IBA War Crimes Committee. 4th Specialist Conference:
War and Justice

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I feel greatly privileged to be invited to deliver the keynote address to such a distinguished body of academics, practitioners and experts in International law. Let me hasten to say that I speak as a practitioner : as a lawyer in apartheid South Africa, judge in democratic SA, judge of the ICTR and ICC, and UN High Commissioner for Human Rights and readily acknowledge that the perspective from the trenches often does not give us the distance for reflection and analyses.

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Under the overall subject of war and justice, this conference will be discussing many issues including the complicated relationship between war and justice, the relationship between armed conflict and terrorism and counter terrorism measures, how to conduct investigations and fair trials in ongoing conflict, how to establish the truth for history and distinguish between rival claims of authenticity of truth, how to render impartial justice and avoid accusations of “victor's justice” and how to predict the future course for justice and accountability.

The International Criminal Court’s jurisdiction over the crime of aggression will be activated as of 17 July 2018, thus fulfilling a vast chasm in human rights protection for victims of wars and conflicts. The Court will have to navigate the challenges of competing wills and obstruction from powerful

states and leaders as well as securing and safeguarding witnesses. Even as we speak, the conflict in Syria rages unabated for seven years. As High Commissioner for Human Rights, I presented factual information to the UNSC in 2013, of egregious violations of human rights, amounting to crimes against humanity, committed by elements on both sides of the conflict and called for a referral of the situation to the ICC.
The 13th April 2018 retaliatory attacks on Syrian government targets, by the US, UK and France, without UN sanction, following the alleged use of chemical weapons by President Assad, has been characterised by President Trump as use of "righteous power" and by Foreign Minister Lavrov of Russia as an act of "aggression". These competing claims offer an immediate example of the challenges facing ICC prosecution of the crime of aggression .

For purposes of my address I have chosen to review the current status of international criminal justice. Is there a trend against accountability institutions and multilateralism that is going to dictate the end of the process of international justice that has been achieved so far? If so, do we retreat or make stronger, our calls for justice and accountability?

I am inspired by the fact that we are holding discussions on these crucial issues impacting the future of International justice at the Peace Palace in The Hague, the home of Grotius, the principal founder of the modern era in international law. Grotius based his rules of war and justice between nations on what he regarded as universal principles recognisable by anyone exercising reason. He had probably heard of the case that arose after the war between the Roman Republic and Syria over 2000 years ago, involving interpretation of a treaty. The peace treaty made between the Roman General Quintus Fabius and King Antiochus of Syria required the Syrian king to forfeit half his fleet to Rome. Following the treaty, the Roman general enforced its terms by cutting every Syrian ship in half. Thus the Syrians lost their entire fleet and Rome walked away with a pyrrhic victory.

Syria today continues to be a theatre for the failure of states to abide by “universal principles, exercising reason.”

Grotius also founded the universality of the principles he expounded on the idea that there could be, in the words of the Roman lawyer, Cicero, “ a society of mankind, not states”
For Grotius, what reason said was good behavior for the citizen was probably a sound basis for deciding what was just behavior for states. Grotius cites the Roman author, Seneca, as saying “Why do we restrain homicide, and the murder of individuals, but glory in the crime of slaughter, which destroys whole nations?
In those words, coming down to us from over 2000 years ago, we see foreshadowed the idea of what we call today an international criminal justice system.

Of course, states have dominated the development of international law since the time when Grotius wrote and still hold the reigns today. And the laws that purported to bind states seemed feeble in comparison with laws that bound individuals. 2500 years ago, a Greek observer could write: “Written laws are like spiders’ webs. They will catch, it is true, the weak and the poor but would be torn in pieces by the rich and powerful”. And the same has tended to be true of laws that should command the allegiance of leaders of the state. But it is evident that we are inexorably moving towards that “society of mankind, not states” foreshadowed so long ago.

The fact is that international criminal justice only came into being in the last 25 years; a drop in time compared to the two century birth process I have described. The child must be nurtured, to grow to full maturity. Now is not the time to countenance retreat or relax our efforts, or to throw the baby out with the bath water; because international justice is here to stay.

