

## ERA OF APPLICATION

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Remarks on the occasion of receiving  
the  
Harvard Law School Association Award

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by

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Dean Elena Kagan;  
Distinguished Professors of the Faculty of Law;  
Jay Hebert, President of Harvard Law School Association;  
Fellow Alumni;  
Guests.

If I may, on behalf of all my fellow alumni, I should like to convey to you, Dean Kagan, our profound gratitude for the incredible leadership and vision you have been providing to our Law School over these years. Please accept our very warm appreciation and admiration. And I thank you very much, Dean Kagan, for your very kind and generous words of introduction; I am very touched and grateful.

I wish to express my deeply-felt appreciation to the Harvard Law School Association, the Dean and members of the Faculty, for selecting me to receive this Award. I am truly honored and humbled to walk in the proximity of such illustrious predecessor-recipients, some of whom—William T. Coleman, Jr., Mary Robinson, Derek Bok, Elliot L. Richardson, Rita E. Hauser, Abram Chayes—I have had the good fortune of knowing as friends, teachers and mentors. And I am very happy and proud to salute *Wod Twon*, Barack Obama, for his extraordinary achievements. I pay tribute to all my predecessors for their examples of commitment, service and leadership. I also pay special tribute to all my fellow alumni, for the huge impact that they are making, individually and collectively, in their chosen fields of engagement.

### Harvard Law School

I conserve very warm memories of my time at the Law School. For me, it was very exhilarating, in fact (as my niece would say) awesome, to find myself walking the same corridors with and learning at the feet of some of the biggest names and minds in legal scholarship. They were, to be sure, very demanding and, at times, quite intimidating, but this soon gave way to a rewarding experience of intellectual exploration and challenge.

The emphasis on learning both the law and its policy implications was new and refreshing for me. I also was very impressed that this bastion of scholarship and learning was hospitable to the experience of engagement and activism; that it provided space for its members to pursue some important but often unpopular and inconvenient questions. May this tradition long continue.

Among my best memories of the Law School are those vigorous, no-holds-barred debates in classes and seminars; I must confess that I was amongst the biggest trouble-makers for my professors in those sessions. And in the midst of all this, we did not lack opportunities to ‘play hard’ and enjoy Cambridge.

I am very grateful to Harvard Law School for an exciting intellectual experience, for my wonderful professors, and for the good friends I met there. That is what the Law School offered then; I am sure it has even much more on offer today.

Since leaving the Law School, my journey has led me predominantly to engagement on issues of international peace and security; human rights and humanitarian concerns; the work of the United Nations; development, focusing particularly on the future of Africa; and the protection and rehabilitation of children exposed to war.

I should like to share with you a few preoccupations—five to be precise- - drawn from my experience of laboring in these particular vineyards over these years. All of these preoccupations center on what I call the ‘era of application’.

### **From development to application of norms**

A remarkable evolution has taken place since I was in the Law School. An impressive body of international instruments and norms has been developed and has gained universal acceptance.

We now have in place what I call a ‘community of values’, covering a broad spectrum of concerns, including human rights across the board, democratic practice, environmental ethics, the rights of women, and the protection of vulnerable populations in times of war.

But, alas, we are not yet in a position to declare victory and go home. I remain deeply preoccupied by a cruel dichotomy, this wide chasm that persists between agreed international standards and impunity unfolding on the ground.

To overcome this gulf, we need a systematic campaign for the ‘era of application’—for transforming international instruments and standards into facts on the ground. To my mind, the time has come for the international community to redirect its energies, from the normative task of the development of standards and rules, to the compliance mission of ensuring their application on the ground. In particular, the ‘era of application’ needs to be embedded within formal, structured and binding compliance mechanisms. This then is my first preoccupation.

### **An example of compliance mechanism: Resolution 1612**

And I spent my last years at the UN, working to crack this conundrum, in the specific context of protecting children exposed to war. After working to put in place, over several years, a comprehensive body of instruments and norms, in January 2005, I put forward a detailed action plan<sup>i</sup>, proposing a structure and a series of measures necessary for a formal compliance mechanism.

