

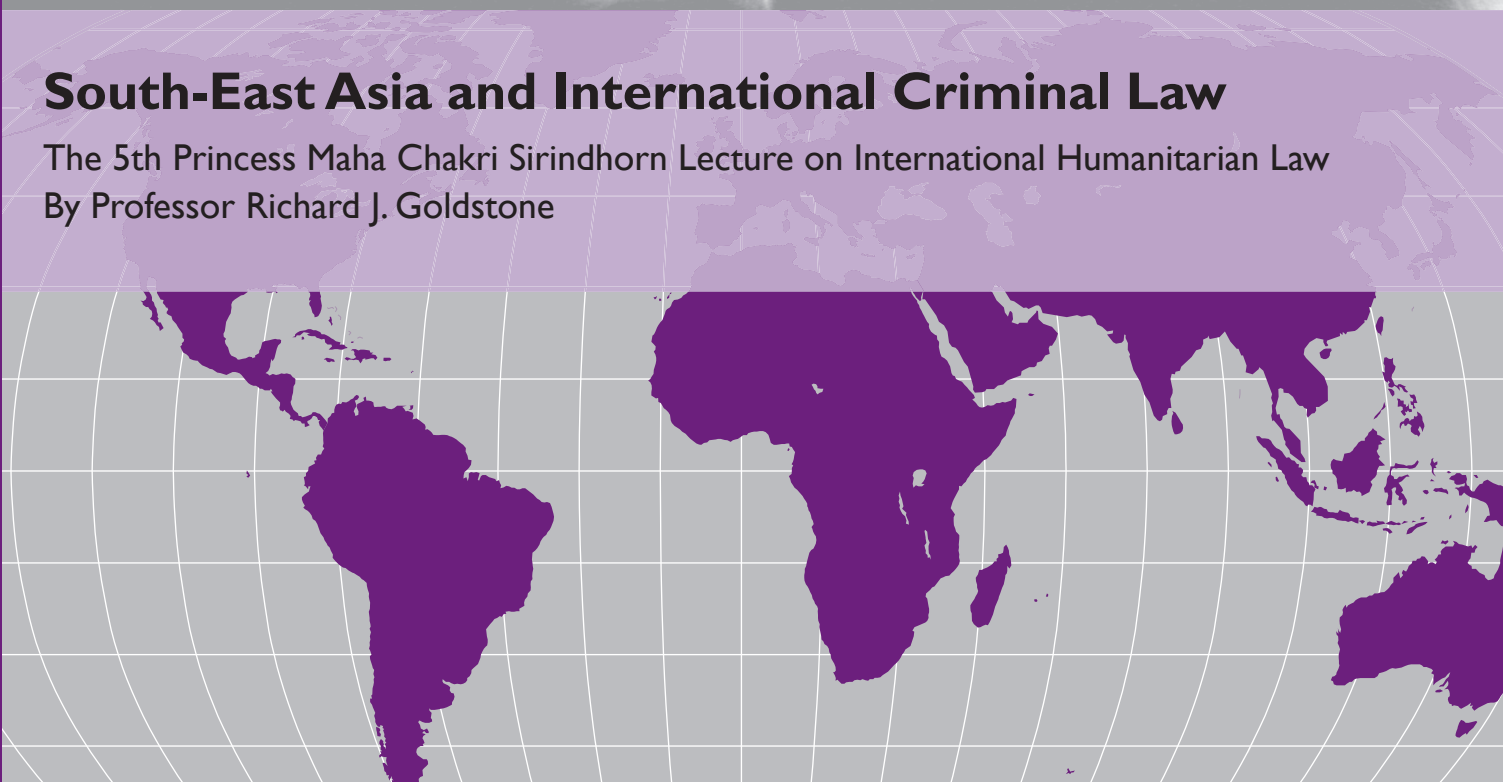
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South-East Asia and International Criminal Law

The 5th Princess Maha Chakri Sirindhorn Lecture on International Humanitarian Law
By Professor Richard J. Goldstone



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PREFACE

The Torkel Opsahl Academic EPublisher has established three open access publication series. The Occasional Paper Series releases substantial single papers or clusters of shorter texts. We are pleased to publish this paper by Richard J. Goldstone – one of the leaders of the field of international criminal justice – on ‘South-East Asia and International Criminal Law’. The paper was presented as the ‘The 5th Princess Maha Chakri Sirindhorn Lecture on International Humanitarian Law’ in Bangkok in June 2011. The Thai Red Cross Society and the Ministry of Foreign Affairs of Thailand have kindly agreed to its publication in this Series. The Thai translation was prepared by the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand. The paper can be freely read, printed or downloaded from the site www.fichl.org.

Morten Bergsmo
Editor of the FICHL Occasional Paper Series

Alf Butenschøn Skre
Senior Editorial Assistant

South-East Asia and International Criminal Law

Richard J. Goldstone*

It is my great privilege and honor to have been invited to deliver the 5th Princess Maha Chakri Sirindhorn Lecture on International Humanitarian Law. I feel particularly honored that H.R.H. Princess Maha Chakri Sirindhorn, Executive Vice-President of the Thai Red Cross Society, is co-hosting this event and presiding this morning.

I was delighted to accept the invitation to deliver this address for a number of reasons. The first was that the invitation came from the Red Cross. I have a long association with the International Committee of the Red Cross ('ICRC') and served for four years on its International Advisory Board. Since I became involved with international criminal justice, my admiration for the ICRC has grown with each passing year. It has been the guardian of international humanitarian law. Without its efforts during difficult decades of neglect, the exciting developments about which I propose to speak today would not have come about.

