The John Marshall Law School

The Dean Fred F. Herzog Memorial Lecture

International Prosecution of Heads of State for Genocide, War Crimes and Crimes Against Humanity

by

Dr Hans Corell
Ambassador
Former Under-Secretary-General for Legal Affairs
and the Legal Counsel of the United Nations

Chicago
16 September 2009

Dean Corkery,
Professor Berendt and other members of the Herzog Memorial Lecture Committee,
Mr. David Herzog, representing the Herzog family,
Distinguished colleagues,
Fellow students,

First of all, I would like to thank the members of the Memorial Lecture Committee for inviting me to deliver this year's lecture in honor of Dean Fred Herzog.

I regret that I never met Dean Herzog in person. But it was interesting to read about him, including about his two years as a refugee in my country Sweden before he came to the United States. His wise words quoted in the invitation to this lecture are so very true: "A good teacher never stops learning."

As a matter of fact, what I enjoy the most at present after all my years in public service at the national and international level are my contacts with academia and students – and the freedom of becoming a student again.

The members of the Memorial Lecture Committee have invited me to speak on the topic *"International Prosecution of Heads of State for Genocide, War Crimes and Crimes Against Humanity"*. In addition, they have encouraged me to go beyond the international law questions and also address the diplomatic and political issues associated with the topic.

I will be pleased to do so, not only because of my involvement in connection with the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994, the Special Court for Sierra Leone (SCSL) in 2002, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003 and the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998. What is more important is that the possibility of bringing Heads of State to justice at the international level is an indispensable ingredient in a multilateral rules-based international system.

I will address the topic in four distinct parts:

- The duties of Heads of State
- International prosecution of Heads of State
- Political issues – in particular the role of the UN Security Council; and
- The role of the United States of America.

In the last part I will focus, in particular, on the opportunity for the present U.S. administration to adopt new policies regarding engagement in the international justice system, particularly the processes of the ICC.

The duties of Heads of State

With respect to the first part, the duties of Heads of State, it is important to note that such officials may have very different standing under the constitution of their respective countries. In case the question of criminal responsibility of a Head of State

arises, it is therefore important to analyze the legal status of this official at the national level.

In so doing, one finds that there are Heads of State ranging from the dictator with absolute power to the King or Queen in a constitutional monarchy, where the Head of State has mostly ceremonial functions. This does not mean that a Head of State of the latter category is beyond reach for international justice. However, this category is certainly different from a Head of State with executive powers, perhaps also the supreme commander of the armed forces of his or her country.

An analysis of the competence of a Head of State could in a particular case lead to the conclusion that it is not this official but the Head of Government who should be brought to justice in case punishment for international crimes should be meted out at the highest level.

If we look to the more general duties of a Head of State, irrespective of how the role of this highest official is defined, his or her duty would be to look after the interests of the State and its nationals. State sovereignty is in this context an important element. It is often said that State sovereignty in a modern society must be exercised in the interests of the people, not in the interest of the sovereign, and that this must be done in conformity with international law, in particular in the field of human rights.

At the international level State sovereignty must be exercised in conformity with international law, customary law as well as treaty law. The principle that agreements must be observed – *pacta sunt servanda* – is one of the cornerstones in this context.

Among international treaties, the Charter of the United Nations must be singled out for several reasons. First, this treaty, which was negotiated by politicians and personalities with experiences of two world wars, now has global acceptance. The UN membership now stands at 192 States.

The Charter is sometimes criticized for reflecting the geopolitical situation in 1945. This is of course true, but the Charter should be read with humility and with sensitivity to the wisdom that it contains. A particular feature in that context is Article 103, which basically means that the Charter trumps obligations under other international agreements in the event that there is a conflict between those obligations and the obligations under the Charter.

Of particular importance in our analysis are also the provisions in the Charter that refer to protection of human rights and prohibit the threat or use of force against the territorial integrity of other States. The use of force is allowed only in two situations: in self-defence or after authorization by the Security Council. It is obvious that among the duties of a Head of State is to see to it that his or her country does not violate these rules, adopted primarily for the purpose of maintaining international peace and security.

An important development in later years is the adoption by the UN General Assembly in September 2005 of the World Summit Outcome (resolution A/RES/60/1). In this resolution the General Assembly clearly states (paragraph 138) that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes,

ethnic cleansing and crimes against humanity." The Assembly then declares (paragraph 139) that the UN Members "are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

This provision was reaffirmed by the Security Council in resolution 1674 (2006) of 28 April 2006.