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<sup>i</sup> Olara A. Otunnu. *Embarking on the Era of Application for the Protection of Children Exposed to Armed Conflict: Proposals for Establishing a Monitoring, Reporting and Compliance Mechanism for CAAC* January 10, 2005.

After almost six months of intensive negotiations, the Security Council, in a groundbreaking development, unanimously adopted Resolution 1612 (2005)<sup>ii</sup> on July 26, endorsing the structure and the far-reaching measures contained in my action plan. This marked a turning point of great consequence. For the first time, the UN had established a formal, structured and detailed compliance mechanism of this kind.

Those who brutalize children and deny them education and medical care in situations of war, are committing two crimes simultaneously -- they are destroying the present as well as the future. These violators need to be identified, named and held accountable by the international community. The compliance mechanism contained in Resolution 1612 (2005) is designed to do just that, and it breaks new ground in several significant respects.

First, it establishes a ‘from-the-ground-up’ monitoring and reporting system, which is tasked with gathering objective, specific, and timely information--‘the who, where and what’--on grave violations being committed against children in situations of armed conflict. UN-led task forces in conflict-affected countries are to focus on monitoring the following six major crimes against children: killing or maiming; the recruitment or abduction of children for use as soldiers; rape and other sexual violence against children; attacks against schools or hospitals; and the denial of humanitarian access to children. These six crimes were especially selected because of their gravity, because they are specifically proscribed under relevant international instruments<sup>iii</sup>, and because they are ‘monitored’.

Under this new mechanism, UN-led task forces are being established, ultimately covering all conflict situations of concern, to monitor the conduct of all parties, and to

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<sup>ii</sup> S/RES/1612. July 26, 2005.

<sup>iii</sup> Several specific instruments now constitute well-defined yardsticks for monitoring and reporting on violations against children in situations of armed conflict; the key instruments are:

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000) sets 18 as the age-limit for compulsory recruitment and participation in hostilities and 16 as the minimum age for voluntary recruitment into national armed forces; it also prohibits insurgent armed groups, “under any circumstances”, from recruiting persons under the age of 18 or using them in hostilities;
- Rome Statute for the International Criminal Court (1998) classifies as war crimes the enlistment and use of children under age 15 in hostilities, intentional attacks on hospitals and schools, rape and other grave acts of sexual violence against children. In addition, the forcible transfer of children from a group targeted for destruction constitutes genocide under the statute of the ICC;
- International Labour (ILO) Organization Convention 182 (1999) declares child soldiering to be among the worst forms of child labor and prohibits forced or compulsory recruitment of children under the age of 18 in armed conflict;
- African Charter on the Rights and Welfare of the Child (1999) establishes 18 as the minimum age for all compulsory military recruitment and participation in hostilities;
- Geneva Conventions of 1949 and its two Additional Protocols of 1977;
- Security Council resolutions devoted to the protection of children in situations of armed conflict: 1261 (1999); 1314 (2001); 1379 (2001); 1460 (2003); 1539 (2004); and 1612 (2005).

transmit regular reports to a central task force based at the UN headquarters in New York. Significantly, these reports are designed to serve specifically as ‘triggers for action’ against the offending parties.

Second, all offending parties, governments as well as insurgents, are to be identified publicly in a ‘naming and shaming’ list. The last report I prepared (2005)<sup>iv</sup>, for example, listed 54 offending parties in 11 countries. These included: the LTTE (Tamil Tigers) in Sri Lanka; the FARC in Colombia; the Janjaweed in Sudan; the Communist Party of Nepal; the Lord’s Resistance Army in Uganda; the Karen National Liberation Army in Myanmar; and government forces in the DRC, Myanmar and Uganda. The latest report (2006)<sup>v</sup>, compiled by my successor, lists 40 parties in 12 countries.

