

**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
FREDERICK K. COX INTERNATIONAL LAW CENTER**

*"International Criminal Law – How Long Will Some Miss the Missing Link?"*

**Lecture**

**by**

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**Case Western Reserve University, Cleveland  
22 February 2005**

Ladies and gentlemen,

First, I would like to thank the Case Western Reserve University and the Frederick K. Cox International Law Center for presenting me with the first annual Cox International Humanitarian Award from Case School of Law.

The Cox International Law Center with its focus on international justice and global legal reform has become widely known, and I am confident that its reputation will spread even more. A visit to its War Crimes Research Portal gives an instant insight into the very ambitious program in which the Center is engaged.

On this occasion, I thank in particular the Director of the Law Center, Professor Michael Scharf. I have had the pleasure of following his activities for a number of years. Among other things, he is the co-author of a remarkable book on the establishment of the International Tribunal for the former Yugoslavia. Thanks also to his predecessor, Associate Dean Hiram Chodosh, who at present represents the Law School. I know that the Dean, Professor Gerald Korngold, is out of the country. Please convey my deepest gratitude to him!

I feel greatly honoured to have been presented with this distinguished award by the Law School and the Centre, and I accept it with a pledge to continue working for a cause to which I have devoted my professional career and in particular my 10 years as the Legal Counsel of the United Nations: the rule of law at the national level and in international relations.

Thank you also for inviting me to deliver the Cox Lecture in Global Legal Reform. The title of my lecture is: *International Criminal Law – How Long Will Some Miss the Missing Link?*

Perhaps you find the title somewhat enigmatic. If you are a practitioner, you may even wonder how this is related to your practice, your professional responsibility or ethical obligations. My hope is that you will realize that the topic has everything to do with precisely this.

But let us go back a little and look at criminal law in general. Law, and in particular criminal law, has existed in all societies in accordance with the maxim *ubi civitas – ibi jus*; where there is a society there is also a legal order.

The content of this law has always reflected the existing values and the current development. At least in my country, we do not have to go back a long way in time to find criminal law provisions that would be wholly unacceptable in today's society.

With the birth of the sovereign nation State, in principle, the field of application of criminal law became the territory of the State. One of the hallmarks of the sovereign State is the right to exercise jurisdiction within its territory and over its citizens.

In 1625, Hugo Grotius, often referred to as the father of international law, published his famous work *De jure belli ac pacis*, which is still relevant in its attempt to make warfare more humane. This work, in which he made a clear distinction between the right to go to war (*jus ad bellum*) and the law that applied in war (*jus in bello*), is still



one of the most important sources of international law and international humanitarian law.

In the 19<sup>th</sup> century and in the beginning of the 20<sup>th</sup> century, conventions were agreed upon. New concepts were developed: war crimes and crimes against humanity. After the Second World War, tribunals were established in Nuremberg and Tokyo to prosecute the most notorious perpetrators for crimes against peace, war crimes, and crimes against humanity.

In 1945, the United Nations was established. Among its first achievements were the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide, both adopted in 1948.

By concluding treaties, in particular in the field of international humanitarian law, States have undertaken to respect certain standards and to criminalize acts that violate these standards. In some States, a ratification of such a treaty means that the treaty becomes “the supreme Law of the Land”, to quote article VI, paragraph 2 of the US Constitution. In other States an additional step is necessary. The treaty has to be incorporated or transformed into national law in order to become effective at the national level.

In the context of criminalizing genocide, crimes against humanity and war crimes, the question of creating an international criminal court was also discussed. What good is a penal law, if there is no court to exercise jurisdiction? And with respect to crimes of the kind we are looking at here one often finds that national courts are either unwilling or unable to address them.

The problem with the establishment of courts like the Nuremberg and Tokyo Tribunals is that they are seen as “victor’s justice”. Even if the trials after the Second World War have been deemed acceptable from a procedural point of view, it is a fact that only persons from one side were held accountable.

After the establishment of the United Nations, the idea of creating an international criminal court took hold. Already in the 1948 Convention against Genocide an international court is mentioned as an option for bringing perpetrators to justice. But not much happened because of the Cold War.