When great conflicts end and they have been fought by societies ruled by a system of law, the question arises as to what to do with those leaders who

are believed to have started the conflicts unjustly. The use of the apparatus of law to effect a verdict on the conduct of defeated leaders has been a tempting machinery to use. It was canvassed and nearly achieved after the defeat of Germany in 1918 and it was widely and successfully canvassed in the early alliance meetings in the second world war. The result of this process reached its apotheosis at Nuremberg and Tokyo in 1945. For the first time in history leaders were held accountable for their actions in authorising crimes of war and what were called crimes against humanity. For the first time judicial power backed by punishment was exercised on behalf of the international community.

The trials at Nuremberg were a precedent that sat waiting in the post war world for further development. In fact a permanent international criminal court was proposed in 1947 in the United Nations General Assembly and a draft statute for an international criminal court was discussed in the UN as early as 1953. But while it lasted, the Cold War made such a development of the Nuremberg principle unachievable. The project remained gathering dust until 1989 when it again returned to the agenda of the General Assembly.

What happened then illustrates why even an international goliath like the UN, can get frustrated with the lack of political will.The United States had been bitten once in the *Nicaragua case* when the World Court ruled against it (1986 ICJ Rep 14 { judgment of 27 june}). The Reagan administration had also adopted an aggressive long arm policy in dealing with perceived threats to its national security. Even in those days, the US felt that it would be exposed to prosecutions by an international criminal court. Professor Michael Scharf, who was in charge of US policy towards the plan for an ICC has told us what happened. He was told to make the UN initiative “go away”.

Professor David Scheffer’s efforts suffered a similar blow, a decade later, as he worked on the draft of the Rome statute for his government.

Then the Balkan wars broke and reports of atrocities were splashed across our television screens. One of the ways in which the US and others could be seen to be taking some action on the atrocities was to propose a tribunal based on the precedent of Nuremberg to try individuals. For the first time, the UNSC adopted a statute establishing an international criminal Tribunal, the ICTY in 1993. Within a year reports of large scale massacres were starting to come out of Rwanda. The failures of the international community to act to stop the genocide, the withdrawal of even the small force of UN troops on the ground, the refusal to even use the word "genocide" when the facts were known, all caused considerable soul-searching in the UN and among major national governments. The response of the Security Council in November 1994 was to form a tribunal for Rwanda , based on the ICTY statute.

The *ad hoc* tribunals had primacy, superseding national jurisdiction over the crimes mentioned in the statutes. States had concurrent jurisdiction; however the tribunals can request national courts to defer to the competence of the tribunals at any stage of the proceedings.This is why in competing requests for transfer of suspects by Rwanda and the ICTR, states, such as Cameroon, Kenya, Belgium, UK and Canada handed over suspects to the tribunal.The tribunals' jurisdiction is limited territorially and temporarily. They were created not by treaty of member states but by the UN Security Council acting under Chapter VII of the UN Charter to maintain international peace and security. In the normal course the Security Council authorises peace keeping missions and in rare instances, military operations. This is the first time that judicial courts were created for the prosecution of perpetrators of serious crimes in those countries with the goal of contributing to the achievement of peace and reconciliation.

The ICC was established by treaty of state parties who signed the Rome Statute, which came into effect on July 1, 2002. The ICC does not enjoy primary jurisdiction. That remains with the state parties.

The preamble to the Rome Statute makes clear that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. The court does not have universal jurisdiction. The court will only act when states are unwilling or unable to try perpetrators- under the principle of complementarity. States retain the primary role in prosecuting genocide, crimes against humanity, war crimes, and after July 2018, the crime of aggression.

The ICC statute has been ratified by 123 states , 34 of them from Africa (currently 33 African states following Burundi's withdrawal on 27 October 2017 a day after the Court's Pre-trial Chamber authorised investigations).

The ICC, which is the world's first permanent international criminal court, is the culmination of determined international efforts to ensure accountability for the worst international crimes. It is a milestone achievement in our efforts to create a world where every individual is granted the protection afforded by international human rights and international humanitarian law

The struggle against impunity , and especially against impunity for serious international crimes, is vital for many reasons, but importantly, to bring justice to victims.There can never be lasting peace without justice. Only justice and accountability can ensure that victims have access to redress and reparations and this in turn is crucial achieving reconciliation and sustainable peace.

