

# ASSESSING THE IMPACT OF SECURITY AND GEOPOLITICAL CONSIDERATIONS ON THE PROTECTION OF HUMAN RIGHTS AND THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE

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## 1. INTRODUCTION

A point of departure in assessing the impact of security and geopolitical considerations on the protection of human rights and the pursuit of international criminal justice is Cherif Bassiouni's perspectives on the topic of our meeting including his rather sinister conclusions in the Pre-Conference Summary of Issues for Discussion. In his view, the cumulative effects and outcomes of global factors will increasingly change international and national priorities in the years to come. As these priorities change, they are likely to displace other priorities whose value-oriented goals are the enforcement of human rights and the pursuit of international criminal justice. There is, as he puts it, a risk that our globalized world is becoming less committed to the identification and enforcement of the common good and that in the next few decades, all of this may lead to a reconfiguration of the international community.

Against this background, we must put the question: what should be the goal of present and future global governance? Let me suggest that the overarching goal must be that all humans can live in freedom and dignity with their human rights protected. Indispensable prerequisites for such a society are democracy and the rule of law.

Let me reflect on the topic assigned to me in the following parts:

- World governance, past and present;
- The need for democracy;
- The need for the rule of law;

- Future global governance with a focus on the protection of human rights and criminal justice; and
- Concluding reflections.

## 2. WORLD GOVERNANCE, PAST AND PRESENT

*Ubi civitas, ibi jus* – where there is a society there is also a legal order – is a Roman saying, often referred to. This could be seen as an expression of common sense and rationality in the administration of the first primitive societies that were developed by humankind. The goal was to achieve certain behaviour, and in particular, to punish acts that were considered unacceptable in these societies. Over time, these societies grew and merged into kingdoms and sometimes empires with more sophisticated legal and political orders. Eventually, the Westphalian system emerged, named after the 1648 Peace of Westphalia with its focus on sovereign states and their right to pursue their own interests.

This system has now gradually been overtaken by the present system that emerged from the ashes of the two world wars in the last century. The most significant change came about through the establishment of the United Nations in 1945. It is true that Article 2 of the UN Charter prescribes that “[t]he Organization is based on the principle of the sovereign equality of all its Members.” However, this sovereignty has to be exercised in accordance with the purposes and principles of the United Nations.

Specific reference should also be made to the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948, which is the common basis for the present global and regional systems for the protection of human rights.<sup>1</sup> Among the rights laid down in the Declaration, which today has acquired the status of customary international law, should be mentioned freedom of opinion and expression (Article 19), and freedom of peaceful assembly and association (Article 20). These freedoms are prerequisites for democracy at the national level.

This evolution could be illustrated with a reference to the development in my own country, Sweden. It started with law by oral tradition, followed by a codification of the law in the thirteen Law Rolls of the Swedish Counties in the 12<sup>th</sup> century AD, followed by King Magnus Eriksson’s law of the land in 1347, followed by an increasingly sophisticated legislative system in which the most recent step was taken in 1995 when Sweden became a member of the European Union. To this should be added membership in the United Nations and many other international organisations. Other states must have a similar history.

<sup>1</sup> See, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), [www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/).

### 3. THE NEED FOR DEMOCRACY

A fundamental element in a security and geopolitical analysis is the need for democracy. This system of governance has spread over the years and analyses have been made to what extent democracy is applied in the world community of states.<sup>2</sup>

As Cherif Bassiouni points out in his Pre-Conference Summary of Issues for Discussion, there are great challenges here. He mentions that in some cases, governability has risen to a crisis level, particularly where there are internal conflicts and/or high levels of poverty. But, as he puts it, even in developed states, governability on the basis of the historic “social contract” carried out under the auspices of governmental democracy is showing “significant flaws, particularly as to governmental effectiveness.”

In a geopolitical perspective, it is imperative that a concerted effort is made to spread democracy in order to achieve proper world governance. This also seems to be the understanding within the United Nations. The following paragraph from the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels on 24 September 2012 deserves to be quoted:

5. We reaffirm that human rights, the rule of law and democracy are interlinked, mutually reinforcing, and that they belong to the universal and indivisible core values and principles of the United Nations.<sup>3</sup>

Against this background, there can be no question about the need for democracy in the world community. States that fall short in this respect deserve to be criticised; in present day society, this matter can no longer be considered internal within the meaning of Article 9(7) of the UN Charter.