Then, for many years my wife and I wished to visit Thailand. Until now we have not had the opportunity to do so. We are so very happy to be in Bangkok and look forward to a spending the next few days in your country.

* **Richard J. Goldstone** is Visiting professor at the Yale University, Jackson Institute for Global Affairs. He is a former justice of the Constitutional Court of South Africa and was the first Chief Prosecutor of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Justice Goldstone was appointed by the Secretary-General of the United Nations to the Independent International Committee, which investigated the Iraq Oil for Food program. Among his other professional endeavours, Goldstone served as chairperson of the Commission of Inquiry regarding Public Violence and Intimidation that came to be known as the Goldstone Commission; and of the International Independent Inquiry on Kosovo. He also was co-chairperson of the International Task Force on Terrorism, which was established by the International Bar Association; director of the American Arbitration Association; a member of the International Group of Advisers of the International Committee of the Red Cross; and national president of the National Institute of Crime Prevention and the Rehabilitation of Offenders (NICRO). He is also a foreign member of the American Academy of Arts and Sciences and an honorary member of the Association of the Bar of the City of New York.

I have read and heard about the impressive and important work that the Thai Red Cross has done and is doing in Thailand. I refer in particular to the crisis that has arisen on the border between Thailand and Cambodia where there are tens of thousands of persons displaced. The Red Cross is without question the most efficient and experienced agency able to facilitate and co-ordinate humanitarian aid to the people in need in this regrettable kind of situation. It deserves the fullest support and encouragement from all of the people of this region. I would also refer to the essential aid brought by the Thai Red Cross to the many victims of floods in the South of Thailand earlier this year.

The good work of the Red Cross reminds us that justice is not solely – or even principally – the province of lawyers and judges. As we strive to heal the divisions of mankind, we must never forget the tireless efforts of the Red Cross and others to heal those who need healing in a much more literal sense. Their perseverance in the face of the urgency of their mission and the magnitude of the task before them deserve our everlasting respect and gratitude.

I have had the good fortune to bear witness to transformative changes in international law. As a young lawyer in South Africa under Apartheid, I saw with my own eyes how a regime might oppress its own people. As the first Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, I was present at the birth of the modern era of international war crimes tribunals. And most recently, I worked on a United Nations investigation on the Gaza conflict of 2008 and 2009. The evolution of international criminal law in that time has been remarkable.

I propose to consider the importance to the global community of the International Criminal Court, known as the ICC. The ICC represents the culmination of the evolution of international criminal law that I have been fortunate to have witnessed during my life in the law. As one who has participated in some small part in the history that led to its establishment, I believe it is my solemn duty to share with posterity my perspective on that history. The history is long and uneven, with defeats that break our hearts and with successes that hint at humanity's true and higher nature. The small, tentative, and halting steps we have taken towards a more perfect system of international justice have, over the years, carried us a very long way. Today I add my voice to those who praise the ICC as the world's best hope for genuine accountability for crimes against humanity.

Let me begin by insisting that the time for international criminal justice is not past. On the contrary, it is dawning. The necessity of denying impunity to war criminals has never been greater. And that need is growing.

The years since World War II have seen monumental changes in the nature of warfare. During the past 65 years, humanity has been blessedly spared of conflicts of that global magnitude. But as Asia and the world have learned through painful experience with proxy wars, ethnic conflicts, and brutally oppressive regimes, the threat of atrocities has not diminished. Asymmetric warfare, terrorism, and urban warfare provide chilling opportunities for savage abuses. We need only open a newspaper or turn on a television to witness the voices from around the world crying out for justice. As members of the international community committed to peace for all of humanity and to justice for all of our brothers and sisters, we must dedicate ourselves anew to the rule of law in all corners of the planet we share.

To appreciate the importance of the ICC and its role in international justice going forward, it is crucial to understand the history that led to its establishment. The laws of armed conflict have an ancient heritage and were largely based on reciprocity. These laws are not a purely Western tradition. References to them can be found in Chinese and Indian writings of some 2,000 years ago, demonstrating their universal moral foundation. Simply put, the idea was that if my enemy spares the lives of my civilians and non-combatants, I will act in a similar fashion in respect of those of my enemy.

Reciprocity was only the beginning of the legal restraints on warfare. Since the end of the nineteenth century a large and impressive body of laws has been designed to restrain armies from attacking civilians without military justification. At the very heart of those laws lies the principle of proportionality. In armed conflicts, civilians are to be protected unless the military advantage is such that the loss of civilian lives is proportionate to that advantage. A war crime is committed if civilians are attacked disproportionately. This proportionality test has become a part of customary international law and is not contested by any State. The comparison is frequently a difficult one to make and especially in the heat of battle. But that is what the law requires. In times of war, a margin of appreciation is given to the armed forces. Thus, in the absence of intent or a high degree of negligence it is assumed that the military action was proportionate.

The laws of war were originally designed to bind Governments and not to visit criminality on any individuals. There was thus no basis upon which individuals could be made amenable to the criminal law. It follows that there was no criminal court to consider any such charges. This changed dramatically with the prosecution of the major Nazi war leaders in the Nuremberg trials. There are important legacies of Nuremberg. They form the foundation of modern international criminal law. Perhaps the most important is the recognition of a new species of crime – crimes against humanity. The idea is that some crimes are so egregious and so shocking to the minds of all decent people that they are regarded as having been committed against all of humankind. It follows that these crimes, today often called “atrocities crimes”, have an international character. Persons who are suspected of committing them can therefore be brought before the courts of any country whose laws recognize them as falling within the jurisdiction of their own domestic crimes. There is universal jurisdiction for such international crimes. Until Nuremberg such jurisdiction was recognized, out of necessity, only for piracy.