Failure to restore the rights and dignity of victims, and failure to secure accountability for human rights violations and international crimes does critical harm to individual victims and to society at large. Peace-true peace- can only be achieved if an end to the eternal cycle of resentment and revenge is achieved by acknowledging the harm done to victims and providing remedies. Accountability and reconciliation are not opposites; they are complementary in the pursuit of peace, stability and freedom from fear and want.

The importance of accountability is underscored under Article 4 of the African Union's Constitutive Act, which explicitly supports the principle of accountability and access to justice for victims. Under the auspices of the

African Union, African countries have also demonstrated their commitment to ensuring accountability by establishing the African Human and Peoples' rights Commission and the African Court of Justice and Human Rights.

Five of the eight countries where the ICC is active, have themselves invited the ICC to carry out investigations of situations within their countries: these are, Uganda, Democratic Republic of Congo, Central African Republic, Cote d' Ivoire, and Mali. These self referrals indicate that far from undermining sovereignty of States, the ICC works with its state parties, to assist them in their efforts to render justice to their citizens and comply with their international obligations. They also reflect a welcome development in international law and relations: a conception of sovereignty that is concerned with the protection and promotion of peoples' fundamental rights.
The successful trial of the former dictator of Chad, Hissene Habre in Senegal, on the direction of the AU, sets a new benchmark to end impunity in Africa. It marks a significant step forward in holding high profile perpetrators of crimes to account in Africa and could be an important model of how hybrid courts can reconcile the often conflicting demands of international law and national sovereignty.

Yet the relationship between the ICC and the AU is fraught with controversy. At the Extraordinary session of the AU General Assembly in October 2013, the AU expressed its concern regarding " the politicisation and misuse of indictments against African leaders by the ICC" and that prosecutions against heads of states "could undermine sovereignty, stability and peace."
African leaders have repeatedly complained of the ICC's focus on Africa: nine of the ten situations under investigations and three under pre-trial investigations involve African countries. They criticise the ICC as a neo-colonialist institution of western powers to target African countries.
Political opposition to accountability remains a worldwide problem; the central concerns of African states is immunity for heads of state following

the ICC charge for war crimes, genocide and crimes against humanity against Omar al Bashir, president of Sudan and the Kenyan indictments. Sudan is not a party to the Rome statute, the situation in Darfur having been referred to the ICC by Security Council resolution; as was Libya.

It is evident that the AU resolution on head of state immunity and threats of withdrawal from the ICC arose because of the profile of the individuals indicted, and not because of the seriousness of the alleged crimes and the numbers of victims. The notion that political power can be a safe haven for impunity would create a dangerous double standard for accountability. It is also incompatible with International law. It would be against the intent of the Rome statute, the preamble of which is explicit in its emphasis on an end to impunity for the named crimes. Furthemore, it would be contrary to the commitment of African states to shun the accountability so strongly championed in the Constitutive Act of the AU and the Charter of Human and Peoples' rights.

Threats of arrests of the prosecutor and investigators have also been made by state parties, Burundi (Burundi has since withdrawn but was a party at the time of commission of the alleged crimes) and Phillipines, whose president, Duarte has also threatened to withdraw from the ICC.

Security Council deferrals have come under criticism for their political bias, exemplified by the failure of the SC to refer the situation in Syria to the ICC and the persistent use of the veto power to block action over the Israeli-Palestine conflict, in the context of Israeli defence force operations in Gaza. While 123 states, a clear majority, have ratified the Rome statute, three of the five permanent members, USA, Russia and China, have refused to subject themselves to the jurisdiction of the ICC and to join in its goal of upholding the rule of law and ending impunity. This is perceived as unjust and selective justice as they have the power of the veto to stop actions in situations of mass crimes and serious human rights and humanitarian law violations, including their own countries.