Third, the Security Council has ordered offending parties, working with UN Country teams, immediately to prepare and implement very specific action plans and deadlines for ending violations for which they have been cited. Typically these should include: immediate end to violations by the listed party; undertaking by the listed party to the unconditional release of all children within its ranks, within a time-frame agreed with the UN team; time-bound plans and benchmarks for monitoring progress and compliance, agreed with the UN team; and agreed arrangements for access by the UN team for monitoring and verification of the action plan.

Fourth, where parties fail to stop their violations against children, the Security Council is to consider targeted measures against those parties and their leaders, such as travel restrictions and denial of visas, imposition of arms embargoes and bans on military assistance, and restriction on the flow of financial resources. We know from experience that the imposition of carefully calibrated and targeted measures can have a significant impact on governments as well as insurgents.

And, finally, in order to monitor compliance with Resolution 1612, the Security Council has established its own special Working Group, composed of all 15 members, to review reports and action plans, and consider targeted measures against offending parties, where insufficient or no progress has been made.

At the broader level, the establishment of the International Criminal Court (ICC) represents a watershed for the ‘era of application’. After all, it was not so long ago that the very idea was dismissed as a utopian dream of soft-headed idealists. Now that the ICC is in place, it needs to move quickly to establish its credibility as an independent and impartial institution. It must be seen to robustly pursue major war criminals, without regard to their status or political affiliations. In particular, it is critical that ICC accountability not be reserved only for the weak, the friendless, and the fallen.

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<sup>iv</sup> A/59/695-S/2005/72

<sup>v</sup> A/61/529-S/2006/826

## **Harnessing networks of global interdependence**

Globalization comes with considerable ‘soft power’. In addition to developing and applying formal compliance mechanisms, in a globalizing world, we can and should harness this ‘soft power’ to promote accountability and the ‘era of application’. This is my second preoccupation.

In a world that has become so inextricably interdependent, no entity or actor operates as an island unto itself. The viability and success of various political, economic and military projects depend crucially on networks of cooperation and goodwill that link them to the outside world- - to their immediate neighborhood as well as to the wider international community. In this context, the force of national and international public opinion; the search for acceptability and legitimacy at national and international levels; trade and financial flows; the growing strength and vigilance of international and national civil societies; and media exposure—all of these represent powerful conditions and levers to influence the conduct of entities and actors around the globe.

We need to press to full advantage these networks of interdependence (notwithstanding the fact that some aspects of this same phenomenon are of course being exploited for illicit and deleterious transnational activities), by vigorously engaging them in support of international legality.

### **Building the rule of law**

My third preoccupation concerns the building and enforcement of an effective rule of law regime within countries. So much turns on this. Without the rule of law, there is no good government, there is no democratic accountability, there is no justice and equality before the law, there are little prospects for free and fair elections, and conflicts that should be mediated peacefully (through normal democratic and legal processes), evolve into violence, if not outright war. Without the rule of law, it is easy to build an infrastructure of repression disguised under various forms; it is easy to massively divert resources meant for education, healthcare and roads, thus condemning large populations to a life of permanent poverty and indignities. Without accountability, corruption and impunity take root and flourish. And corruption, like cancer, corrodes and distorts everything in its path, making development and genuine democratic practice virtually impossible. These and more are the cost to a society, when there is no overarching and binding structure of democratic and legal accountability.

In this very season, we are witnessing citizens in Pakistan stand up to be counted. They are marching, protesting the removal of their Chief Justice; they are demanding the rule of law, and a genuine democratic dispensation. In March, in an unprecedented development, the entire judiciary in Uganda went on strike for a week, to protest government impunity and assault on the rule of law ; this, against the backdrop of the storming of the courts by armed troops; ministers publicly threatening and insulting judges; defendants released on bail only to be kidnapped by the army; the proliferation of secret torture centers, which are euphemistically called ‘safe houses’; galloping

corruption at the very center of the state; and an era of 20 years of one-man one- party rule.