### 4. THE NEED FOR THE RULE OF LAW

It so happened that I was invited to deliver a lecture on the rule of law in Brussels on 30 June this year.<sup>4</sup> My point of departure in addressing this topic is that the rule of law is an indispensable prerequisite for proper global governance. In addition, and most importantly, the rule of law is not only a legal matter.

<sup>2</sup> See e.g., THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2013, available at [www.eiu.com/public/topical\\_report.aspx?campaignid=Democracy0814](http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0814).

<sup>3</sup> UN Doc. A/RES/67/1, [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/1).

<sup>4</sup> See, Dr. Hans Corell, lecture at Leuven Centre for Global Governance Studies symposium on The Rule of Law as a Strategic Priority in the European Union's External Action: The Promotion of the Rule of Law in the 21st Century: Prospects and Challenges (30 June 2014), [www.havc.se/res/SelectedMaterial/20140630thepromotionoftheruleoflaw.pdf](http://www.havc.se/res/SelectedMaterial/20140630thepromotionoftheruleoflaw.pdf).

It is much more comprehensive. It encompasses ethical elements that must be supported by all. And it has to come from the grassroots.

With respect to the rule of law at the national and international levels and the various definitions of the concept, reference is made to the Brussels lecture.

What is important in this context is that protection of human rights and criminal justice are core elements in a rule of law system. It is true that protection of human rights is a later addition, while criminal justice has been part of the system from the very outset; it has been a constant companion in the development over the centuries that led to present day society. The question that must be put is whether, in a globalised world, it is not an anomaly if this element is missing at the international level. The following paragraphs from the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels on 24 September 2012 could be quoted as an answer to the question:<sup>5</sup>

12. We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.

23. We recognize the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law, and in this respect, we welcome the States that have become parties to the Rome Statute of the International Criminal Court, and call upon all States that are not yet parties to the Statute to consider ratifying or acceding to it, and emphasize the importance of cooperation with the Court.

From a geopolitical perspective, the challenges in implementing the rule of law are of particular importance. Also, this aspect was part of my Brussels lecture. Among several challenges that could be mentioned is the requirement that the states themselves actually abide by the rule of law, and that international organisations live up to their own proud declarations on the importance of the rule of law.

Let us now look briefly at other challenges, some of which have been addressed in other sessions in our meeting.<sup>6</sup> One major challenge is the growing world population. We were hardly 2 billion people on the globe when the United Nations was established in 1945. Today, we are some 7 billion, and in 2050, we will be 9.6 billion.<sup>7</sup> This can create tensions that may have negative effects,

<sup>5</sup> See, *supra* note 3.

<sup>6</sup> Reference is made in particular to the contribution by Professor Martin Lees to High Level Meeting of Experts.

<sup>7</sup> UN POPULATION DIVISION, WORLD POPULATION PROSPECTS: THE 2012 REVISION, <http://esa.un.org/wpp/>.

in particular if aggravated by climate change that may have serious effects on the human habitat. If this leads to rising sea levels and desertification, we may experience unprecedented movements of people around the globe – a new category of refugees.

Yet another challenge is armed conflicts, in particular conflicts generated by religious extremists.<sup>8</sup> This represents one of the most serious challenges, in particular in cases where the extremism is directed against efforts to empower women.

Another challenge is terrorism, which has to be vigorously combated, not through a “war on terror” – a very dangerous misnomer –, but through law enforcement. Of particular importance is that democracies do this with full respect for the rule of law and human rights. The practice of identifying suspected terrorists and subjecting them to so-called “targeted killings” is particularly worrisome. I fear that in many cases this is actually committing murder, in particular if the killings take place outside the battlefield.