There have been strong calls for Security Council reform, in particular to curb the use of the veto power in situations where international crimes and mass atrocities have been perpetrated.
In 2016 three African states declared their intention to withdraw from the ICC: South Africa, Burundi and Gambia. Gambia has reversed this declaration made by deposed dictator Jammeh. Burundi withdrew on 27 October 2017 and SA has not dropped its decision to withdraw.

In January 2017, the AU set up a committee to elaborate a strategy for collective withdrawal from the ICC-apparently chaired by Burundi. A number of AU member states expressed opposition to withdrawal: Nigeria, Botswana, Senegal, Cape Verde, Zambia, Tanzania and Liberia.
The Minister of Foreign Affairs of Nigeria, Geoffrey Onyeama, made plain in a press interview in Addis Ababa (27 January 2017) that Nigeria and others believed that the court had an important role to play in holding leaders accountable hence Nigeria fully stood by it.
He further stated “The issue is that the AU which was not a party to the Rome statute which established the court, should not be developing a strategy for collective withdrawal for something that each country entered individually”.
President Khama of Botswana reiterated his country’s support for the ICC in his final state-of- the nation address. The head of the E African regional bloc condemned the continuing ICC investigations in Burundi.
South Africa ‘s decision to withdraw from the ICC, was first reached within the ruling African National Congress party and acted on after the ICC pre trial chamber ruled that South Africa had failed to comply with the ICC’s request to arrest President al Bashir, in violation of the Rome statute. Their continued membership, it was said, interfered with their role to engage in peace negotiations and dialogue in Africa. The SA Minister of Justice, Michael Masutha, in his remarks to the ASP asserted that the ASP needed to spell out a procedure or resolve the conflict between Articles 27 and 98 of the Rome statute and the competing obligations they imposed on a state

party to both assist with arrests for the ICC and comply with their duties under Customary International law to respect official indemnities.

At the meeting of African ministers in NY in September 2017, prior to the ASP General Assembly in December, an AU Commission proposal was delivered by SA's legal adviser, Prof. Dire Tladi in which he highlighted the tension caused by the provisions in the Rome statute and submitted suggestions for its resolution. There is support for the call for dialogue, or for a conclusive determination by the Appeals Chamber of the ICC or the International Court of Justice. Organisations such as Africa Group for Justice and Accountability (AGJA), in which I am a member together with other African international lawyers, including Hassan Jallow, Richard Goldstone, Mohamed Chande Othman and Fatiha Serour stand ready to assist .

The former president of the ICC, Sylvia Fernandez, in an address to AGJA, accepted that many challenges had confronted the project of international criminal justice in the past year, including state withdrawals from the ICC and the various concerns around them. This context, she said, “provides an opportunity to discuss and debate issues and have a constructive dialogue.” She confirmed the court's efforts continuously to reach out to states and try and understand the concerns of all states, citing a successful seminar in Niger with 13 African states.

The AU has also communicated its initiative to approach the UNGA to seek a determination on immunity of heads of state , from the ICJ. Some view this as a route for States to obtain clarity on the issue behind withdrawals from the ICC.

Meanwhile, the appeal launched by Jordan against the pre trial chamber's decision (similar to the order against South Africa) that they had failed to comply with a request for cooperation in the the arrest of President Omar Al Bashir when the latter was attending a regional summit in Jordan, is set to be heard by the Appeals Chamber, and so the head of state immunity issue may be judicially determined sooner than the other initiatives.

In addition to the ICC many other judicial and quasi judicial mechanisms have played a crucial role in enhancing justice and accountability: Regional and national judicial institutions, *ad hoc* tribunals set up in Sierra Leone, Cambodia, Kosovo. Timor Leste, Lebanon, Central African Republic, South Sudan and the UNGA's- IIIM to investigate crimes in the Syrian conflict.

It should be apparent that while international accountability processes have contributed immensely to challenging impunity for serious violations of international law, and engendered increased awareness globally of such crimes, such mechanisms cannot operate in a vacuum. Nor are they sufficient by themselves, to stop the cycle of violations. The biggest stumbling block has been the lack of political will on the part of governments. It is for this reason that we must insist on more proactive engagement by states and the international community to heed early warnings of conflict, to pursue dialogue and conflict prevention and work in close cooperation with civil society.