During the 1990s, an interesting development occurred. The events in the Balkans and Rwanda prompted the Security Council to establish an International Tribunal for the former Yugoslavia in 1993 and an International Tribunal for Rwanda the year after. I was myself deeply involved in this process.

Later, I also had the privilege of negotiating an agreement between the United Nations and Sierra Leone, signed on 16 January 2002, establishing a special court to bring to justice those most responsible for the atrocities committed in that country since 30 November 1996. Another agreement was signed on 6 June 2003 between the United Nations and Cambodia for the purpose of bringing to justice the leaders of the Khmer Rouge for crimes committed in the 1970s.

These steps by the United Nations should be seen as an indication that the international community no longer accepts impunity for genocide, crimes against humanity and war crimes.

The obvious and logical conclusion from all this is that there has to be a permanent international criminal court that is always prepared to deal with such crimes when the need arises. The creation of such a court was eagerly awaited by many.

For the purpose of this lecture it is not necessary to go into the details of the negotiation process leading up to the adoption in 1998 of the Rome Statute of International Criminal Court (ICC). Suffice it to say that the General Assembly of the United Nations revived the issue in 1990. In 1993, the Assembly requested the International Law Commission to elaborate a draft statute for such a court. Once the draft had been delivered the following year, the Sixth Committee of the General Assembly and its subsidiary bodies took over.

In 1997, the General Assembly decided to convene an international conference in Rome in 1998. After five weeks of intense negotiations, the Rome Statute of the International Criminal Court was adopted on 17 July 1998.

At a Press conference on 11 April 2002 following the sixty-sixth ratification of the Statute, bringing it into force on 1 July 2002, Secretary-General Kofi Annan said:

“A missing link in the international justice system is now in place. For a long time we have had the International Court of Justice, which deals with disputes between States. But until now we had no permanent international court where individuals could be put on trial. The establishment of the new Court will fill that gap.”

The judges of the ICC were sworn in on 11 March 2003. The Prosecutor has decided so far to open investigations into two situations, both in Africa: in the Democratic Republic of Congo and in the Republic of Uganda.

Let us stop for a moment and consider what was achieved in Rome. The ICC has jurisdiction over genocide, war crimes and crimes against humanity. These concepts were well known from the past, but they were developed and codified in the Rome Statute. This is not the place to analyze these crimes in detail. I refer to the text of the Statute and, why not, to the War Crimes Research Portal of the Cox Centre.

What I would like to say on this occasion is that in the international community, and in particular among allies of the United States, the ICC Statute is considered a major achievement. The Statute was adopted with an overwhelming majority: 120 votes in favour, 7 against (among them China, Israel and the United States of America), and 21 abstentions.

At present, the Rome Statute has been ratified or acceded to by 97 States, among them virtually all Western allies of the United States. The decision by the US administration not to join the Rome Statute is therefore all the more regrettable.



But unfortunately, the story does not end here. Not only does the US stay away from the ICC. It even tries to influence, if not intimidate, other States into not ratifying the Rome Statute or to limit the effectiveness of the Court.

There is one attempt that is particularly worrisome, namely the efforts to have the Security Council forbid the ICC to address cases against peacekeepers from States that are not party to the Rome Statute. This is what happened.

On 12 July 2002, the Security Council adopted resolution 1422 (2002). Acting under Chapter VII of the UN Charter, the Council requested that the ICC, unless the Council decided otherwise, should not commence or proceed with an investigation or prosecution of current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to an operation established or authorized by the United Nations. This regime should apply for a twelve-month period starting 1 July 2002.

To achieve this result, the US threatened to veto any extension of the mandate of the United Nations Mission in Bosnia and Herzegovina (UNMIBH).

A similar resolution, extending the period for another year, was adopted on 12 June 2003, see resolution 1487 (2003). To the relief of many, an attempt by the US in 2004 to renew the resolution failed.