The first appearance of universal jurisdiction in an international treaty is to be found in the 1949 Geneva Conventions. The most serious violations of those conventions are designated “grave breaches”. Every nation in the world has now ratified the Geneva Conventions and all are obliged to bring before their criminal courts any person suspected of having committed a grave breach. If such nation is unable or unwilling to do so, it is obliged to deliver such person to a nation, with jurisdiction over the alleged crime or crimes that is willing and able to do so. In effect, the Geneva Conventions provide for universal jurisdiction in an attempt to deny violators a safe haven. I might add that the Geneva Conventions are the first and thus far the only international agreement to receive universal ratification. The credit for this remarkable achievement must go to the International Committee of the Red Cross.

The Geneva Conventions’ use of universal jurisdiction was followed in the 1975 Apartheid Convention and the 1984 Torture Convention. The first-named convention declared Apartheid in South Africa to be a crime against humanity. It was effectively ignored and regrettably no attempt was ever made to use its criminal sanctions against those responsible for the crimes of Apartheid. If it had been taken seriously by the Western nations, Apartheid might well have ended at least a decade earlier.

It was the Torture Convention that ushered in the effective use of universal jurisdiction that has substantially changed the situation of many persons suspected of having committed war crimes. This change is manifest in the request from a Spanish court in 1999 addressed to the authorities of the United Kingdom requesting the arrest and transfer to Spain of General Pinochet, the former military dictator of Chile. His presence was sought to face prosecution for crimes committed by his regime almost twenty years earlier. The highest court of England held that the request was a valid one. Only his ill health saved Pinochet from being sent for trial in Spain. His exposure to liability would have been impossible – and indeed unthinkable – in the absence of universal jurisdiction. It is also important to note that on his return to Chile, Pinochet's self-granted amnesty was withdrawn by the Chilean Parliament. At the time of his death, he was facing many criminal charges for human rights violations and fraud.

Provision for universal jurisdiction has been uniformly included in the United Nations treaties that have been adopted since the 1970s. They are designed to combat terrorism and to deny safe havens to suspected terrorists.

Since the Pinochet affair other domestic courts have used universal jurisdiction in order to pursue persons suspected of committing international crimes. These include suspected Bosnian war criminals, Rwandan genocidaires, Argentine torturers and the former dictator of Chad, Hassan Habre. In short, it has become a great deal more hazardous for those suspected of committing international crimes to travel abroad. Universal jurisdiction is thus a powerful tool in the implementation of international criminal law.

A second important legacy of the Nuremberg Trials was the recognition of command responsibility. Under this doctrine commanders are held criminally responsible for war crimes committed by those under their command. It is accompanied by the denial of Head of State immunity. These developments play a central role in current prosecutions against Heads of State and their political and military leaders.

It may come as a surprise that, according to a recent study, between January 1990 and May 2008, in domestic and international courts, 67 Heads of State or Heads of Government from 43 nations have been formally charged or indicted on serious criminal offences. The charges are

evenly divided between human rights violations and corruption crimes and some leaders faced both charges.

The importance of command responsibility cannot be overstated – no longer can those ultimately responsible for the decision to commit atrocities be shielded from punishment merely because they did not commit the physical act. If they were in a position to prevent the commission of war crimes and failed to do so, they are deemed guilty themselves of having committed them. So, too, if they fail to take appropriate steps to punish those under their command after the commission of war crimes. These forms of criminal liability reflect our deepest feeling of where the moral responsibility for war crimes ultimately resides.

Universal jurisdiction in domestic courts, along with command responsibility for heads of state, imposed some accountability on the perpetrators of atrocities. But the most important and dramatic development in international criminal law in the last two decades has been the establishment of international criminal courts. After what was regarded in the West as the success of the Nuremberg and Tokyo trials, it was assumed at the end of the 1940s that a permanent international criminal court would be established soon thereafter. This assumption is to be found in express provisions of the Genocide and Apartheid Conventions. However, that endeavor lay dormant during the Cold War. It was revived only in response to the egregious war crimes committed when the Serb Government of Slobodan Milošević and the Bosnian Serb Government of Radovan Karadžić attempted to ethnically cleanse parts of the former Yugoslavia of all non-Serb inhabitants.

In 1994, the Security Council established the International Criminal Tribunal for the former Yugoslavia (the 'ICTY'). It did so under powers conferred by Chapter VII of the Charter of the United Nations that authorizes it to pass peremptory resolutions that are binding on all Member States. It may only do so when it has determined that a particular situation constitutes a threat to international peace and security and that the measure is designed to remove that threat. In the case of the former Yugoslavia, the Security Council decided that an international criminal tribunal could assist in removing the threat and assist in the restoration of peace and security. It thus explicitly recognized a direct link between justice and peace. Without making that connection, the Security Council would have lacked jurisdiction to establish the war crimes tribunal.

The Security Council's intervention in the former Yugoslavia was due to a perfect storm of circumstances that awoke the international community from its Cold War slumber. It is highly unlikely that that action by the Security Council would have been taken if the violations were not being perpetrated in Europe and were horrifying to so many people in the Western democracies. Some of those Governments felt compelled by public opinion to take action to stop the carnage. They were not prepared to commit to military action and settled for the establishment of the ICTY.

