



Human Rights and the International Criminal Court

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**“The Protection of Human Rights through the International
Criminal Court as a Contribution to Constitutionalization and
Nation – Building”**

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**German –Southeast Asian Center of Excellence for
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Dear Professor Surasak Likasitwatanakul,
Dear Ambassador Schumacher,
Excellencies, Ladies and Gentlemen,

Please permit me, by way of exception, to begin with a personal statement – a personal statement that I have made already quite often when speaking about Human Rights: Peace, absence of war and violence is the best protection, the best guarantee against human rights violations. War making, armed conflicts and political violence are the deadliest threat to human rights. Consequently, no effort must be spared to secure peace and to avoid war and violence.

On this note, I convey to you the greetings of all 18 judges of the International Criminal Court, and a personal message from the President of the ICC, Judge Sang-Hyun Song from South Korea, who wishes the best of success for this conference.

I would like to commend the organisers, Thammasat University, the German-Southeast Asian Center of Excellence for Public Policy and Good Governance, and the German Embassy in Bangkok, for convening this important event. I am truly grateful for the invitation to participate in the conference and I feel honoured to be the keynote speaker this evening.

In my remarks tonight I will explore the relationship of human rights on the one hand and the International Criminal Court (ICC) on the other hand. While the ICC is not a human rights court in the strict sense, it has great significance for the global protection of the most fundamental human rights and values.

Let us first go back in history to the aftermath of World War II, which turned out to be an important point in time for the development of international human rights law and international justice.

We are all aware that it was the barbaric monstrosities committed by the Nazi regime in my own country, Germany that gave rise both to the modern notion of human rights and to the development of international justice. This eventually led also to the establishment of the International Criminal Court.

First, the persecution of Jews, then Germany's invasion of Poland on 1 September 1939, a textbook example of a "crime of aggression" that led directly to the Second World War, with all the ensuing crimes against peace, crimes against humanity and war crimes. The new international order, with the United Nations as its main structure, was set up against this devastating backdrop.

As I have said today in an interview with Thai Television NBC, today's conception of human rights is rooted in the Universal Declaration of Human Rights, which was adopted on 10 December 1948 by the United Nations General Assembly. To borrow the words of the UN Secretary-General, Ban Ki-moon, [QUOTE] *"in a world still reeling from the horrors of the Second World War, the Declaration was the first global statement of what we now take for granted -- the inherent dignity and equality of all human beings."* [UNQUOTE]

Indeed, this was the first time that the international community consisting of the sovereign nations of the world declared a set of fundamental rights and freedoms that each and every human being on this planet is entitled to, regardless of their colour, sex, religion, national or social origin or other status.

Thailand can be proud that it was one of the 48 states that voted in favour of the historic resolution proclaiming the Universal Declaration.

The rights and freedoms contained in the Declaration range from the most fundamental ones – such as the right to life and liberty and freedom from torture and slavery – to essential civil and political rights – including equality before the law and freedom of thought – and key social, economic and cultural rights such as the right to social security and the right to education.

The Universal Declaration of Human Rights was a stepping stone firstly for the International Covenant on Civil and Political Rights and secondly for the International Covenant on Economic, Social and Cultural Rights. One may say that together these three documents form the International Bill of Rights. The two covenants placed the universal norms of basic human rights in the framework of multilateral treaties, which have to date been joined by the overwhelming majority of the United Nations member states¹, Thailand among them.

The revolutionary aspect of these instruments was that States for the first time voluntarily subscribed to legally binding documents which imposed obligations on them concerning their domestic affairs and the treatment of their own citizens.

International human rights law and the international system of human rights protection has developed further and today Thailand, for instance, is party to seven core human rights treaties, including the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child, as well as its Optional Protocol on the Involvement of Children in Armed Conflict and on the Sale of Children.

The global promotion of human rights, however, continues to be a momentous challenge. Countless people in various regions still do not enjoy many of the most basic rights and freedoms enumerated in the Universal Declaration.

What is particularly alarming is that fundamental human values, including the right to life and liberty, and freedom from torture and inhumane treatment, continue to be frequently and flagrantly violated in many quarters of the world. All too often such violations take place in the context of war and armed conflicts, which in themselves represent the ultimate threat to all human values – and you remember what I said in the first sentences of this speech.