A further major challenge is transnational organized crime, which has extremely serious effects even on the proper governance of states. There is also an inherent risk that the territories of “failed states” and states that do not have proper defence and police forces may become platforms for such criminal activity.<sup>9</sup>

One of the most serious challenges in implementing the rule of law is corruption. It is an extremely harmful element, which causes great damage to the efforts of establishing the rule of law. States have to act with determination here and live up to their obligations. The following paragraph from the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels on 24 September 2012 deserves to be quoted here:

25. We are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication, and therefore stress the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.<sup>10</sup>

A very particular challenge related to the present analysis is the increasing inter-connection between national and international law. One example often referred

<sup>8</sup> Reference is made here to the Vienna Declaration *Putting Global Ethical Standards into Practice in a Dangerous and Divided World* adopted by the InterAction Council of Former Heads of State and Government on 28 March 2014, [www.interactioncouncil.org/vienna-declaration](http://www.interactioncouncil.org/vienna-declaration).

<sup>9</sup> United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), [www.unodc.org/unodc/en/treaties/CTOC/](http://www.unodc.org/unodc/en/treaties/CTOC/).

<sup>10</sup> See, *supra* note 3.

to is constitutional law, which, as far as citizens' rights are concerned, overlaps considerably with international human rights law. Today, it is difficult to imagine that a new constitution of a country is developed without clear references to and even quotes from international human rights instruments. Other examples of this increased inter-connection can be found in environmental law and investment law with more subjects to come.

We should also be aware of the growing amount of treaties in various fields, which means that the national legislator's freedom of action will be limited. One of the most important elements in legislating at the national level today is that the legislator ascertains that the law to be enacted is in conformity with treaties to which the state is a party.

From personal experience, I know that this element is particularly important in the field of human rights. Therefore, in the obligatory process of ascertaining that proposed legislation is in conformity with the constitution of the country, in parallel, a corresponding examination must be performed with respect to international human rights treaties.

A further challenge is the need to monitor and oversee the implementation of international human rights norms. This applies in particular if an international human rights court has come to the conclusion that international human rights norms have been violated in a particular case. Such rulings often mean that the state in question will have to amend its national legislation in order to avoid that the same violation is repeated.

In my Brussels lecture, I also addressed the responsibility of international organisations for implementing the rule of law, and in particular, the responsibility of the UN Security Council in this context.

## 5. FUTURE GLOBAL GOVERNANCE WITH A FOCUS ON THE PROTECTION OF HUMAN RIGHTS AND CRIMINAL JUSTICE

Let me first reiterate that protection of human rights and criminal justice are core elements in a rule of law system. Any governance system that cannot deliver in this respect is doomed to be defective. In the worst-case scenario, a state with a weak governance system risks developing into a "failed state". With the increasing globalisation and interconnection among states, those states that fall behind in establishing democratic governance under the rule of law will pose a threat to international peace and security, thus putting also other states, even states that are fairly stable democracies, at risk.

In addition, there is the sinister scenario described in the following way by Cherif Bassiouni in his Pre-Conference Summary of Issues for Discussion:

In the next few decades, all of this may lead to a reconfiguration of the international community, which could resemble what existed in the middle-ages in Europe and in other parts of the world: the rich and powerful (whether they are organized as states or groupings of states) will be in the fortresses on top of the hills which are surrounded by walls and moats to keep them safe on the inside, while on the outside, will be those living in a sea of poverty and chaos.

This scenario brings to the forefront the more general question of global governance. It is therefore critical to look at earlier proposals and ideas in this respect.

The question of global governance has occupied thinkers and philosophers over centuries. Different designs have been forwarded. Some authors have supported the idea of a world government. Others have rejected it, like Immanuel Kant, who instead advocated an international association of free republican states.<sup>11</sup> Albert Einstein was of the opinion that we should have a world government based on a constitution approved by all states, with a monopoly on armed force and with a mandate to solve conflicts between states by legislation.<sup>12</sup>

If we look at proposals that have emerged after the Second World War, the contribution by the University of Chicago could be mentioned. A group under the leadership of Robert M. Hutchins, the Chancellor of the University, and Giuseppe Antonio Borgese, Professor of Literature, produced a preliminary draft of a world constitution, published in 1948. Another very elaborate proposal for a world federation was published by Grenville Clark and Louis B. Sohn in 1958.<sup>13</sup>

However, there are also many other proposals.<sup>14</sup> Some of these are built on the idea that there should be a world government and a world legislative assembly. The reasoning in some of the proposals is sometimes confused, in particular when reference is made to a world government, while at the same time, nation states should be maintained. Others are extremely complex and probably also very expensive. In some cases, proposals are built on the idea of reforming the United Nations in a manner that it might develop into a world government. Proposals with respect to transition from the present system to a new system are often lacking.

