – when a permanent universal system will exercise jurisdiction over all such cases, without distinction.

One of our responsibilities, and indeed our legacy, is to strive to further develop the ad hoc tribunals, sharpen the investigation skills, better manage the trials and very importantly, perfect the management of evidence and records as well as the administration of international judicial arrangements. This will also force us all to reflect more deeply on the support for victims and witnesses who are largely themselves victims. We need to strengthen cooperation between states so that fugitives from justice do not enjoy impunity anytime anywhere. As of today, we can safely say that our brief experience has demonstrated that the system of international criminal accountability is feasible, workable and absolutely necessary if international peace, justice and the rule of law is to prevail. That endorsement has progressed us beyond ad hoc arrangements to a permanent international system of criminal justice. We can also safely say that, in the context of Rwanda and Yugoslavia, as in others, given the fact that indictees had largely left the country, only an international tribunal, supported by political will of states, has ensured the success of the prosecutions of the planners of genocide. In the absence of such a tribunal, the Government of Rwanda would, on its own, have been hard pressed to negotiate relevant treaties with all countries where the genocidaires were hiding before having them repatriated to Rwanda to stand trial.

The system of international criminal justice, exercised through ad hoc tribunals, is not however without its challenges and difficulties. By its nature, the international system can deal with only a limited number of cases. It thus focuses on cases of planners and leaders of massacres, leaving the rest to be adjudged by national courts and tribunal. This also
creates room for arrangements at the national level to promote justice and reconciliation and thus lasting peace in the aftermath of otherwise unimaginable atrocities. The Rwandan Gacaca system is one good example of a national, culturally relevant response to the genocide. The Ad Hoc Tribunals in the meantime, seek to share the burden with national systems through a process of referral of cases. Thus a referral of one or two cases from the ICTR in Arusha to a third country in Africa or elsewhere allows not only for a sharing of responsibility but also is an important opportunity for the citizens of that country to realize the impact and magnitude of genocide in a neighbouring state and for awareness and consciousness raising of its citizens to intensify the fight against impunity on a global scale. Such sharing of information, technical expertise and resources also assists in the further development of the necessary political will and technical capacity in national systems that is so crucial to the prosecution of crimes against humanity in the larger interest of freedom, democracy, respect for human rights and global peace and justice for all.

The progress of the war against impunity depends so much on the level of state cooperation. We are – and perhaps will continue to be – dependent on state cooperation for the success of the system. That is the major challenge to international justice. In several critical areas – the arrest of fugitives, the tracking and location of witnesses and evidence, the facilities for detention and imprisonment, etc., the majority of states live up to their legal obligations to cooperate. Those who fail in their responsibilities need to be encouraged and ultimately coerced into compliance. State cooperation is our strength but it is also the Achilles heel of the system. We need to continue to find ways of ensuring it is available. Such cooperation must also extend beyond fugitive arrest and actively incorporate the investigation and blocking of assets and lifting the veil on immigration procedures so that close family members are not used to protect illegal wealth or continued fundraising for illegal purposes. Situations as in Darfur, Northern Uganda or Somalia (as elsewhere) have also to be addressed in order to stop warlords from continuing atrocities against the people, keeping their immediate families abroad in safety whilst they continue to cause chaos at home, immigration restrictions and warrants of arrest against such warlords as well as identifying and restricting the flow of small arms into the theatres of conflict. The issue of impunity is not restricted just to prosecution post facto; it is an active concept that must be used for prevention as well. In this debate that we must also consider.

Often I entertain the hope that someday the system of international criminal justice will be freed from this dependence on national cooperation. Perhaps someday we will envisage a system with its own international and independent authority with a police force, prison and all the support facilities which a national justice system enjoys.

Often, perceptions of the national interest – political, strategic – may stand in the way; it is our challenge to develop a universal consensus on the fact that justice at home and abroad are the best guarantees for national and international peace and security. The edge enjoyed
by the municipal system over the national system in the area of deterrence lies in the
greater certainty of detection and punishment that exists in the former. We must strive to
give the latter more teeth for it to have greater deterrence effect.

Whilst the Ad Hoc system of international criminal justice was based on the primacy of the
ad hoc tribunals, the system has now progressed considerably. The transfer of cases to
national jurisdictions by the ICTR and the ICTY under their respective completion
strategies now acknowledges the need for a stronger partnership between the national and
international systems. The system of complementarity of the International Criminal Court
(ICC) acknowledges that the first line of action in the battle against impunity lies at the
national judicial level. National systems must be given the opportunity to be part of the
struggle against impunity. The international system can and should step in where the
national mechanisms are unable or unwilling to intervene.

This shift provides us with opportunities as well. An opportunity particularly for an
international effort designed to develop the necessary will and capacity in each member
state of the U.N. to be in the front line of the struggle against impunity.

The judicial process is an important and necessary complement of the struggle against
impunity. We must recognise it is not enough. One may however be naïve to close down
the ICTR and the ICTY and the SCSL beyond 2010 and go away with the belief that the
judicial process of the past decade or so is by itself enough to prevent a recurrence of
tragedy. We must embark on effective preventive strategies. Bad government lies at the
root/heart of these great humanitarian tragedies with which we are grappling. Good
governance based on a government truly of the people, the rule of law, respect for human
rights enforceable by an independent and effective judiciary together with effective
national oversight institutions need to be encouraged in all member states as the first line of
defence against mass tragedy.

The Action Plan of the Secretary General to combat genocide, launched on the 10th
anniversary of the Rwandan genocide, provides further elements – an early warning system
of impending tragedy, an effective rapid response mechanism to prevent or halt these
massive violations of human right and judicial intervention to ensure accountability of the
perpetrators. The plan needs the active support of the international community. It provides
a holistic approach to prevention of mass tragedy. It needs to be implemented. The gains
so far made in combating impunity can thus be consolidated and improved upon by
strengthening the international judicial process through more effective state cooperation
and a resort to other non-judicial preventive as well as remedial measures.

As I, and no doubt many other in this audience, dream of a better world and a more just
legacy of our generation, I am also acutely aware that the question of impunity for crimes
against humanity is also fundamentally tied in with the question of social justice. The issue
of lack of access to national resources, discrimination of ethnic minorities and resource conflicts are also at the root of many a battle all over Africa. It is no doubt also exacerbated by the politicization of race, class and ethnicity and religion to serve selfish and narrow purposes. How then do we view the fight against impunity in the context of expanding opportunity for all and ensuring social-economic justice as well for all? Should the Rule of Law not also entertain the full range of socio-economic and cultural rights in addition to the civil and political rights of the people? These indeed are some of our challenges and opportunities to make genocide history so that we can give meaning to our fervent hope of ‘Never Again’. The struggle does and must continue.

Thank you.