The problem with this endeavour is not only that the US administration coerced the other members of the Council. The most embarrassing element is that the resolution is meaningless from a legal point of view. The ICC will have to interpret the Rome Statute independently. In so doing, the ICC will most certainly come to the conclusion that if a peacekeeper is prosecuted before the ICC – and by the way this is a highly unlikely event – the Security Council will have to make a decision that specifically addresses that particular case if the Council wants to stay the prosecution.

This attempt is just an illustration of how the US frustrates the efforts by others to address through the ICC the impunity that has caused – and continues to cause – so much pain and suffering in the world.

An interesting feature in the Rome Statute is article 13 (b), which authorizes the Security Council, acting under Chapter VII of the UN Charter, to refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the ICC appears to have been committed.

This provision makes it possible for the Security Council to use the ICC in situations, in which the State where the genocide, crimes against humanity or war crimes are committed is not a party to the Rome Statute. In other words: instead of establishing new tribunals like the ones for the former Yugoslavia and Rwanda, the Council can refer the situation to the ICC, which is already there, prepared to address the situation immediately.

Many of us wondered how the US would react if such a situation presented itself. Now it has. On 31 January 2005, the Secretary-General transmitted to the President

of the Security Council the report of the International Commission of Inquiry on Darfur.

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law.

The Commission concluded however that the Government of Sudan had not pursued a policy of genocide, although in some instances individuals, including Government officials, may have committed acts with genocidal intent. However, the Commission stated that only a competent court can decide, on a case-by-case basis, whether this was the case in Darfur. The Commission also stated that crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.

Ultimately, the Commission strongly recommended that the Security Council should immediately refer the situation of Darfur to the ICC, pursuant to article 13(b) of the ICC Statute.

In this context it is interesting to note that the US had engaged in this matter, admirably and with great determination, maintaining that the crimes committed in Darfur should be labelled genocide. Also others have come to the conclusion that genocide has been committed, and that therefore there is an obligation on other States to bring those responsible to justice.

This issue is now before the Security Council. Its members have stressed their determination to tackle impunity and to ensure that the perpetrators are brought to justice. Several States, in particular European States, think that the situation should be referred to the ICC, as recommended by the Commission. However, the US seems to favour a tribunal established by the United Nations and the African Union.

Sadly, no solution seems in sight yet. It is a paradox that the resentment of the US administration towards the ICC will seriously affect the possibility of swiftly bringing the perpetrators of the crimes in Darfur to justice.

Another matter that has to be addressed in the near future is the responsibility of members of the previous Iraqi regime. It is imperative that this trial be conducted by an independent and impartial court. An Iraqi court is foreseen for this purpose. Many believe that the trial should take place before an international court under international law.

In my view, this would be the proper way to proceed. However, it is the prerogative of the State concerned to exercise jurisdiction over its nationals in a situation like the one in Iraq. The question is then what can be done, if there is doubt that a court consisting only of Iraqi judges would be able to perform this task. One solution is to invite foreign judges to serve on the Court. If this is a sensitive matter for the Arab community, it should be noted that in the Commonwealth, judges often serve in other countries than their own. This was evident when candidates for the Special Court for



Sierra Leone were interviewed. Maybe judges from the community of Arab States could join the Iraqi judges on the bench.

In December last year, I had a rewarding experience. Together with a few colleagues I interacted with some 40 Iraqi judges and prosecutors in a training organized by the International Bar Association. Basically, these people have to build a new national justice system, completely different from the one that existed during Saddam Hussein's dictatorship. It goes without saying that this is a tremendous challenge.

It should be clear to all that we cannot allow the impunity to continue. The international community has to act in situations where States responsible for bringing perpetrators to justice are either unable or unwilling to do this. It is important to note that it is only in these situations that the ICC would have a role to play. This follows from the principle of complementarity upon which the Rome Statute is founded.

Let us now shift our focus. The Rome Statute is not only about the ICC. There is another element of tremendous importance here: the way in which the substantive law has developed in the process of the creation of the ICC.

Certainly, international criminal law has evolved over a long period of time. Important codifications took place during the past century and in particular after the Second World War with the adoption of the Convention against Genocide in 1948, the Geneva Conventions in 1949 and the additional protocols in 1977.