Incidentally, these two governments—in Pakistan and Uganda—have something in common. They are both beneficiaries of a ‘special relationship’—they both benefit disproportionately from the political sponsorship and financial largesse of key western democratic governments. I ask: Can the citizens of western democracies stand by and accept this kind of alliance against the rule of law and democracy, this subversion of the very values that underpin their own system of governance? In the ‘era of application’ can we remain indifferent to this perverse practice of shielding undemocratic and repressive regimes from the sanction of their own people, through the intermediary of external protection and patronage? If we cannot support those fighting for their rights, at least we should not align against them.

### **Genocide and crimes against humanity**

We are in the 21<sup>st</sup> century. There is much to celebrate, because in the modern era our civilization has achieved breath-taking advances in virtually every field of human endeavor.

And yet, these quantum leaps in human progress coexist uneasily with a darker side to our civilization. Witness our capacity to inflict and tolerate injustice, our capacity for deep hatred and cruelty towards our fellow human beings. See the way in which we can destroy entire communities in the quest for power, or in the name of ethnicity, religion or race. And yet we had dared to think that these episodes belonged to a much darker era, long consigned to history. Not so. Herein lies my fourth preoccupation.

As we meet here, the children and women of Darfur, for example, are being subjected to systematic ethnic cleansing, rape, massacres and forced displacement. They are crying out for international protection.

It is a wonderful thing that international public opinion is now very well informed and fully mobilized on Darfur. This is unprecedented. Yet this is not enough. This worldwide mobilization must now lead to concrete measures by the African Union and the United Nations, to bring a definitive end to the abominations that are continuing on the ground.

Not far from Darfur, in fact in the same valley of the Nile, is another catastrophe, far longer in duration and unprecedented in magnitude, but with which many of you may be much less familiar.

In northern Uganda, for over ten years, two million people have been brutally uprooted and herded, like animals, by their government, into some 200 concentration camps. They have been forced to live in abominable conditions, defined by staggering levels of squalor, disease, starvation and death. In these concentration camps, 1,500 people (1,000 of them children) have been dying weekly; this is more than three times the death rate in Darfur. HIV/AIDS is being used by the government as a deliberate weapon of mass

destruction; soldiers are screened and those who have tested HIV-positive are especially deployed to the north, with the mission of wreaking maximum havoc on local girls and women. Consequently, the rate of HIV infection in the region has exploded from near zero to staggering levels of 40-60 percent (the nationwide infection rate is 6.4 percent). Imagine 4,000 people sharing a public latrine; women waiting in line for more than 12 hours to fill a jerry can at a water point; and a family of 10 people packing themselves sardine-like into tiny huts of 1.5 meter radius!

The deadly conditions imposed on the camp populations by the government is exactly what the Genocide Convention classifies as, “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.

Two generations of children have been deprived of all education as a matter of policy; they have been deliberately condemned to a life of darkness and ignorance, deprived of all hope and opportunity. The entire mass of livestock of the community was forcibly confiscated, and now their land is being taken as well. And these dark deeds are underpinned by a toxic campaign of ethnic racism, hatred and demonisation, very much reminiscent of other episodes of genocide in the modern era.

The Central Luo society is renowned for its deep-rooted and rich civilization, values system and family structure—these have all been destroyed under the conditions imposed in the concentration camps over the last fifteen years. This loss is colossal and virtually irreparable; it signals the death of a people and their culture.

So, an entire society—the Central Luo—has been systematically destroyed—physically, culturally, emotionally, socially and economically—in full view of the international community. A once vibrant and dynamic society has been reduced to a mere existential shadow of itself.

I know of no recent or present situation where all the elements that constitute genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) have been brought together in such a chillingly comprehensive manner, as in northern Uganda today. This is what prompted the Ugandan writer, Elias Biryabarema, after visiting the concentration camps, to write: “Not a single explanation on earth can justify the sickening human catastrophe, the degradation, desolation and the horrors killing off generation after generation. Frankly, it’s not entirely imprecise to describe what I saw as a slow extinction—shocking cruelty and death stalking a people by the minute, by the hour, by the day. Museveni owes these children, these women an answer: they deserved it yesterday, they do today and will tomorrow.”

