Public Lecture by Deputy President Kgalema Motlanthe at the University of Pretoria, Tshwane, Gauteng

31 March 2014

Programme Director;
Vice-Chancellor and Rector of the University of Pretoria, Professor Cheryl de la Rey;
Vice Principal Academic, Professor Tyrone Pretorius;
The Dean in the Faculty of Law, Professor Andre Boraine;
Director: Centre for Human Rights, Professor Frans Viljoen;
Academics and Administrators;
The Diplomatic Corps;
The University Community;
Ladies and Gentlemen:

I wish to start by thanking the University of Pretoria for affording me the opportunity to deliver this public lecture on the theme: 'Human Rights and Democratisation in Africa'.

This presentation is not so much about 'giving the official line' as about comparing notes, with the object of elucidating the philosophical assumptions upon which the future of our continent is beginning to solidify into an intelligible form.

With this in mind I wish to reflect on the issue of the International Criminal Court (ICC) in the context of current controversies in which it is embroiled, in so far as such controversies impinge on present day state of African self-consciousness. In engaging in this rather intricate exercise I will attempt to argue that the ICC is an indispensable international judicial organ, which, however, can best serve African judicial interests in the context of the principle of complementarity.

As an underlying premise of this relationship, complementarity will here denote African primacy in addressing key issues of gross violation of human rights, much the same way Africa

should, ideally, take charge in addressing key issues that define concerns of our age, within the framework of global co-operation.

My thesis is that Africa needs its own Court, vested with universal jurisdiction over the three core international crimes of genocide, crimes against humanity and war crimes.

Parenthetically, at present an African Court on Human and People's Rights exists, with jurisdiction over all cases and disputes submitted to it concerning the interpretation of the African Charter on Human and Peoples' Rights, the Protocol and any other human rights instrument ratified by it. Our contention in this presentation is that the African Court on Human and People Rights should incorporate the three international crimes of genocide, crimes against humanity and war crimes. So for purposes of clarity, please note that when we refer to the African Court we will be arguing for the African Court on Human and People's Rights with jurisdiction on international crimes.

What is worth noting about this proposition, however, is that the African Court is not envisaged as a substitution for the ICC. Instead, it is an initiative necessitated by the challenges that seem to impair the efficacy of the ICC with regard to the African situation.

The African Court will as such fill a void in the form of the widening gulf beginning to emerge between what the ICC was intended for and what it is turning out to be in the eyes of its African detractors and many in the developing South.

As we shall argue in this presentation, taking primacy on issues of international crime in Africa, such a Court will be able to refer matters to the ICC in cases where it experiences innate limitations or where, in the context of its relationship with the ICC, it is ideal to do so in the interests of justice. I would argue

that the African Court should be so structured that in the event that the victims feel thwarted in their efforts for justice, they can indeed proceed to petition the ICC on their own accord.

Ladies and Gentlemen;

It is useful to emphasise upfront that our approach in this presentation is framed in political terms and will thus steer clear of legalistic arguments, for which the Centre for Human Rights is eminently suited. While the ICC's orientation is by definition legalistic, as any court is, its creation was necessitated by political considerations. Because it is conceived in a political vessel, the ICC cannot be usefully comprehended outside the political mould in which it is congenitally cast.

However, before we plunge into the midst of these issues, I wish to shine the spotlight on the bare essentials of the ICC's character and South Africa's disposition to the ICC's creation.

Programme Director;

As an international tribunal, the ICC is charged with the responsibility to throw the book at perpetrators of mass commission of crimes against humanity, war crimes, and genocide.

In like manner, the current democratic South African state is founded on the notion of human rights and justice as enshrined in our Constitution, adopted in 996.Key values that define our democratic state include human dignity, human rights, equality, and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law. The centrepiece of our Constitution is the Bill of Rights, which contains civil and political rights, including justifiable socio-economic rights.

These values constitute the basis of our world view as a country, by dint of which South Africa, along with like-minded

African nations, played a major role in the negotiation of the Rome Statute, leading to the inauguration of the ICC in 2002.

Similarly, South Africa signed and ratified or acceded to a number of other international and regional human rights instruments, which include the United Nations (UN) International Covenant on Civil and Political Rights ; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ; and UN International Convention on the Elimination of All Forms of Racial Discrimination among others.