The leaders of Serbia rejected the legality of and justification for the ICTY. They regarded it as representing an act of discrimination against their people. This complaint by the Serb leadership came to my attention soon after my appointment as the first Chief Prosecutor of the ICTY. I decided that it was appropriate to pay a courtesy visit to the three major capitals of the former Yugoslavia: Belgrade, Zagreb and Sarajevo. My first meeting was with the Serb Minister of Justice. He expressed his Government's strongest objection to the Tribunal and criticized what he called the biased role of the United States in having the Security Council establish it. He pointed out that the United Nations had not considered setting up a criminal tribunal in the face of the awful crimes committed in Asia, the Middle East and elsewhere in Europe. He referred in that regard to atrocities committed by the regimes of Pol Pot and Saddam Hussein. "Why was the first such tribunal established to put Serbs on trial?". This was, he asserted, an unacceptable act of discrimination and partiality.

Of course, he had a point. The only response I could make (with more confidence than I felt) was that if the ICTY was the first and last such criminal tribunal then that would indeed be unacceptable. It would be treating the former Yugoslavia as an exceptional case. But, if others were to follow, then Serbia had no good reason to complain because it happened to be the first. Little did I know that scarcely more than a year later the Security Council would establish a second *ad hoc* tribunal, the International Criminal Tribunal for Rwanda; and that mixed domestic/international criminal tribunals would follow for East Timor, Sierra Leone, and Lebanon. Most important of all, the ICC followed not many years later. In retrospect, then, my answer to the Serb Minister of Justice was vindicated. The ICTY was not selective punishment, but rather the very beginning of a new era in the history of international criminal law. That new era is that of the ICC.

Allow me now address the establishment of the ICC. The ICC builds on the foundation of the international criminal tribunals that were established in the 1990s. However, it also represents a fundamental improvement on the model of international criminal justice those tribunals reflected. The tribunals of the 1990s owed their very existence to political decisions by the United Nations. In other words, those tribunals were established not solely with regard to the seriousness of the crimes committed, but also for political reasons. Other humanitarian crises that escaped scrutiny under the system of *ad hoc* tribunals were overlooked not necessarily because the atrocities were less heinous, but because of the crass political realities of international relations. In essence, that was the complaint I heard from the Serb Government. The ICC operates on a fundamentally different basis – prosecution is not contingent on an extraordinary moment of political will by the Security Council.

A number of nations decided in the second half of the 1990s that a permanent international criminal court was necessary to replace the system of *ad hoc* tribunals. The result was a Diplomatic Conference called by the Secretary-General of the United Nations, Kofi Annan. It was held in Rome in June/July 1998. To the surprise of all, plenipotentiaries from some 148 nations were present and on 17 July 1998, 120 of them voted in favor of the Rome Treaty. There were only seven against (including the United States of America). An unusually high threshold of 60 nations was set on ratifying the Treaty before it would come into operation. Again to the surprise of all, that took less than four years. The Treaty came into operation on 1 July 2002. Today, 115 nations have ratified the Treaty with a number in the pipeline including Egypt, the Philippines and Tunisia. The Treaty has been signed but not yet ratified by Thailand.

It is interesting to have a look at the ratifications by UN region: Africa – 31; North Africa/Middle East – 1 (Jordan); Americas – 27; Asia/Pacific Islands – 14; Europe/CIS – 42. There was active participation of many Asian and Pacific Governments at the Rome Conference, meetings of the Preparatory Commission and Assembly of States Parties. There is also current representation at the International Criminal Court ('ICC') by Judge Sang-Hyun Song of the Republic of Korea and Judge Fumiko Saiga of Japan. Nonetheless, the Asian region remains significantly underrepresented at the ICC. To date, only 14 States, including Australia, Afghanistan, Bangladesh, Cambodia, Cook Islands, Fiji, Japan, Marshall Islands, Mongolia, Nauru, New Zealand, the Republic of Korea, Samoa and Timor L'Este have become States Parties to the ICC.

The legitimacy of the ICC depends in part on the limits of its scope. I would like to emphasize that only the most serious international crimes fall within the jurisdiction of the ICC. The crimes are genocide, crimes against humanity, war crimes and aggression. Only crimes committed after 1 July 2002 fall within the jurisdiction of the Court. In the case of nations ratifying the Rome Treaty after the date the Court became operative, the Treaty becomes effective with regard to them only prospectively, that is, from the date of such ratification.

An important recent change in the jurisdiction of the ICC is the addition of a crime of aggression. At the first ICC Review Conference held in the middle of 2010 in Kampala, Uganda, the parties agreed by consensus on a definition of the crime. An “act of aggression” is committed by military action by a State against the territory of another State or an attack by the armed forces of a State on the land, sea or air forces of another State. The **crime** of aggression is defined to include the planning, preparation or execution by someone who holds control over the political or military action of a State of an act of aggression. By its character, gravity and scale it must constitute a manifest violation of the Charter of the United Nations. In short, the crime of aggression can only be committed by someone in a leadership position and only if there is a manifest violation of the prohibition on the use of force contained in the Charter of the United Nations. Under Article 52 of the United Nations Charter, legitimate self-defense would not constitute aggression. This crime of aggression will not fall within the jurisdiction of the ICC until 2017 and then only after at least 30 States ratify these provisions. And, even then, individual States will be entitled to opt out of the provisions.

In respect of personal jurisdiction, the ICC may exercise its jurisdiction against nationals of States that have ratified the Rome Treaty or nationals of any State for crimes alleged to have been committed in a country that has ratified the Treaty. In addition, the Security Council of the United Nations may refer a situation to the ICC under its peremptory Charter provisions and that may include the nationals of any member of the United Nations. It is in that way that the ICC has jurisdiction over nationals of Sudan and Libya even though neither country has ratified the Rome Treaty.