In a very carefully worded report in January this year (A/63/677) "Implementing the responsibility to protect" the Secretary-General of the United Nations stated that it would be counterproductive, and possibly even destructive, to try to revisit the negotiations that led to the provisions of paragraphs 138 and 139 of the Summit Outcome. "Those provisions represent a remarkably good outcome, which will well serve the ultimate purpose of the responsibility to protect: to save lives by preventing the most egregious mass violations of human rights, while reinforcing the letter and spirit of the Charter and the abiding principles of responsible sovereignty."

I believe that the Secretary-General is right. However, this is a field of international law that is developing, and the main organs of the United Nations, among them the Security Council, construe the Charter independently. Looking to the future, it is therefore important to keep in mind that from a legal point of view the Council is not restricted to the situations enumerated in the General Assembly resolution but is free to make its own assessment. I will revert to this matter in the third part of my presentation.

The duty of a Head of State in this context is to see to it that the population in his or her country is protected from the crimes with which we are concerned here.

In short, the ultimate duty to ascertain that the responsibility to protect is upheld at the national level rests with the Head of State or Government. The famous sign that President Truman kept on his desk comes to mind: "The Buck Stops Here."

International prosecution of Heads of State

I now come to the second part of my lecture: international prosecution of Heads of State.

It should first be noted that different attempts to establish international criminal justice have been made in the past. However, for the purpose of this lecture it is sufficient to focus on the last 20 years, in particular since the development during this period has been remarkable.

In addition to the special tribunals already mentioned – the ICTY, the ICTR, the SCSL and the Extraordinary Chambers in the Courts of Cambodia – should be noted the Special Tribunal for Lebanon. Except for the Cambodian ECCC that constitute international assistance to strengthen national courts, all these tribunals are efforts to establish international justice on an *ad hoc* basis.

As a point of departure we must first note that Heads of State or Government and other State officials have personal immunity from civil or criminal jurisdiction at the national level in another State in accordance with customary international law. This is clearly explained by the International Court of Justice in its judgement in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002, p. 3.* Reference is made in particular to paragraphs 51-55 of the judgement, which concerned immunity of a Minister for Foreign Affairs from criminal jurisdiction.

However, this principle does not apply with respect to international criminal justice. By way of example, the statutes of the ICTY (Article 7 (2)) and ICTR (Article 6 (2)) contain provisions according to which the official position of any accused person, whether as Head of State or Government shall not relieve such person of criminal responsibility nor mitigate punishment.

In this context it is important to note that no incumbent Head of State has been brought to justice before these tribunals. However, former Heads of State have been brought to justice. Regretfully, the case against Slobodan Milosevic before the ICTY could not be brought to an end because of the fact that the defendant diseased. But the former President of Liberia Charles Taylor now stands trial before the SCSL. Irrespective of the outcome of this trial – needless to say the Court has to observe scrupulously the standards that must be applied in criminal proceedings, including the presumption of innocence – it will be of great importance. It will testify to the fact that persons at this level are not immune from standing trial.

It is important to keep in mind that the tribunals mentioned now are temporary arrangements. In a few years time they will no longer be in operation. Let us therefore focus on the Rome Statute of the International Criminal Court and the ICC.

The first provision we should focus on is Article 27 of the Statute on "Irrelevance of official capacity". It reads as follows:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a Government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

As it appears, the first paragraph addresses the question of immunity in the same manner as the statutes of the ICTY and ICTR. The second paragraph makes it crystal clear that there is no right to invoke personal immunity before the ICC.

In paragraph 61 of the judgement in the Case concerning the *Arrest Warrant of 11 April 2000* the International Court of Justice makes express reference to these provisions:

> Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.
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> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

Let us now look at the jurisdiction of the ICC.

The ICC is limited to address the most serious crimes of concern to the international community as a whole. They are the crimes enumerated in the title of my presentation: genocide; crimes against humanity and war crimes. The crime of aggression is indicated in the Rome Statute but is not yet defined.

It should be noted that in addition to the provisions on genocide and war crimes in the Rome Statute there are separate conventions that regulate those crimes. There is no corresponding convention on crimes against humanity. An effort is presently made to encourage States to adopt such a convention. I recognize one of the initiators of this initiative in the audience, Professor Cherif Bassiouni.