Another issue discussed in these proposals is the right to a military defence. Some of the proposals require that states must give up that right and that a world government should have monopoly on the use of military force. Some thinkers advocate complete disarmament. Personally, I do not for a moment believe

<sup>11</sup> IMMANUEL KANT, ZUM EWIGEN FRIEDEN EIN PHILOSOPHISCHER ENTWURF (Reclam ed., 1881) (1795).

<sup>12</sup> ALBERT EINSTEIN, OUT OF MY LATER YEARS (1950).

<sup>13</sup> GRENVILLE CLARK & LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW (1958).

<sup>14</sup> See e.g., Global Challenges Foundation, *Survey of Proposals and Ideas on Global Governance – Overview of literature* (November 2013), <http://globalchallenges.org/pdf/survey-of-proposals-and-ideas-on-global-governance.pdf>.

that this is realistic. In my opinion, each state is under an obligation to have a military defence, either their own or through a defence alliance.

In the future, this should not be seen as a threat to other states, but rather as a common interest among states in establishing law and order on the globe. Otherwise there will be a vacuum that risks being quickly filled by criminal elements who will soon constitute a threat to national governments and thus to international peace and security. The term “failed state” comes to mind again. I base my position here also on my observations when the UN administered Kosovo and East Timor.

In my view, contemplating a system of global governance of the kind suggested in many of these proposals leads in the wrong direction. It is also totally unrealistic that responsible politicians would throw the existing system overboard and replace it with an untested construction.

While these proposals are interesting and while it is important that further thought is given to the future world governance, it is imperative that a discussion of this central question at present is conducted in realistic and rational terms. The question is where to start and where to employ our energy.

At present, I do not see any alternative to the existing system of world governance, which is through sovereign nation states interacting within the United Nations where almost all of them (193) are members. It is obvious that we should concentrate on how to improve the existing system. The governance has to be democratic and the rule of law must be applied. And, as always, where power is exercised, it must be scrutinised, in particular by watchful and critical media. Furthermore, state sovereignty has to be exercised in the interest not of a sovereign but of the people, and relations to other states should be based on good neighbourliness.

The problem here is that states have a tendency to identify their national interests in a very narrow perspective, not to say on the basis of sheer self-interest. What is required in this analysis is more statesmanship, and in case there is an argument, there should be a preparedness to listen to others, and if possible adjust in a manner that may take also their interests into consideration.

In 2008, I had the privilege of participating as an adviser in a meeting of the InterAction Council of Former Heads of State and Government when they discussed the topic *Restoring International Law: Legal, Political and Human Dimensions*.<sup>15</sup> Allow me to repeat a quote from their Final Communiqué from this meeting that I have referred to many times in the past:

Therefore, the InterAction Council recommends:

Insisting that states observe scrupulously their obligations under international law, in particular the Charter of the United Nations and encouraging the leading powers to

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<sup>15</sup> See [www.interactioncouncil.org](http://www.interactioncouncil.org).

set an example by working within the law and abiding by it, realizing that this is also in their interest;

Realising that it is necessary for states to engage in discussions with those with whom they have controversies in order to explore the possibility of resolving the difference;

Underlining the importance of the Security Council exercising its mandate effectively and decisively in accordance with the responsibility granted to it by the UN Charter;

Acknowledging that there are situations, which require the Security Council to act with authority and consequence in accordance with the principle of the responsibility to protect;

Acknowledging that the challenges mankind faces must be addressed through multilateral solutions within a rule-based international system,<sup>16</sup>

The problems that have to be resolved require that the population of the world understands what these problems are and what needs to be done. What is necessary today is to get people on earth, and not least their representatives, to realise that there are common pressing problems that need to be solved in collaboration.

In this context, it is important to note that we already have a large number of such solutions that works well. It is just that no one thinks about it. The entire UN system with the various specialized agencies is one example. Who thinks of post, telecommunications and transportation by land, sea and air as systems developed in collaboration between the states? And what work is never interesting for the media to report on.

What all this boils down to is that people must gain knowledge and insight about what needs to be done and find the political will and the necessary techniques to develop new systems. In this context, it is absolutely necessary to see to it that education about human rights and the rule of law is given in schools as early as possible. I reiterate an earlier suggestion that a considered effort should be made by pedagogues who know how the education should be structured at different levels in schools.