The other limit on the jurisdiction of the ICC comes about by reason of what is called complementarity. In effect, this makes the ICC a court of last and not first resort. It is designed to ensure that whenever possible suspected war criminals are investigated and tried by the courts

of the suspect's own nation. This has a number of advantages. One is that in order to exercise the rights of complementarity, nations are encouraged to promulgate laws that make international crimes part of their own domestic criminal law. In the absence of such legislation it would not be able to launch such an investigation or prosecution. Another is that alleged criminals would be tried under the laws of their own nation. It follows that nationals of countries willing and able to conduct good faith investigations and prosecutions of their own nationals preclude the ICC from exercising its jurisdiction over them.

But if domestic courts are unable or unwilling to investigate a case, the ICC may step into the breach. Cases may come before the ICC in the following ways: by a situation being referred to the Court by the Government of a State Party; by a reference from the Security Council acting under its peremptory powers under the Charter of the United Nations; or by the prosecutor acting under his own powers. The prosecutor may only initiate an investigation using his own powers in cases in which the ICC has jurisdiction and then only with the approval of a pre-trial chamber of the Court. That the Security Council retains authority to initiate cases ensures a measure of political accountability – a global consensus that grave crimes have been committed will not be frustrated. That the prosecutor can initiate an investigation independently ensures that such extraordinary consensus, which may be lacking for any number of political reasons, may not be necessary for justice to be pursued.

It must be recognized that the Security Council is very much a political body and it will act under its peremptory Chapter VII powers only in cases where a permanent member does not exercise a veto. It follows that there will be no reference of a situation to the ICC from the Security Council where it is considered by a permanent member to be inconsistent with its interests. It was primarily for this reason that the majority of nations represented at the Rome Diplomatic Conference were not prepared to agree that cases should only be referred to the ICC by the Security Council. There was obviously no objection by any nation to a reference by the Security Council being one of the mechanisms for cases to be referred to the ICC.

Even in cases where the Security Council has referred a situation to the ICC, its political will to ensure that its reference is effective has been disappointing. I refer to the situation in Sudan. That was referred to the ICC on 31 March 2005. Eleven members voted in favor of the resolution. There were four abstentions including the United States. The first two

arrest warrants in consequence of this reference were issued in May 2007. Then, in March 2009, a further warrant was issued for the arrest of the President of Sudan, Omar al-Bashir. To this date none of those arrest warrants have been executed. Sudan, even though bound by the Security Council reference to the ICC, is in contemptuous disregard of its international obligations. Mainly because of threats of a veto by China and possibly by Russia, the Security Council has been unable to take appropriate action to ensure that Sudan cooperates with the ICC. The regular reports from the ICC to the Security Council with regard to this situation have not resulted in any meaningful response.

Notwithstanding the failure to bring President al-Bashir before the ICC, the effect of the arrest warrant has certainly had serious consequences for Al-Bashir. There are now 115 nations that are obliged to arrest him should he visit their shores. It was for this reason, for example, that President Al-Bashir was not invited to attend the 2010 inauguration of President Zuma in South Africa. The South African Government explained to the Sudanese Ambassador to Pretoria that if their Head of State were to visit South Africa, the South African authorities would have no option but to arrest him and transfer him to The Hague. Unfortunately, in recent weeks President Al-Bashir has been allowed to visit three African members of the ICC, Chad, Kenya and Djibouti. Those countries have failed to honour the international obligations they solemnly assumed by ratifying the Rome Treaty. I do hope that the other members of the Treaty will make their voices loudly heard in opposition to this trend.

The prosecutor of the ICC, naturally, is an advocate. He cannot be perceived as disinterested or impartial. The most important individuals for the success of the ICC as an impartial and fair institution are its judges. The 18 judges of the ICC are elected by a two-thirds majority of all the States Parties (known as the Assembly of States Parties). The threshold is thus a high one. Nominees for election must possess competence in criminal law and procedure or in relevant areas of international law. They are required to be persons of high moral character, impartiality and integrity who are eligible for appointment to the highest judicial office in their own country. The Assembly of States Parties, in electing the judges is obliged to have regard to the representation of the principal legal systems of the world, equitable geographical representation, and a fair representation of female and male judges.

Because of the importance of the role of the judges, the Coalition for the ICC, representing over 2,500 civil society organizations in 150

countries, with the approval of the leadership of the Assembly of States Parties, has set up an Independent Panel on ICC Judicial Elections. It is my privilege to chair this Panel. It consists of five persons, one from each of the United Nations regions. Judge O-Gon Kwon of South Korea represents the Asian and Pacific region. It will be our duty to consider the documents submitted by the nominating Governments and to make a public determination as to whether the nominee is qualified for election as a judge of the ICC. The criteria for qualification are those contained in the Rome Treaty. The ultimate role of the Independent Panel will be to ensure the perception and reality of ICC judges as impartial and fair jurists. Those are crucial prerequisites to the credibility of the institution.

The ICC thus represents a major step forward in the fair, equal, and universal pursuit of justice. Nonetheless, in the wake of the first situations to come before the ICC, other complaints alleging the partiality of international criminal justice have come to the fore. But these complaints lack foundation. Some African nations and the African Union have claimed that the ICC is being used only against African nations. That complaint ignores the fact that only one of the six situations presently before the ICC, relating to African countries, has resulted from an initiative of the Court. Three of them, those relating to Uganda, the Democratic Republic of the Congo and the Central African Republic were referred by their own Governments. Two situations, one in respect of Sudan and one in respect of Libya were referred to the ICC by the Security Council. Only the situation in Kenya arising out of the violent election of 2007 comes before the Court in consequence of the first use by the Prosecutor of his own powers. I might also mention that the Prosecutor is presently examining another ten situations on four continents. These include Afghanistan, Chad, Colombia, Georgia, Guinea, Honduras, Ivory Coast, South Korea, Nigeria and Palestine. Thus, the ICC's dual system, permitting initiation either by the Security Council or by the Prosecutor under his own power, is coming into its own. There is every indication that investigations and prosecutions at the ICC will reflect the merits of the cases against the alleged perpetrators.