¹ ICCPR – 172, ICESCR - 160

I will come back to this, but let me now shed some light on the history behind the International Criminal Court, the ICC.

The ICC is a permanent judicial institution that was set up to end impunity for the most serious crimes of international concern, namely genocide, crimes against humanity, war crimes and the crime of aggression.

The ICC is the direct heir of the International Military Tribunal established in Nuremberg in 1945 to try the Nazi leaders after Germany's defeat. The trials in Nuremberg, as well as in those Tokyo, established the principle of every individual's responsibility under criminal law for mass atrocities, even if they are high-ranking representatives of the state or its military apparatus.

In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, including its Article VI which, already then, envisaged the establishment of an international criminal court. A year later, the four 1949 Geneva Conventions were adopted under the auspices of the International Committee of the Red Cross. They regulate warfare, defining the necessary minimum protection of civilians and of those no longer participating in the armed conflict, such as prisoners of war and wounded soldiers.

Today, all member States of the United Nations are party to the 1949 Geneva Conventions; Thailand acceded to them as early as in 1954.

An important breakthrough of the Geneva Conventions was that their common Article 3 defined the minimum applicable protection also in internal armed conflicts such as civil wars, whereas until then, international conventions on the conduct of war had exclusively concerned international warfare.

In summary, common Article 3 prohibits the following acts against protected persons in any internal armed conflict: murder, cruel treatment, torture, taking of hostages, outrages upon personal dignity and the passing of sentences or the

carrying out of executions without proper trial. It is easy to see the relevance of these essential rules to the protection of fundamental human values.

The progress of international criminal justice largely stalled in the period from the 1950s to the end of the cold war. The 1990s, however, witnessed the beginning of a new era in international relations and a steep surge in the development of international criminal law and justice. The defining moment with no doubt was the unanimous decision of the UN Security Council to establish an international criminal tribunal for the former Yugoslavia, followed a year later by a similar tribunal for Rwanda.

The creation of the Tribunals for the former Yugoslavia and Rwanda set in motion a rapid succession of activity by States, civil society, diplomats, scholars and others on the establishment of a permanent international court that would have jurisdiction over the gravest crimes under international law.

In 1996, I had the chance to become the Head of the German ICC Delegation and Chief Negotiator for the International Criminal Court, a position I occupied for seven years. After two years of intensive work of the member States of the United Nations, including Thailand, these efforts resulted in the historic adoption of this treaty, the Rome Statute of the International Criminal Court at a diplomatic conference held in Rome, Italy, under the auspices of the United Nations. Many regard today this treaty as the most important international treaty after the UN Charter adopted in San Francisco in 1945.

It was a truly emotional moment when the Statute was adopted at the last minutes of the Rome Conference and I do not believe that it would be an exaggeration to compare it to the spirit of the Universal Declaration of Human Rights. In Rome, in the late evening of 17 July 1998, there was a feeling that the community of nations had now come together in the face of a moral duty to act in order to protect the most fundamental human values.

Let me illustrate this with quotes from the preamble of each document:

First, the Universal Declaration:

[QUOTE] *Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind*²
[UNQUOTE]

And then the Rome Statute:

[QUOTE] *Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*³ [UNQUOTE]

For the International Criminal Court to come to existence, the Statute had to be ratified by at least 60 States. Again, this milestone was reached in an astonishingly short period of time, and less than four years after the adoption of the Statute, the ICC was formally established on the 1st of July, 2002. Thailand has signed the Rome Statute already in October 2000.

Let us now look more closely at the offences stipulated in the ICC's Statute under four categories and how they relate to universal human rights norms.

First, the ICC has jurisdiction over the crime of genocide, five forms of genocide, which in itself is a massive violation against an entire group of people by way of killing its members or otherwise bringing about its destruction – and such a genocide took place some time ago even in a neighbour country of Thailand, namely Cambodia.

Second, the Statute defines a number of crimes against humanity, 15 crimes against humanity, which are offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid or deportation committed as part of a large-scale attack against any civilian population. It is important to notice that genocide and

² UDHR, preamble

³ Rome Statute, preamble

crimes against humanity do not necessarily have to occur within the context of an armed conflict.