Article 13 of the Rome Statute addresses the conditions under which the ICC may exercise its jurisdiction. From this provision follows that jurisdiction can be exercised in three situations. First, a State Party may refer to the Prosecutor a situation in which one or more of the crimes just mentioned appears to have been committed in its territory or by one of its nationals. Second, the Security Council acting under Chapter VII of the UN Charter may refer to the Prosecutor a situation in which one or more of such crimes appears to have been committed. Third, the Prosecutor may initiate an investigation in respect of such a crime in accordance with Article 15 of the Rome Statute.

What immediately comes to mind here is the indictment of Sudan’s President Omar Hassan al-Bashir on charges of war crimes and crimes against humanity. In this case, the ICC is acting at the request of the Security Council in accordance with Article 13 (b) of the Rome Statute, i.e. the second situation just referred to.

On 23 June this year, I had the privilege of addressing the Stockholm Criminology Symposium under the title *"Addressing Impunity: How United are the Nations*?" In so doing, I focused on the specific situation that obtains after the indictment of the Sudanese Head of State. I reiterate what I said then, namely that the indictment of President al-Bashir is now above all a matter for the Security Council. It is a common principle that if one embarks on a certain course of action one should also be prepared to follow suit and face the consequences. Therefore, when the Council asked the ICC to address the situation in Sudan, the Council should also have realized that the evidence might lead the Prosecutor to the very highest level.

It goes without saying that President al-Bashir is entitled to the presumption of innocence. But if indicted, he should be brought to justice. It is therefore tragic to see the inability of the Council to act with consequence and determination in this matter. Surely, one would expect the Council to follow suit with a resolution ordering Sudan to comply with the arrest warrant.

Let me also reiterate that this situation goes to the very heart of the Rome Statute and international criminal justice. If the evidence leads in this direction, it is precisely persons at this level that should be brought to justice. Through its inability to act in consequence, the Security Council not only undermines its own authority but also the authority of the ICC.

I will revert also to this issue in the third part of my presentation.

One of the purposes of criminal law is that it should have a preventive effect, both on the individual and in a general sense. Unfortunately, criminal acts are a common feature of all societies and no society will ever be able to rid itself entirely of criminality. However, if the criminal justice system does not work at the national level, this is a recipe for lawlessness, even anarchy. I recall the tremendous difficulties that the United Nations encountered when the Organization was charged with governing Kosovo and East Timor. It takes time to establish a functioning criminal justice system.

The same applies at the international level. No doubt, there are those who criticize the efforts so far to administer criminal justice at that level. But we should keep in mind that we are only at the beginning of a very arduous process. It is therefore important that the present efforts continue in a systematic and persistent manner. Let us hope that those entrusted with the administration of the system realize the magnitude of their responsibility. The world community simply cannot afford to fail when we have come this far.

No doubt, the more systematic and effective international criminal justice becomes, the more impact it will have on the behaviour at all levels within States. This should be the case, in particular, with respect to officials at the level of Head of State or Government if they become the focus of the process. But in order to achieve this result, there must be a true political commitment behind the effort.

A question that comes to the forefront here is how the responsibility of a Head of State is engaged. If it is this person that takes the lead in orchestrating the atrocities,

the criminal responsibility is obvious. The question is more complex if the Head of State is not directly involved.

An important provision in this context is Article 28 of the Rome Statute. According to subparagraph (b) of this Article,

> - - - a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
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> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Time does not allow for an in-depth examination of this issue here. Suffice it to indicate that superior authorities, whether military or civilian, may be responsible for crimes committed by their subordinates under certain conditions. This means that the criminal responsibility of a Head of State could be engaged e.g. if he or she passively observes how military commanders violate the laws of war.

By way of example, if it is widely reported that the armed forces of a State use illegal weapons or engage in indiscriminate bombings that cause great civilian losses, the criminal responsibility of the Head of State can be engaged if it is later established that the events occurred and that the State's principal officer did not order the military to stop these criminal acts.

Political issues – in particular the role of the UN Security Council

This brings me to the third part of my presentation: political issues – in particular the role of the UN Security Council.

To establish international criminal justice is an extremely sensitive issue from a political point of view. The United Nations is based on the principle of the sovereign equality of all its Members. Bringing officials of a State before an international criminal court is by many viewed as an infringement of the sovereignty of the State. However, gradually Governments have come to the conclusion that bringing perpetrators of international crimes to justice is necessary in order to maintain or restore international peace and security.