These complaints from the Government of Serbia, the African Union and some of its members thus lack any justification. But they teach an important lesson on the important elements of a just system of international criminal law. In order for any system of justice, whether domestic or international, to earn credibility and to gain acceptance, there has to be the both the fact and the perception that the system is fair and equal in its

application and that it is not driven by political rather than moral concerns. The principal advantage of the ICC over its *ad hoc* predecessors is that, in virtue of its permanence and its political independence, it is able to achieve this fairness and equality more fully. And this provides it with a firmer moral foundation than any system of international criminal justice that came before.

Perhaps there is an irony in that at the same time it was the success of those earlier criminal tribunals that created the momentum for the ICC. Those successes included:

- (a) The demonstration that international criminal courts could hold fair trials;
- (b) The substantial and rapid development of the laws of armed conflict and especially in respect of gender-related crimes;
- (c) The demonstration that in many cases indictments aided the peace rather than the converse.
- (d) The growing evidence of deterrence in some situations.

The last two areas of success warrant consideration.

Many feared that the threat of individual criminal liability would drag out conflicts as leaders refused to surrender in the face of prosecution in the international courts. These fears, it turns out, were unfounded. The role of the ICTY in the end of the war in Yugoslavia is a poignant example of the impact that international law can have in promoting the peaceful resolution of armed conflicts.

It was the agreement reached by the warring parties at Dayton in November 1995 that brought the war in the former Yugoslavia to an end. That meeting could not have taken place if Radovan Karadžić, the Bosnian Serb leader and Commander-in-Chief of the Bosnian Serb Army, had been able to attend it. This was only four months after the Bosnian Serb Army had massacred some 8,000 civilian men and boys at Srebrenica. That was held by both the ICTY and the International Court of Justice to constitute an act of genocide. It would not have been morally or politically possible at that time for the leaders of Bosnia and Herzegovina to attend a meeting with Karadžić. In September 1995, I issued a second indictment against Karadžić and his army chief, Ratko Mladić, based upon events in Srebrenica. That effectively prevented Karadžić from attending the Dayton meeting – he would have been arrested by the United States and transferred to The Hague for trial. He had no option but to accept being represented at Dayton by the President of Serbia, Slobodan Mi-

lošević. In effect the indictment facilitated the Dayton meeting and the end of the war in the former Yugoslavia followed from it. This is a clear illustration of justice assisting peace.

I accept that an arrest warrant might have the opposite consequence and make peace negotiations more difficult. But as far as I am aware, that has not happened thus far.

What of deterrence? Ultimately the highest purpose of international criminal law is to ensure that these crimes never happen again. Let us consider the deterrence of attacks on civilians. We have already seen that in a situation of armed conflict, causing civilian casualties in consequence of a proportionate attack on a military target does not constitute a war crime. The questions that arise are thus: were the civilian deaths justified by the importance of the military target and were reasonably sufficient steps taken to ensure that civilian lives were protected?

During the twentieth century, deliberate attacks against civilians grew exponentially. According to Mary Kaldor, of the London School of Economics, at the beginning of the century, the ratio of civilian to military casualties was about 85–90%. That means that for every civilian casualty there were about 9 military casualties. In World War II the ratio was about 1:1. (This is hardly surprising if one thinks about the intentional bombing of cities, large and small). During the past 30 years or so the ratio has risen to about 1:9, that is, for every military casualty there are nine civilian casualties. The ratio at the beginning of the twentieth century was completely reversed by the end of that most bloody century. It is in this context that deterrence becomes so important. Of course, deterrence is always difficult to establish. In effect, it requires an examination of what might have happened in the event that there was no international criminal court with relevant jurisdiction. Bearing that in mind, I would like to discuss two situations in which the development of international criminal justice appears to have deterred attacks on innocent civilians.

The first situation involves not a rogue country attacking its own citizens, but instead – perhaps surprisingly – an attack in 1999 by NATO forces against Serbia. The bombing of Serbia arose from the serious human rights violations that were being committed by the army of the then Serbian President, Slobodan Milošević. They were intent on the ethnic cleansing of Kosovo by the expulsion of its majority Albanian population. The NATO powers had repeatedly warned Milošević that if his forces did not desist, military action would be taken to force them to do so. He re-

fused to back down and NATO launched the most intensive bombing campaign since World War II. Over a period of 78 days, NATO aircraft carried out over 38,000 combat missions. The bombs were dropped from a height of over 15,000 feet and so avoiding any NATO casualties. No ground troops were used. The number of Serb civilians killed was approximately 500 and about 6,000 were injured – a remarkably low number having regard to the statistics to which I have just referred. So, while the ratio of casualties was some 6,500:0, it became obvious that the NATO commanders took reasonably effective steps to protect civilians.

As chairman of the Independent International Commission on Kosovo, I was able to discuss this situation with senior military commanders in both the United States and German armies. They confirmed that the reasons for the low number of civilian casualties were firstly, the availability and use of precision ordnance. And secondly, they were well aware and concerned that International Criminal Tribunal for the former Yugoslavia (the ICTY) had jurisdiction in respect of war crimes committed anywhere in the former Yugoslavia.

Notwithstanding the comparatively low civilian casualty rate, the Russian Federation and other States requested the Prosecutor of the ICTY to investigate the alleged commission of war crimes by NATO forces – the bombing of the Chinese Embassy and the Serbian Radio and Television building, and the attacks on a convoy of Albanian refugees, on the village of Korisa, and a passenger train as it was crossing a railway bridge.