The question is now what specific conclusions can be drawn from all this with respect to the protection of human rights and the pursuit of international criminal justice.

Looking at conflicts around the world and what causes them, a common denominator is that the root causes are basically the same: democracy and rule of law are missing. A core ingredient in the rule of law is human rights. It is therefore necessary to strengthen the protection of human rights. This can be

<sup>16</sup> See Final Communiqué from InterAction Council (June 27, 2008) [www.interactioncouncil.org/final-communicu-29](http://www.interactioncouncil.org/final-communicu-29).

done mainly in two ways: (1) through education and legal technical assistance and (2) by taking measures to prevent dictators, warlords, and otherwise corrupt and ruthless men from getting into power.

With respect to the two first methods, it is important to continue the work that is already done by international organisations, states, and non-governmental organisations. The challenge is to coordinate this work and interact with the receiving states in a constructive, effective, and determined yet respectful manner. Useful tools in this context should be the various existing systems for assessing the situation in individual states with respect to human rights, corruption, the rule of law, and other features.<sup>17</sup>

With respect to preventing the abuse of power, it is absolutely necessary that the United Nations, through the Security Council, engages effectively in fulfilling its obligations under the UN Charter. As I have maintained so many times in the past, the first condition is that the members of the Security Council respect international law and in particular the UN Charter and fundamental human rights standards both when they serve on the Council and in general, when they act internationally or at the national level. They must set the example by adhering to the rule of law and in particular respect the law of which they are the custodians – the UN Charter.

The members of the Council, and in particular, the five permanent members, must be able to join hands when the Council is confronted with situations that threaten international peace and security. The failure of the Council to deal in an effective manner with situations like the one in Syria is a tragedy, to say the least. And by demonstrating that they are unable to join hands in situations of this kind, they actually fuel conflicts instead of preventing them through resolute action when this is needed. Even greater damage to our system of collective security is made when permanent members of the Council violate the UN Charter, as it happened in Iraq in 2003, in Georgia in 2008, and now in Ukraine.<sup>18</sup> To a observer who has followed the work of the Security Council for many years, it is perplexing to conclude that the members of the Council are sometimes unable to use the formidable potential that the Security Council represents. Reference is made again to the recommendations by the InterAction Council just quoted.<sup>19</sup>

With respect to the pursuit of international criminal justice, it is important to remember that justice should primarily be delivered at the national level. The principle of complementarity laid down in the Rome Statute should be the common standard in the future. Therefore, there is also here room for

<sup>17</sup> Reference is made to the material produced by the Human Rights Council, the World Bank, Transparency International, the World Justice Project with its Rule of Law Index, and others.

<sup>18</sup> See Hans Corell, Keynote Address at Conference Henri Lafontaine: Reforming the United Nations Security Council (Dec. 11, 2013), [www.havc.se/res/SelectedMaterial/20131211corellonscreform.pdf](http://www.havc.se/res/SelectedMaterial/20131211corellonscreform.pdf).

<sup>19</sup> See *supra* note 16.

legal technical assistance to states that are still not able to deliver justice at the national level.

At the same time, it is crucial that the remarkable advances in the field of international criminal justice that have been made over the last 20 years are protected and enhanced. The latest development here gives cause for some concern. When the several special tribunals are now winding up, our focus should be on the International Criminal Court (ICC), which is facing great challenges at the moment.<sup>20</sup>

Particularly, worrying are the attempts by certain leaders to try to exempt persons in the highest positions at the national level from the Court's jurisdiction and even to encourage states to withdraw from the Rome Statute. On 7 October 2013, former UN Secretary-General Kofi Annan delivered the third Annual Desmond Tutu International Peace Lecture in South Africa.<sup>21</sup> The question and answer session that followed included a question on the prospect of some African countries withdrawing from the International Criminal Court. Mr. Annan clearly stated that any leaders who chose this route would earn "a badge of shame for themselves and their country."<sup>22</sup>

Because of the way in which the ICC has handled the cases against the President and Deputy President of Kenya, various attempts have been made, including by the African Union, to stop the trials with reference to the positions that these two accused presently hold in their country. This has led to the very unfortunate result that the Assembly of States Parties to the Rome Statute (ASP) at its meeting in November 2013 added new provisions to the Rules of Procedure and Evidence of the ICC that might conflict with the very clear provision in Article 63(1) of the Rome Statute that the accused shall be present during the trial.