The responsibility for bringing such perpetrators to justice rests with the world community. No organization could assume this responsibility with greater legitimacy than the United Nations. It was also under the auspices of the UN that the Rome

Statute of the International Criminal Court was negotiated. The ICC is not a UN organ, but there is a close connection between the Court and the UN.

A relationship agreement between the two entered into force on 22 July 2004 as foreseen in Article 2 of the Rome Statute. The responsibility for the administration of the ICC is a matter for the Assembly of States Parties and, obviously, for the organs of the Court in accordance with the Rome Statute. But the ICC needs the support not only of the States Parties but of all the Members of the UN.

This is so, in particular since the ICC is dependent on the collaboration of authorities at the national level to be able to perform its functions. It is of extreme importance that such cooperation is forthcoming.

Cooperation with the ICC can be expected in cases where the State itself has referred a situation to the Court. The first experience of such cooperation will be in the three African States – Uganda, the Democratic Republic of the Congo and the Central African Republic – all parties to the Rome Statute, where the ICC is engaged at present on the basis of requests from those States.

The situation in Kenya, a party to the Rome Statute, should also be followed with great attention. The post-election violence in that country in early 2008 has now become a matter for the ICC. The intention was that Kenya should deal with this situation on her own through a national special court as proposed by the Commission of Inquiry into Post-Election Violence (CIPEV), the so-called Waki Commission. But the steps proposed by the Commission are long overdue, and in early July this year the chairman of the Panel of Eminent African Personalities, former UN Secretary-General Kofi Annan, handed over a sealed envelope entrusted to the Panel by the Waki Commission to the ICC Prosecutor. The envelope contained the names of alleged perpetrators of the post-election atrocities.

Let us now revert to the general issue: if the ICC is not supported in an effective and efficient manner by the States concerned, the Court needs backing from entities that are in a position to assist. The obvious example is the Security Council with its powers under Chapter VII of the UN Charter.

In cases where the Council has asked the ICC Prosecutor to address a situation the evident conclusion is that the Council has an obligation to support the ICC. It is against this background that it is so sad to note the Council's inability to act in consequence with its request to ask the ICC Prosecutor to address the situation in Sudan when President al-Bashir was indicted.

An important element is here the reference in Article 13 (b) of the Rome Statute to Chapter VII of the UN Charter. Article 39, which appears in this Chapter, reads as follows (the references to Articles 41 and 42 imply non use of force and use of force, respectively):

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

It is on the basis of Chapter VII that the Council established the ICTY and the ICTR. The same Chapter applies in situations where the Council contemplates referring a situation to the ICC Prosecutor. The Council therefore has to make a determination in accordance with Article 39 and decide whether a request to the ICC Prosecutor is necessary to maintain or restore international peace and security.

It is also against this background that paragraph 139 of the Summit Outcome previously mentioned should be read. Obviously, the provision in the resolution by the General Assembly is of great importance when the Council is considering how to address a particular situation. But, as I just said, the Council construes the Charter independently and is therefore not restricted to the situations enumerated in the General Assembly resolution but is free to make its own assessment as to when it is necessary to exercise responsibility to protect under Chapter VII.

In this particular situation where there is a direct correlation between the crimes enumerated in the Rome Statute and the ones enumerated in paragraph 139 of the Summit Outcome, there should, however, be no potential for a conflict.

But what if there are objections to criminal pursuit? Surely, bringing people at this level to justice risks aggravating the situation! Will it not be more difficult to negotiate a peace agreement between the warring parties? Is there not a risk that the conflict is prolonged with continued human suffering for an extended period of time? Should we not listen to the victims? What if they are more interested in peace now than in bringing perpetrators to justice?

Such objections can certainly not be disregarded. It is therefore important to analyze each particular situation carefully. But at the same time it is equally important to remember that if the officials who bear the greatest responsibility for international crimes committed in a particular situation are not brought to justice, this constitutes a clear risk not only for a continuation of the conflict at hand but also for breeding new conflicts in the future.

There is also a growing realization that if officials at the highest level in a State are suspected of international crimes, these persons soon become a burden to their own country. If the State community joins hands and takes coordinated action against such a State, the situation could change very quickly.

In such a situation there is also a role for civil society, not least the business community. To do business with a State or with entities within a State where the highest officials are suspected of crimes of the kind we are discussing here and where the State does not co-operate with the international tribunal would not be in conformity with the Global Compact or with Corporate Social Responsibility. Such questions should be raised and discussed as elements in the risk assessments that responsible businesses make in today's world.