In respect of the train incident, a United States Defense Department official expressed regret for the loss of life and a similar apology was forthcoming from the NATO Supreme Commander, General Wesley Clark. There was a fulsome apology from President Clinton to the Chinese Government for the bombing of its embassy. That was followed by payment of compensation in an amount of USD 28 million to the Government and USD 4.5 million to the families of the three Chinese citizens who were killed and fifteen Chinese citizens injured in the attack.

NATO cooperated with the Office of the Prosecutor and furnished a detailed response to each of the incidents. A committee of experts within the Office of the Prosecutor prepared a report in which they advised that there was insufficient evidence to justify an investigation into any individual NATO official. The Chief Prosecutor acted on that advice.

The information furnished by NATO went a long way to establish that precautions were taken to avoid civilian casualties and that those that resulted were not the result of a deliberate policy. The Independent International Commission on Kosovo stated that it was:

... impressed by the relatively small scale of civilian damage considering the magnitude of the war and its duration. It is further of the view that NATO succeeded better than any air war in history in selective targeting that adhered to the principles of discrimination, proportionality, and necessity, with only relatively minor breaches that were themselves reasonable interpretations of 'military necessity' in the context.

I would emphasize that the cooperation of NATO in the ICTY investigation was crucial to the decision of the Prosecutor. Without it, there can be little doubt that the commission of war crimes by NATO would have been investigated.

I would also mention that the indictment issued by the ICTY against President Milošević during the very time that NATO was bombing his country in no way inhibited him from eventually agreeing to the terms laid down by NATO for a cessation of its military campaign. During the Kosovo Commission, I was informed by the United Nations intermediary, former Prime Minister of Russia, Victor Chernomyrdin and the NATO intermediary, then Prime Minister of Finland, Martti Ahtisaari, that in their dealings with Milošević, the question of the ICTY arrest warrant was not discussed. It was just not on the agenda of Milošević. The indictment might not have had assisted the peace but it certainly did not hinder it.

The second situation illustrating the potential of international criminal law to act as a deterrent is more recent. I refer to the United States action that ended with the killing of the leader of al-Qaeda, Osama bin Laden. The choice facing the Obama Administration was whether to bomb the compound in which the United States had determined Bin Laden was living or to send in a team of so-called Navy Seals to take him "dead or alive". According to President Obama, the choice of the former would have put a substantial number of civilians at risk of death and injury and the choice of the latter involved placing United States troops in mortal danger. The latter means was chosen in order to protect civilians in or near the Bin Laden compound. Of course, one cannot speak with any certainty, but in my view it is highly likely that prior to the recent devel-

opment and publicity relating to international criminal law the protection of civilians would not have been prioritized by the United States' policy makers.

I recognize that there is no shortage of illustrations of international criminal law failing to deter the commission of serious war crimes. Perhaps the most vivid illustration is the 1995 Srebrenica massacre to which I have already referred. That massacre was carried out under the direct command of Ratko Mladić who was acting on the orders of his civilian Supreme Commander, Radovan Karadžić. The ICTY was then up and running, and both Karadžić and Mladić had been indicted for crimes against humanity committed in the earlier period of the war in the former Yugoslavia. Of course, notwithstanding their indictment, Karadžić and Mladić did not actually believe that one day they might face justice in the international war crimes tribunal. The deterrent effect was absent. For those of us in the Office of the Prosecutor of the ICTY this was a most disappointing realization. I feel some satisfaction in the knowledge that, after thirteen years in hiding, Karadžić is presently standing trial in The Hague for charges that include the Srebrenica massacre.

One has to recognize that the deterrent effect of a criminal justice system will always be unpredictable. It is no different in a domestic situation. In your country or my own the crime rate will depend directly on the efficiency of the criminal justice system. The more effective it is the lower will be the crime rate. The converse is also true – in countries with inefficient or ineffective criminal justice the higher the crime rate will become. No matter how efficient the system, some criminals will still anticipate escaping justice and crimes will continue to be perpetrated. And some unbalanced people, sadly, will never be deterred. It is no different, I would suggest, in the international community. If political and military leaders anticipate being brought before a court and facing possible conviction and punishment, this may deter some of them from committing war crimes. It will not deter them all. But, just as the imperfect deterrence of even the most efficient domestic criminal justice systems does not undermine their purpose or legitimacy, the fact that some war criminals will never be deterred should not blind us to the important reality that some war criminals will be deterred. And the many thousands of innocent civilians who are spared as a result must not be forgotten.

The progress of international criminal law has also furthered the application of the recently developed doctrine called the "Responsibility to Protect". This doctrine was born out of egregious examples of nations

failing to intervene in the face of the most serious violations of the human rights of innocent civilians by their own Governments. I would refer to the global community standing by when, in the middle of 1994, over 800,000 innocent children, women and men were slaughtered in the Rwandan genocide. It would have taken but a small military force to have effectively prevented much of the killing. There are other examples. One thinks, of course, of the killing fields in Cambodia.

After receiving the report from a high level panel of experts established by him in the aftermath of the Rwandan genocide, Kofi Annan, then Secretary-General of the United Nations, called upon Governments to embrace the responsibility to protect their own citizens. He made it clear that the primary responsibility rested on the Governments concerned. But if they are unwilling or unable to do so, the responsibility shifted to the international community. He emphasized that in such an event, the international community must use a range of measures designed to protect endangered populations, including diplomatic and humanitarian efforts and, only as a last resort, the use of military force.