The first of these new provisions (rule 134*bis*) would allow an accused to be present through the use of video technology during part or parts of his or her trial. The second provision (rule 134*ter*) concerns excusal from presence at trial, and the third provision (rule 134*quater*) concerns excusal from presence at trial due to extraordinary public duties. The question is whether these rules are in conformity with the Rome Statute. If they are not, the ICC has no other choice but to invalidate them.

The thinking behind the last provision also seems to miss a very important point. One of the basic features in the system of international criminal justice is that it is likely that the evidence might lead the Prosecutor to persons in very

<sup>20</sup> See Hans Corell, *Challenges for the International Criminal Court*, INT'L JUD. MONITOR, Winter 2014, [www.judicialmonitor.org/archive\\_winter2014/specialreport1.html](http://www.judicialmonitor.org/archive_winter2014/specialreport1.html).

<sup>21</sup> See Kofi Annan, Speech at 3<sup>rd</sup> Annual Desmond Tutu International Peace Lecture: Strong and Cohesive Societies: The Foundations for Sustainable Peace (Oct. 20, 2013), <http://kofiannanfoundation.org/newsroom/speeches/2013/11/third-annual-desmond-tutu-international-peace-lecture>.

<sup>22</sup> *Id.*

high positions at the national level, including the head of state or government. If the evidence leads in this direction, it is precisely persons at this level who should be brought to justice before the ICC.

As I have developed in an address concerning international prosecution of heads of state for genocide, war crimes and crimes against humanity, 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; it is at this level that the principal standards applied in conflicts where international crimes may be committed are set, and it is at this level that the overriding orders are given.<sup>23</sup>

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.

The obvious question that the ICC must consider is whether it is at all possible to try persons at this level if they remain at large.

As the Secretary-General's Representative at the Rome Conference in 1998, it is with sadness that I must conclude that the ICC is in a very serious situation. Therefore, it is important that the different actors under the Rome Statute understand their roles and their responsibilities. What the ASP must realise is that the persons who serve in different capacities in the ICC must have extensive courtroom experience whether as judges, prosecutors or defence counsel. As I have developed in more detail in the past, my recommendation for achieving an effective, efficient and professional ICC in the future is that the ASP should

- Elect competent judges with genuine courtroom experience to the ICC;
- Abolish candidate list 2 in the Rome Statute (which entails that diplomats and law professors with no courtroom experience can be elected as judges); and
- Agree among them not to elect judges who are above 70 years (common highest national retirement age), during their nine-year tenure in the court.<sup>24</sup>

With respect to the last point: what impression does it give if among the judges of the ICC, there are individuals who because of their age are no longer considered suitable to serve on the bench in their national courts?

It is also imperative that states should agree to abolish vote trading and similar unworthy features in the process of electing judges.

<sup>23</sup> See Hans Corell, *International Prosecution of Heads of State for Genocide, War Crimes and Crimes Against Humanity*, 43 J MARSHALL L. REV. xxv (2009), [www.havc.se/res/SelectedMaterial/20090916headsofstate.pdf](http://www.havc.se/res/SelectedMaterial/20090916headsofstate.pdf).

<sup>24</sup> See Hans Corell, *Foreward to INTERNATIONAL PROSECUTORS, v* (Luc Reydam, Jan Wouters & Cedric Ryngaert eds., 2012), [www.havc.se/res/SelectedMaterial/internationalprosecutors\\_prelims.pdf](http://www.havc.se/res/SelectedMaterial/internationalprosecutors_prelims.pdf).

## 6. CONCLUDING REFLECTIONS

In conclusion, the question must be asked where this analysis leads seen in more general terms against the background of the very sinister scenario that Cherif Bassiouni presented in his Pre-Conference Summary of Issues for Discussion. I am thinking in particular of the reference to the Middle Ages quoted above.

The first conclusion is that human rights and international criminal justice must be put in a larger perspective. Even if they are of great importance, they are only ingredients in a larger scenario in which requirements such as a more just economic development, protection of the environment, nuclear disarmament, and empowerment of women are crucial elements in a world with a population that is growing exponentially. It is therefore obvious that greater efforts must be concentrated on addressing these phenomena also.