However, one cannot disregard the fact that there could be situations were pursuing criminal charges against the highest officials of a State might have very serious consequences and even constitute additional threats to international peace and

security. It is against this background that the Rome Statute contains a provision on deferral of investigation or prosecution. It reads as follows (Article 16):

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This provision constitutes a safety clause to prevent that a prosecution before the ICC in a particular case would lead to unacceptable consequences. From the Prosecutor's point of view this is a very important provision. The Prosecutor must go where the evidence leads him or her and should not have to make decisions of the kind contemplated in Article 16. That provision entails a political assessment for which the Security Council must be responsible. This system means that the Prosecutor can focus on the criminal justice elements without being accused of acting on the basis of political considerations.

Correspondingly, Article 16 requires that the Security Council applies this provision in an unbiased and credible manner. This is another element in the analysis that the Council should make of its own performance. I have explained my concerns about the Council's performance in a letter to the Members of the UN of 10 December 2008 – *Security Council Reform: Rule of Law More Important Than Additional Members.*

Of particular importance is that the Security Council abides by the same standards when it applies the UN Charter. Otherwise the Council will be accused of using double standards. The Council has asked the ICC Prosecutor to address the situation in Sudan. Why did not the Council do the same in the Middle East?

At a manifestation for peace between Israel and Palestine, held in Stockholm on 10 January 2009, I said that I could not see that the situation in the Middle East is different from other situations where the State community has come together to ascertain that suspected war crimes are investigated and that those responsible are brought to justice. Pointing to both Israel and the Palestine Authority, I said that the accusations made in different directions must be investigated in a professional manner so that all, and not least those directly affected, can have an answer to the question where the responsibility lies.

Yesterday, the United Nations Fact Finding Mission on the Gaza Conflict issued its report. It is horrifying reading. The Mission recommends (paragraph 1766) that, in the absence of good faith investigations by the appropriate Israeli authorities, the Security Council should refer the situation in Gaza to the ICC Prosecutor pursuant to Article 13 (b) of the Rome Statute.

The role of the United States of America

This brings me to the fourth and last part of my presentation: the role of the United States of America.

It is with great sorrow that many friends of the U.S. around the world have followed the development with respect to the rule of law in your country in later years. This is true in particular of people of my generation in Europe who look to the U.S. as a friend that twice came to our rescue in the last century.

On earlier occasions, I have quoted a critical remark by Nicholas Rostow, who was the General Counsel to the U.S. mission to the United Nations during the period 2001-2005 and with whom I had many contacts at the time. I will quote him also today in reflecting on the opportunity for the present U.S. administration to adopt new policies regarding engagement in the international justice system, particularly the processes of the ICC.

In an article – *Law Abiding – Restoring America's Global Reputation* – Nicholas Rostow says (The American Interest (Winter (Jan./Feb.) 2008 (Vol. III, No. 3):

> So whatever one may think about the nature of international law, the next administration will have to address the sullied international legal image of the United States. To prepare for this task, we should review the record.

I can recommend this article for reading. A few days ago I also read with great interest the manuscript of a book that will be published later this year and in which ten former Legal Advisers to the State Department discuss their experiences from serving different U.S. administrations.

Nowadays, I never miss an opportunity to emphasize that the only way ahead is a multilateral rules-based system. The Western democracies obviously must take the lead in establishing this system. If they do not set the example, how can they expect other States in less fortunate circumstances to bow to the law?

Great efforts are made by many, not least by American organizations, to assist States in establishing systems under the rule of law at the national level. However, this is not the occasion to go into detail about this work. Let us instead look at the international criminal justice system.

One conclusion from the history of the establishment of the international criminal tribunals is that the U.S. has been very supportive of these efforts and sometimes the main engineer. It was therefore with great regret that many of us took note of the U.S. vote against the adoption of the ICC Statute in Rome on 17 July 1998.

It is a well-known fact that in spite of this vote, the Statute was signed by the Clinton administration on 31 December 2000 and that the signature was withdrawn by the Bush administration in 2002.

Less known, perhaps, is that the Bush administration adopted a very aggressive policy against the ICC. As an example could be mentioned its efforts to undermine the ICC by putting pressure on other States to sign bilateral non-surrender agreements under Article 98 of the Rome Statute. The purpose of these "Article 98 Agreements" was to protect U.S. nationals from the assertion of ICC jurisdiction by prohibiting the other State from surrendering U.S. nationals to the ICC.