The population of northern Uganda has been rendered totally vulnerable; they are trapped between the genocide, atrocities and humiliations that are being systematically committed by the government, and the gruesome violence (abduction of children, massacres, and maiming of civilians) of the Lord’s Resistance Army (LRA). The government has cynically manipulated LRA’s presence and activities to divert attention from and conceal the genocide and the concentration camps. A carefully scripted narrative has been

promoted, according to which the catastrophe in northern Uganda begins with the LRA and will end with their demise. This contrived one-dimensional storyline has not only been ‘bought’ but is being eagerly amplified by the international community.

In September 2005, world leaders adopted the declaration on “Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”<sup>vi</sup>. They made a solemn commitment to act together to protect populations exposed to such existential threats, when their own government is unable or unwilling to protect them, or, worse, when the state itself is the instrument of a genocidal project. This has been precisely the situation in northern Uganda for the last twenty years.

The genocide in northern Uganda presents a most burning test case for “Responsibility to Protect”. Will the international community apply “Responsibility to Protect” objectively and non-politically, based on the facts and the gravity of the situation on the ground, or will action or inaction be determined once again by political considerations and targets of convenience?

The nightmare and staggering facts about the genocide in Uganda are well known to embassies, UN agencies, international NGOs, and human rights organizations. Yet, with precious few exceptions, those in a position to raise their voices have instead chosen to join in a conspiracy of silence.

In the face of genocide of this magnitude, where are the human rights activists? Why are there no demonstrations in our capitals and on our campuses? Where are independent and investigative journalists? Where are the congregations of faith? Where are the people of God when we need them most? Where are the democratic parliamentarians—members of the U.S Congress, the British Parliament, the Pan-African Parliament, the European Parliament? Where is the voice of the Black Congressional Caucus on this genocide?

When faced with genocide, we have a moral and legal obligation to expose it, denounce it, and stop it, regardless of the ethnicity or political affiliation of the population being destroyed. The genocide in northern Uganda is occurring on our collective watch.

My last preoccupation is this. In the ‘era of application’, we must strive for the path of a much more principled and consistent application of international norms, particularly concerning human rights, democracy, the rule of law, and protection from genocide. If we do not commit to the same set of standards for all peoples, we puncture the credibility of our normative discourse, and undermine the universality which is the foundation of the new ‘community of values’. When the selective application of these standards become a normal and entrenched practice, as is sadly the case today, then we reap a whirlwind of cynicism. But this state of affairs is neither inevitable nor acceptable. I believe that we have a common responsibility to work to reverse this situation.

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<sup>vi</sup> A/RES/60/1. (paragraphs 138-140).

## **Conclusion**

Fellow alumni, distinguished professors,

I have underscored these preoccupations because they are really our common concerns—ensuring that normative and legal standards are translated into compliance; engaging the burgeoning networks of global interdependence to enhance international legality; building and strengthening the rule of law within countries; exposing and acting to end episodes of genocide; and repudiating the practice of the selective application of international norms.

I believe that the alumni and the Law School are very well-placed to play a leading role in expanding the province of protection and dignity, of justice and equity, and of genuine democratic practice for many, many more people around the world.

These also are core American values. Which is why it is my fervent hope that my American brothers and sisters will be at the forefront of this movement, providing it critical leadership and support. This is my plea to you.

## **Dedication of the Award to Janani Luwum**

If I may, I should like to dedicate this Harvard Law School Association Award to a very special hero and role model—to Janani Luwum, the son of Omego Eliya Okello (the catechist teacher) and Lamego Aireni; a farm-boy born in the hamlet of Mucwini, among the Chua people of the Central Luo; a herds-boy who would become a great shepherd for God's own flock across a big swathe of the Great Lakes region of Africa—as the Archbishop for Uganda, Rwanda, Burundi, and eastern Congo. Throughout my journey, he has been a great source of inspiration, compass, and challenge.