Of course politics will play a determinative role in whether or when this doctrine of Responsibility to Protect will be implemented. There was a signal failure in the case of Burma when Russia and China vetoed a Security Council resolution that would have enabled the Council to become seized of the situation there. Those two nations argued that Burma did not pose a threat to international peace and security in the region and that the internal affairs of Burma did not have a place on the Security Council agenda.

The first time that the United Nations Security Council took active steps under this doctrine of Responsibility to Protect was in respect of the situation in Libya. On 26 February 2011, the Security Council unanimously adopted a resolution referring the Libyan situation to the Prosecutor of the ICC. In accordance with the Rome Statute, the Prosecutor has the responsibility for determining whether to proceed with such an investigation. After a preliminary investigation, the prosecutor determined that there was sufficient evidence to believe that crimes against humanity had been and still were being committed by the regime of Muammar Gaddafi. As he reported to the Security Council at the beginning of May 2011, there was also relevant evidence of the commission of rape, deportation and forcible transfer that constituted war crimes under the Rome Statute. The investigation that followed was directed at those who appeared to bear the highest responsibility for the commission of those war crimes.

Over 10,000 people were reported killed and many more tens of thousands injured. The prosecutor also reported that he intended to seek arrest warrants against three members of the Colonel Gaddafi's Government and that he had evidence to establish that Gaddafi's forces had "systematically" attacked civilians in recent months. He reported to the Security Council that the three appeared to bear the greatest criminal responsibility for crimes against humanity and they included those who gave the orders for the alleged atrocities. Whether or not arrest warrants will be issued depends upon the determination of the judges of the Pre-Trial Chamber of the ICC.

The Security Council further authorized enforcement action under its peremptory powers conferred by Chapter VII of the United Nation's Charter. It did so after determining that the situation in Libya constituted a threat to international peace and security. The resolution went on to authorize "all necessary measures" (that is, military action) to protect civilians and civilian populated areas under threat of attack and to enforce compliance with a no-fly zone. As the situation in Libya and across the Middle East develops in the coming months, we will witness the next steps in the evolution of international criminal law.

I trust that I have demonstrated this morning the rapid and impressive development of international criminal law and justice during the past 18 years since the establishment of the ICTY. The future of international justice depends upon the ICC and the system under which it operates achieving wide credibility. That is not likely to happen without the full support of the powerful nations of the world – including the United States. Asia (and Thailand in particular) can play an important role in the ICC's future. Asia has begun to reclaim its rightful place as a dynamic force on the world stage. Alongside its economic rise comes the opportunity to be a force for good as well as for prosperity. Thailand and its Asian partners can provide leadership by ratifying the Rome Statute, and showing full support for the ICC in its mission.

I stand before you today not only to praise the ICC for what it has accomplished, but also to issue a call to action for what remains to be done. The nations of Asia must ratify the Rome Statute and become full members in the international pursuit of justice against war criminals. These nations should support the ICC in recognition of their ascendancy on the world stage and their increased role in the international order. They should support the ICC because joining the ever-growing international consensus will put much-needed pressure on the most powerful nations to

ratify as well. But, fundamentally, the nations of Asia should support the ICC with full force and without reservation simply because it is the right and moral thing to do. There is great diversity across the many peoples of the world, from East to West, in their conceptions of the right and the good, and of justice and the rule of law. The ICC represents a core set of commitments about which there can be no dispute. It is a universal moral vision around which the people of the world can join together in one voice, unified at long last, to proclaim that we are all brothers and sisters on this Earth. And for the first time in history we will not permit our brothers and sisters to be victims of such crimes any longer, wherever they may occur.

The question facing the international community is whether we will have a better world in which all war crimes are credibly and efficiently investigated and those guilty of war crimes are prosecuted and appropriately punished – in other words withdrawing impunity for war criminals. I cannot believe that we would have a better and more peaceful world if we revert to the pre-World War II situation in which war criminals were effectively beyond the reach of justice. If we care about the victims of war crimes and their rightful claims for justice, the solution is an obvious one.

International criminal law will not be fully effective unless and until all the nations of the world are prepared to respect and implement it. If there was universal ratification of the Rome Treaty it would become wholly unnecessary for any domestic court to exercise universal jurisdiction. All alleged war crimes would be amenable to the jurisdiction of the ICC. This gets to the very heart of the ICC's promise, and what it might mean for the rule of law throughout the world. The Nuremberg Trials and the *ad hoc* tribunals of the 1990s were monumental achievements of justice, but they were only a beginning. Their limitations are present in their names: they were *ad hoc* and extraordinary. True justice must be ordinary and regular, unremarkable and without exception. The International Criminal Court, with the support of Thailand, Asia, and the entire brotherhood of nations, might achieve exactly that.

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South-East Asia and International Criminal Law

The 5th Princess Maha Chakri Sirindhorn Lecture on International Humanitarian Law

By Professor Richard J. Goldstone

This Occasional Paper contains an edited version of a lecture presented by Professor Richard J. Goldstone in Bangkok on 13 June 2011 as “The 5th Princess Maha Chakri Sirindhorn Lecture on International Humanitarian Law”. Addressing the topic of *South East Asia and International Criminal Law*, Professor Goldstone first provides a brief overview of the historical development of the main principles underpinning the laws of armed conflict. He notes that the basic rule of reciprocity as a legal restraint in warfare has an ancient – and in no way a purely Western – heritage.

Professor Goldstone further reflects on the role of Nuremberg, the international *ad hoc* tribunals and the International Criminal Court in establishing individual criminal responsibility for atrocities, and the ongoing effort to strengthen accountability for such crimes. He argues that alongside Asia’s economic rise comes the opportunity to be a force for good as well as for prosperity. The Asian countries can – and should, suggests Professor Goldstone – play a significant role in the strengthening of the respect for and implementation of international criminal law.

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