Third, the Statute contains a long list of war crimes, 50 forms of war crimes, with a separation between those that are punishable in an international armed conflict and those that constitute crimes in a non-international armed conflict. War crimes listed in both categories include for instance conscripting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes; and the killing or torture of persons not actively participating in the conflict, such as civilians or prisoners of war.

As you see, the prohibited acts under the Rome Statute in a large part concern the most fundamental human rights, peremptory norms of international law such as the right to life and freedom from torture, but there are also offences which particularly affect women and children, and numerous other connections to specific human rights, for instance the freedom from racial discrimination, the freedom of movement and fair trial rights.

Finally, the fourth category of criminal conduct in the ICC's jurisdiction is the crime of aggression, aggressive war-making, the illegal use of armed force against another State. At the time of the adoption of the Statute, States could not reach agreement on the definition of this crime, but this shortcoming was overcome last summer at the first Review Conference of the Rome Statute, held in Kampala, Uganda.

Even though the ICC cannot actively exercise jurisdiction over the crime of aggression for at least another six years, I consider the achievement of the Review Conference to be a truly historical step towards criminalising aggressive warfare.

Experience shows that war, the injustice of war in itself, begets massive war crimes and crimes against humanity. We have seen this time and again, in World War II,

in Vietnam, in the former Yugoslavia, in Iraq, and in the situations in Africa with which the ICC is currently seized. A terrible law seems to hold true: war, the ruthless readiness to use military force, to use military power for political interests, regularly results in massive and grievous crimes of all kinds. These crimes directly violate fundamental rights; and indirectly they can affect the enjoyment of almost any of the basic human rights or freedoms.

Recently, Michael Bohlander, a German professor now teaching in Durham, United Kingdom, reminded me about a further appalling aspect of this evil: even nowadays, in modern warfare, in the time of so-called surgical strikes, 80 to 90% of war casualties are regularly civilians, mostly children and women. This is an ongoing scandal, a shame for all of humanity.

We have sufficiently clarified the link between the subject matter of ICC crimes and human rights, but we also need to discuss the justification for international mechanisms in the fields of human rights and criminal justice. Are international courts or intergovernmental human rights bodies necessary to begin with?

The short answer seems to be that they certainly are, as evidenced by the slowly but steadily growing number of such institutions set up in regional and international contexts. Their purpose, however, is not to replace national mechanisms or the responsibility of States but rather to complement them and to fill any gaps that remain.

The basic principles of international human rights law provide that States have a threefold obligation in relation to human rights and freedoms; first of all, States and State actors themselves must respect human rights and refrain from any violations of the same. To give a very concrete example, the responsibility to respect means, for instance, that police officers are not allowed to inflict inhuman treatment or torture on anyone.

Second, States have an obligation to protect individuals and groups against human rights abuses. This obligation entails for instance the duty to criminalise certain

behaviour, to investigate and prosecute abuses and to hold perpetrators responsible.

Third and last, there is a duty on States to fulfil human rights by taking positive steps to facilitate their enjoyment. In other words, States cannot merely sit back and say, “well, we are not violating anyone’s human rights and we punish anyone who does”, but rather they have an obligation, at least a political and moral obligation, to actively adopt measures towards the materialisation of human rights and freedoms.

Despite the existence of international human rights bodies, the world is still beset with human rights violations, large and small. Thailand knows this only too well, as it currently holds the presidency of the United Nations Human Rights Council, an intergovernmental body responsible for strengthening the promotion and protection of human rights around the globe. This is a historic responsibility for Thailand, particularly as it is the first Asian State to have this important role.

In the context of Thailand’s campaign for a seat on the Council, your Prime Minister said that [QUOTE] *“[t]he most important thing in solving human rights problems is that we have to acknowledge their existence and dare to face up to them”*. [UNQUOTE] This is a very positive statement. Changing negative realities requires courage. One has to identify the obstacles and then find ways to overcome them.

The International Criminal Court reflects this kind of philosophy. In creating the ICC, the global community of sovereign nations recognised that it has to act collectively to put an end to grave crimes which threaten the peace, security and well-being of the world⁴ – again, these are the words of the Rome Statute.