However, instead of focusing resolutely on these elements, too much energy and resources are spent on dealing with conflicts generated by misguided personal ambitions, religious extremism, and greed. The difficulties in building democratic societies in states in transition from dictatorship constitute a specific challenge. The situation in the Middle East is poisoning the atmosphere in the entire UN system. The human suffering generated by conflicts in particular in Africa and Asia is unspeakable. The inability of the state community to deal effectively and decisively with the regime in North Korea is appalling. Such a regime does not belong in our modern world.

This situation also means that enough resources cannot be devoted to fighting terrorism, corruption, transboundary criminality and other crimes, which are generated by humans in all societies. It is a fact that there are, have always been, and will always be individuals with a disposition that will not conform to the established order in the societies in which they live, but to engage in criminal activity.

The focus of the efforts of states and international organisations – the global governance system that we have – should be on conflict prevention and crime prevention. And here, it is imperative that the democracies of the world should take the lead and set the example.

The point of departure must be that states define their interests in a circumspect and statesmanlike manner. With reference to what I said at the outset, the overarching goal should be that all humans can live in freedom and dignity with their human rights protected. The conclusion must therefore be that the best way of protecting the interests of one's own people is to work for a global society where all humans can do so. The way to achieve this is through cooperation among states directly or through international organisations, notably the United Nations.

But in certain situations, this does not work because some states fall short. If so, they constitute a threat to international peace and security. When this

occurs, there is one institution with a legal obligation to deal with the situation, namely the United Nations Security Council.

If our analysis leads to the conclusion that in today's world, realistic global governance has to build on the existing system of nation states in the final analysis, one always ends up on the doorstep of the Security Council as the ultimate operator.

Based on my experiences as the UN Legal Counsel from 1994–2004 and my work thereafter, in my analysis, I always ended by focusing on the Security Council and in particular on its five permanent members.

Surely, these members may sometimes have different interests. However, considering the mandate given to them under Article 24 of the UN Charter and the Council's competence to act, including by the use force if this is necessary in order to maintain or restore international peace and security, the members of the Council should realise that they must apply the law justly using the same yardstick all around the world.

The latest development, in particular the annexation by the Russian Federation of Crimea in flagrant violation of international law, is deeply troubling. I am sure that the Crimea issue, where the Russian Federation undoubtedly has a legitimate interest, could have been solved in a legally acceptable manner. Instead, Russia resorted to a behaviour that makes one think that we still live in the 19<sup>th</sup> century.

This kind of behaviour by a permanent member of the Security Council is simply not acceptable. If crime and conflict prevention is to be successful, it is absolutely crucial that the members of the Security Council as the final arbiters should lead the way.

The way ahead, if we are to avoid the scenarios described in the Pre-Conference Summary of Issues for Discussion at the High Level Meeting of Experts, is that the Security Council takes its responsibilities seriously and that its members define their own interests in a statesmanlike manner. If they do not, they risk undermining the authority of the United Nations. Let me reiterate what I said about this in December 2013:

And surely, the permanent members realize that if they undermine the authority of the Security Council and thereby the UN as a whole in any new structure, they will never ever be given the legal authority that they are accorded under the UN Charter – to permanently sit on a body that is authorized to make decisions, including on the use of force, that all members of the Organisation are under a legal obligation to follow.<sup>25</sup>

Finally, if we look to the future, humankind is facing enormous challenges. If things go wrong and there is a major conflict in the future, this may actually

<sup>25</sup> See *supra* note 17.

lead to the destruction of the human habitat. In such a conflict, there can be no victor. It is therefore imperative that states and their leaders make every effort to join hands in a genuine attempt to make our existing system work also in situations where views differ. This does not mean that they should give in when it comes to fundamental requirements, like democracy, rule of law and criminal justice. Surely, there would be common denominators here, not least if people were allowed to have their say in all countries.

If at the end, things go wrong – in spite of all the lessons, we should have learnt from history and the contributions from academia and the many think-tanks around the world –, what could be the reason? What if in the final analysis, if there is anyone left to make one, the conclusion is that it went wrong because of – if you forgive me – stupidity?

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