The Archbishop was a giant of a man, with an imposing physical stature, yet a remarkably un-intimidating presence. But his real gianthood flowed ever so gently from very deep within. I remember his deep dark gentle face; it was always glowing, always creased in that warm smile and easy laughter. His was a most natural charisma, and he never lost his simplicity and unassuming ways, even when he became a big celebrity. He had about him that aura of everyone's favorite uncle.

He always exuded a joy, a peace, a generosity, that surpassed our understanding. These also happened to be the signature qualities of his incredible mother; we simply adored her, the radiant and saintly Lamego Aireni (in the revival tradition, we all called her fondly and simply, Lamego, meaning Sister).

The Archbishop helped to plant the seeds that would develop into my own life-long interests in world affairs and in ecumenism, even though I was too young to understand what these were really about. In my mind, I will forever associate him with several exotic place-names—Lausanne, Limuru, Vatican, Geneva, Uppsala, Lambeth, Oslo, Utrecht. I first encountered these names as the venues for the various international conferences he used to attend, where they discussed big things—I remember him telling us, for example, about dialogue among leaders of different churches and different faiths, or about their

projects for world evangelisation. He gave us an exciting glimpse into that exotic far-away world; I loved the still slides he always brought back to show us.

It was a hectic Thursday morning at the Law School. I had finished one class and running to the next, when a colleague rushed to me, breathless. He had just caught an improbable headline news on BBC World Service—Archbishop Janani Luwum had been murdered by Idi Amin. I was shattered and disoriented. I trembled in disbelief: Lord, it can't be true; there must be a mistake in the news.

I last met the Archbishop in London. Among other things, he strongly encouraged me to apply to Harvard Law School. As the students' president at Makerere University, I had spearheaded the students' resistance to Idi Amin. This led to a fateful showdown with the dictator, and I was very lucky to have escaped alive to Tanzania and, eventually, the UK.

I would later learn how the Archbishop met his fate, how he faced down Idi Amin, armed only with the quiet power of love and faith. I learnt how he walked to his death—praying, serene, and confident. His murder became the turning point that marked the beginning of the end of the Amin regime.

Here I was, at the Law School, learning all I could about human rights, and there he was, living the experience—bearing witness, providing a prophetic voice, at a moment of great darkness in my homeland.

I learnt later too that when Lamego Aireni received the horror news, she did not weep, no, she did not weep. Instead, she jumped to her feet, singing her favorite revival songs, “*Wilobo Kulu*” and “*Wii Polo*”, praising God and rejoicing for the gift of Janani's life. And when the army dumped his desecrated body at the village church at Wii Gweng, the hill of rocks, she sang and danced all the way to the graveside, across the valley from the family home. (Incidentally, on the site of the Archbishop's family home now stands the concentration camp where the people of Mucwini have been warehoused for the last many years).

Like Lamego Aireni, I too rejoice; I thank God for the extraordinary life and example of this great man of God, and for the blessings he has brought to so many people. That is why, bowing in deep gratitude, awe, and love, I humbly dedicate this Harvard Law School Association Award to our beloved Janani, on this the 30<sup>th</sup> anniversary of his martyrdom.

Looking yonder, I can see Lamego Aireni, dancing prayerfully, her elongated *ojili* (ululations) ricocheting across the hills. I hear her joyful rendition of “*Wilobo Kulu*” and “*Wii Polo*”. I hear her *mwoc*, proclaiming victory from the jaws of this darkness—*Polo yee! Gang Kwo yee! Gang Deyo yee! Cayuni!* And now I must join Mama Aireni in these songs and dance of celebration, with all the *wuc* and *mwoc* that I can muster from my ancestors' repertoire. I thank you all very much.