Now, let me stress again in the clearest terms that the International Criminal Court is not a substitute for national justice systems. As I have emphasised in this

⁴ Cf. preamble of the Statute

television interview this morning, under the Rome Statute, it remains the primary responsibility of each country's own justice system to exercise criminal jurisdiction over international crimes. Ideally, all crimes would be prosecuted by domestic courts as it happens in ordinary circumstances.

However, it is precisely in the face of the worst atrocities that national systems have historically appeared time and again to be either unwilling or unable to act, for instance due to the partial or complete breakdown of domestic judicial infrastructure or because of political reasons if the suspected perpetrators are high-ranking persons close to the country's leadership.

It is for such situations that the majority of the world's independent States have voluntarily established the International Criminal Court, a court of last resort that can try individuals suspected of being responsible for genocide, crimes against humanity and war crimes when the national jurisdiction in question is not capable of doing so.

This structural relationship of the ICC and the national jurisdictions is known as the principle complementarity. Indeed, this is the most important foundation, the basis of the entire ICC system established by the Rome Statute.

The principle of complementarity allows the Rome Statute system to advance the struggle against impunity at two levels simultaneously, strengthening the global protection of fundamental human values while respecting and reaffirming state sovereignty.

Beside the punishment of the perpetrators and the prevention of future crimes, the ICC has ground-breaking potential to contribute to the fulfilment of victims' human rights by way of the Court's progressive rules on victim participation and reparation.

I also have to draw attention to the fact that under certain circumstances, the ICC is in a comparable position as States in that it has to respect the human rights of

individuals under its effective control. The most obvious example is the requirement to uphold the rights of the accused before the Court and the rights of detainees in the ICC's custody.

Fairness of the proceedings is a cornerstone of the Court's work which the Judges of the ICC safeguard with great care. Article 21 contains a general provision which states that the Court's application of law must be consistent with internationally recognised human rights. Indeed the law of human rights is one of the specific areas of competence required of the judges of the ICC.

Excellencies, Ladies and Gentlemen,

To conclude my remarks, I will first summarise my discussion of human rights and the International Criminal Court, and then I will briefly touch upon the relationship of Thailand and the South-East Asian region with the ICC.

The ICC was devised by the international community as one means of fighting the impunity of the world's gravest crimes affecting the most vulnerable members of our societies, particularly women and children.

The ICC is a neutral, judicial and non-political body which observes the highest standards of fairness and due process. It is solely the sovereign decision of each nation whether to join the ICC or not. The Court's membership is constantly growing and currently numbers 114 States Parties from the five regions of the world.

The States Parties to the ICC represent diverse legal and religious traditions as well as many different constitutional systems such as republics, federations and monarchies. This geographic, cultural and political diversity demonstrates the truly international nature of the ICC.

Thailand has a long history of participation in the ICC process. A senior government delegation from Thailand participated in the Rome Conference in

1998. On 2 October 2000, Thailand took a very important first step towards the ICC by signing the Rome Statute. And only last month, in December 2010, I was delighted to notice that a high-level delegation represented Thailand at the 9th session of Assembly of States Parties to the Rome Statute held at the UN headquarters in New York.

By taking the next step of ratifying the Statute, Thailand would send out a clear signal of commitment to peace, human rights and the rule of law, not only at home, but around the world. By joining the ICC, Thailand would contribute to the global protection of all of humanity from the scourge of terrible atrocities that affect innocent children, women and men with devastating consequences.

Ratification also gives a State the equal right to nominate candidates and to vote in the election of the highest officials to the ICC. The next elections for the Prosecutor and six posts of Judges will take place in 2012, so now would be an excellent time to join the ICC to shape its future development and make it, maybe through a judge from your country, even more global than it is now.

Several Asian countries, including Japan, South Korea and Bangladesh have already ratified the Rome Statute and many more are considering joining the ICC family. Cambodia and Timor-Leste joined the Court in 2002 as the only two Southeast Asian States Parties so far. I am certain that not only the 114 States Parties, but also the Court itself, would be delighted to welcome Thailand as a new State Party.

Thailand has made recent strides in the field of international law by ratifying major international treaties, and by making very tangible pledges in connection with its campaign for the membership of the UN Human Rights Council. By ratifying the Rome Statute, Thailand would build on this record in an impressive way.

Thank you for your attention.