However, the thorough review that all these provisions underwent in the process of elaborating the Rome Statute has contributed greatly to clarify the scope of war crimes and crimes against humanity, and the crime of genocide has been brought into the Statute. The result is that there is now a coherent international criminal code within the framework of the Statute.

During the negotiations there were also attempts to include two more crimes: aggression, which is mentioned in the Statute, and terrorism. But these attempts did not succeed. This is understandable; the task of the five-week Conference was enormous and one has to have reasonable expectations.

Presently, the question of definition of aggression is addressed by the Assembly of States Parties to the Statute.

Whether terrorism will be included is yet to be seen. This would be a matter for the First Review Conference scheduled for 2009. However, in the meantime we may see a development of a different kind. In the wake of some of the most heinous terrorist acts in later years, such acts may be viewed as crimes against humanity. As such they would fall under the jurisdiction of the ICC.

The picture would not be complete, if reference was not made to an important document, initiated by the US: the Elements of Crime. The purpose of this document, which was adopted by the members of the Assembly of States Parties on 9 September 2002, is to assist the ICC in the interpretation and application of the articles on genocide, crimes against humanity and war crimes. It is focused on the conduct, consequences and circumstances associated with each crime.

So, what has been accomplished during a rather intense period of time is a Statute that clarifies in a very succinct manner the most serious crimes under international law and establishes a court to apply this law.

Does this concern a lawyer at the federal or state level in the US, you may ask. The obvious answer is: indeed it does!

First, the adoption of the Rome Statute has led to a review of the penal law in many countries in order to bring it in conformity with the Rome Statute. In some instances, like in my country Sweden, it has also entailed a general review of the national legislation in this particular field.

Another effect of this harmonization will be that lawyers in different countries are much more likely to speak on the same wavelength. Among other things, this will facilitate international legal assistance. We should not forget the principle of complementarity and the fact that relatively few persons can be brought to justice before the ICC. As a matter of fact, the establishment of the ICC could be seen as an encouragement to bring perpetrators to justice before national courts. In that context it will be important that States can assist each other across borders.

This means that for the future we will have much more of a common denominator in this particular field of criminal law. No doubt, this will also influence the training of the military and their legal advisers. By the way, I was very impressed when I visited the Judge Advocate General's School in Charlottesville a few years ago. Ultimately, this law will have to be applied by national judicial institutions and by those who appear before them. Much more interaction among States is likely.

You may think that all this does not concern US lawyers as long as the US is not a party to the Rome Statute. I respectfully disagree! The substantive law of the Rome Statute has been elaborated by representatives from many States, including with the active participation of the US. The values expressed in those provisions are widely shared and will now be reflected in the national laws of many countries. Hopefully, this will be so also in the US to the extent it is not already the case.

For a long time in many other professions borders have been of very limited significance. Mathematics, chemistry, physics, medicine, etc. are basically the same everywhere. Scientists and experts in these areas form distinct communities within which communications are exchanged and understood.

There is no reason why this should not be the case also in the legal field. As a matter of fact, such communities do exist already: business, maritime law, environment, to mention a few. This should also be the case in the field of criminal law, although for obvious reasons there are differences because of rules on jurisdiction and the principle of legality.

The common denominators are obvious also in the legal field. And in today's world – globalisation and all – lawyers are obliged to be informed. Irrespective of how the national legal training that all lawyers go through is organized, I suggest that there is a moral and ethical obligation for those concerned to study the result of the efforts



undertaken at the international level. Teachers, students, practitioners, yes everyone in the legal profession, has an obligation to familiarize him or herself with the overriding principles and norms that apply in the legal field.

Let me give you an example. The Universal Declaration of Human Rights, the two International Human Rights Covenants from 1966 and many related treaties in the field of human rights play an important role in many countries. Someone familiar with these instruments will have an extra set of norms against which conclusions in day-to-day work can be tested.

What about Guantánamo in this context? I do not intend to get into the details of this sad chapter in US history. Nor do I intend to discuss the confusion caused by the misnomer “war on terrorism”, which puts the concepts from the laws of war on their head. Terrorism is a terrible crime. It is imperative that it be countered in a systematic and determined manner. But this effort is not a war; you cannot conduct a war against a phenomenon.