It should be noted, however, that toward the end of the Bush administration the attitude with respect to the ICC changed somewhat. For example, on 31 March 2005 the U.S. decided not to block the adoption of the Security Council resolution that referred the situation in Darfur (Sudan) to the ICC Prosecutor. Furthermore, in July 2008, the U.S. opposed efforts of other States to apply Article 16 of the Rome Statute and defer the investigation and prosecution of President al-Bashir.

Under all circumstances, it is now crucial that the new U.S. administration adopts a radically different position vis-à-vis the ICC even if this will not be easy.

In reflecting on the opportunity for the Obama administration to adopt new policies regarding engagement in the international criminal justice system I do not want to be presumptuous when there is an authoritative American proposal in this respect on the table. I refer to the report, released in March 2009 by an independent task force, established by the American Society of International Law, the Task Force on U.S. Policy Toward the International Criminal Court (ICC). It was co-chaired by former State Department Legal Adviser William H. Taft IV and Judge Patricia M. Wald.

The Task Force believes that there is an auspicious opportunity to put U.S. relations with the Court on an articulated course of positive engagement and recommends that President Obama take prompt steps to announce a policy of continued positive engagement with the Court. It should be noted, however, that the Task Force does not recommend a U.S. ratification of the Rome Statute at present.

The Task Force makes several recommendations. To an external observer the following are of particular interest:

- Examination of methods by which the United States can support important criminal investigations of the ICC, including cooperation on the arrest of fugitive defendants, the provision of diplomatic support, and the sharing of information, as well as ways in which it can cooperate with the ICC in the prevention and deterrence of genocide, war crimes, and crimes against humanity;
- U.S. participation as an observer in the Assembly of States Parties to the Rome Statute, including discussions on the crime of aggression and the 2010 Review Conference of the Rome Statute;
- U.S. development assistance focused on rule-of-law capacity building, including that which enables countries to exercise their complementary jurisdiction to the ICC effectively;
- An inter-agency policy review to re-examine whether, in light of the ICC's further performance and the outcome of the 2010 Review Conference, to recommend to Congress that the United States become a party to the Rome Statute with any appropriate provisos, understandings, and declarations similar to those adopted by other States Parties;
- Consideration of amendment to U.S. law to permit full domestic U.S. prosecution of crimes within the jurisdiction of the ICC so as to ensure the primacy of U.S. jurisdiction over the Court's jurisdiction under the complementarity regime.

With respect to the "Article 98 Agreements" the Task Force recommends that the President should examine U.S. policy concerning their scope, applicability, and implementation and that receipt of certain U.S. assistance should be further de-linked from any such agreements.

On a more general note it cannot be emphasized enough how important it is that the U.S. establishes itself as a bulwark for democracy and the rule of law. The best way to do this is to respect international law and to support a multilateral rules-based international system. There are many in the U.S. and around the world who hope that the new administration will be able to make a difference here.

A positive signal would also be sent if thorough investigations could be made so that the responsibility for the violations of both U.S. and international law that occurred during the previous administration could be clearly established. If, for example, it is established that the United States of America engaged in systematic torture of prisoners or captives, it is important for the U.S. credibility as a State under the rule of law that it is clarified at what level this was authorized and that those responsible are brought to justice.

Yet another opportunity to demonstrate a commitment to international criminal justice will be the aftermath of the report by the United Nations Fact Finding Mission on the Gaza Conflict. In fact, because of its actions over many years the U.S. bears a great responsibility for the present situation in the Middle East. Depending on how things unfold, the new U.S. administration may have an opportunity to demonstrate that it applies the same standards in the Middle East with respect to accountability as it does in other parts of the world.

In conclusion, let me reiterate that the possibility of bringing officials at the level of Head of State or Government to justice at the international level is a necessary ingredient in a rules-based international society. The reason for this is that it is at this level that the principal standards applied in conflicts where international crimes may be committed are set. It is at this level where the overriding orders are given.

In other words, in order to establish international criminal justice it is necessary to examine whether the evidence leads to the place where in the specific situation the buck stops. Surely, this expression is understood also in the Middle East, in Sudan, in Zimbabwe, in Burma and in other parts of the world.

Thank you for your attention!