With respect to Guantánamo, let me just say that when the news came that there were those who thought that US federal courts would not have jurisdiction over persons incarcerated there, many of us with an international legal background could not believe our ears. Human rights instruments, including treaties to which the US is a party, require that persons arrested on suspicion of criminal acts, because in reality this is what it is, are promptly brought before a court or a judicial officer. Fortunately, the US Supreme Court put the matter straight.

The point I want to make with this and other examples is that, just like scientists and experts, who have traditionally interacted across borders, so should persons from the legal profession engage across borders. This is already done, in particular by lawyers active in the field of international law. Case School of Law and the Cox International Law Center are excellent examples.

But it is important that all lawyers realize that international law is not just for some specialists in that particular field. International law has become a necessary ingredient in the education and practice of all lawyers.

The US should be in a particularly favourable position here, since nowhere else in the world have I met such an enlightened community of international law scholars. It is just that sometimes I have a feeling that many of them are better known over the world than within their own country.

There is a challenge here, not only to this Law School and the Law Center with its ambitious international law program, but also to other institutions engaged in teaching, research and application of international law: to spread the message.

Also, the US has a responsibility because of its powerful position in today’s world. This was clearly understood by the Presidents of this country at the time of the creation of the United Nations. Let me reiterate two of the quotes that I cited in my farewell lecture at the United Nations last year.

The first quote is from Harry S. Truman, Democrat and US President 1945-1953. The other is from the former General Dwight D. Eisenhower, Republican and US President 1953-1961.

First Truman:

“Nothing is more essential to the future peace of the world than continued cooperation of the nations which had to muster the force necessary to defeat the conspiracy of the Axis powers to dominate the world.

While these great states have a special responsibility to enforce the peace, their responsibility is based upon the obligations resting upon all states, large and small, not to use force in international relations except in the defense of law. The responsibility of the great states is to serve and not to dominate the world.”<sup>1</sup>

And now Eisenhower:

“Yet this peace we seek cannot be born of fear alone: it must be rooted in the lives of nations. There must be justice, sensed and shared by all peoples, for, without justice the world can know only a tense and unstable truce. There must be law, steadily invoked and respected by all nations, for without law, the world promises only such meager justice as the pity of the strong upon the weak. But the law of which we speak, comprehending the values of freedom, affirms the equality of all nations, great and small.

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We recognize and accept our own deep involvement in the destiny of men everywhere. We are accordingly pledged to honour, and to strive to fortify, the authority of the United Nations. For in that body rests the best hope of our age for the assertion of that law by which all nations may live in dignity.”<sup>2</sup>

Let me close by again thanking the Case Western Reserve University and the Frederick K. Cox International Law Center for honouring me and for inviting me to speak. I regret that some of my remarks have been critical. But I feel that I have an obligation to be honest and to speak my mind.

I have great respect for the United States. I belong to the generation that will never forget that twice in the past century the United States assisted Europe in situations where we were in most serious distress. Not least because of this, many are looking to the United States as a symbol for democracy and the rule of law. Recent events demonstrate that the US is not at present setting the example that many are looking for – and the world needs.

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<sup>1</sup> See Stephen C. Schlesinger, *Act of Creation – The Founding of the United Nations*. Westview Press 2003, p. 15. See also <http://www.trumanlibrary.org/ww2/stofunio.htm>

<sup>2</sup> See e.g. <http://www.yale.edu/lawweb/avalon/presiden/inaug/eisen2.htm>



Finally, is there an answer to the question: How long will some miss the missing link?

With respect to the ICC and the United States it is difficult to predict. I suggest that the answer depends partly on you. And let me say to the students – the new generation: one should always learn from the past. From the statements just quoted we learn that also the most powerful nation must work with others to achieve the peace and freedom we are all striving for. This is an effort in which all nations must engage.

To reach this goal, we need a well functioning international criminal justice system. The system is in place. But to function well it needs the support of the United States of America.

Thank you for your attention!