Our approach to foreign policy is steeped in these founding values, which are about contributing to a better Africa and a better world. In consequence, our subscription to the notion of the ICC as a nation is grounded in this theoretical background.

Programme Director;

The ICC's record on African cases has triggered off a deluge of passions from both African states-parties and non-states-parties to the Rome Statute, since it began executing its mandate in 2002. There has been restlessness from many African nations prompted by the perception that the ICC is biased against Africans. Some have even pointed out a few cases outside the African continent on which, they submit, the ICC could have set its judicial sights but, inexplicably, did or has not.

These accusations have met with the formal endorsement of the African Union (AU), thus receiving political gravitas that renders their ignorance unhelpful in the light of the urgency underlining humanity's moral responsibility to prevent gross human rights violations, prosecuting them where they occur and thus, serving justice for the victims of such violations.

My contention is that, because they cannot be ignored when situated in a broader global context, such charges against the ICC provide the necessary and sufficient grounds to reimagine a new judicial scenario that can respond to the yearnings of ordinary Africans for justice.

As such I beg your indulgence as I will be a little convoluted in my engagement, since I intend to make the case for the African Court through surfacing the perceived flaws militating against the ICC as sole universal dispenser of justice on the plane of human rights violations.

For a start, I would argue that in modern history any understanding of international institutions of governance cannot succeed until it takes into account prevailing meta-context, by which I mean the character of current geo-political power relations. You will know as much as we do that the world as we currently understand it is not a non-contextualised, non-problematised entity floating on the historical sea of objectivity.

We live in a world where power is at once critical, and decisive. Power comes in mainly two forms; hard power and soft power. The former is manifested in raw aggression typified by the famous phrase, 'survival of the fittest'. The latter is often nuanced yet tendentious nudging of the world into particular directions. In either case the ultimate object of wielding power is to serve the interests of the powerful, the global hegemons.

Further, it is a fact that at this point in history the West, meaning developed nations of Europe and North America, are perched at the commanding heights of global power. Calls for the reforms of the UN Security Council are prompted by this prevailing global experience. By the same token, our call as a country along with the AU and many nations from the South for a fairer world, including in the world trade regime that freezes some parts of the world outside the global mainstream of development, resonates with this understanding.

So, our lived reality, which means the Western political norms, constitutes the matrix in which the rest of the world derives its shape. In this way ethos of the powerful global forces is universalised as naturally beneficial to the international community. History is depicted as uni-directional, going against which is not only disastrous to one's interests but to those of humanity at large.

Consequently, the interests of global powers are presented as the natural advancement of the human race, promotion of democracy, the struggle against totalitarianism and so on. To pretend that these features of our historical landscape do not exist is as good as believing that the moon was made of cheese!

Consistent with this understanding of the patterns of history, some have argued that the ICC as a novel global conception of justice has not been able to disentangle itself from these perceptions of insidious machinations. In consequence, and most unfortunately, the ICC is beginning to be seen as transnational legitimization of hegemony.

We have already pointed out, at the beginning of this presentation, that selective prosecution is among accusations thrown at the face of the ICC. For instance, as du Plessis, Maluwa and O'Relly show in 'Africa and the International Criminal Court', 'countries from the South frequently complain of skewed power relations in the UN Security Council.

This imbalance has affected the ICC, under the Statute of the ICC (the Rome Statute), the Security Council has the power to refer cases to the court. The Security Council has referred some cases – Libya and the Sudanese region of Darfur – but not others…'[1]. Cases such as these have strengthened the

[1] Du Plessis, Max, Maluwa, Tiyanjana, O'Reilly, Annie: 'Africa and the International Criminal Court', July 2013

hand of those in Africa who look at the ICC as ‘an imperial plaything’. True, comparatively, Africa has experienced more cases that warrant ICC attention than any other part of the world. However, some would say there have equally been cases that the ICC could but did not prosecute..

Relations between the ICC and the AU took a turn for the worse when the former decided to charge President Al Bashir of the Sudan. What made matters worse was that the ICC took this action at a time when the AU was involved in a peace process in the Sudan and therefore fearing that threats of indictment would only compound an already brittle political situation.

Matters were not made any easier by the fact that the Sudan is a non-Party State to the Roman Statute, meaning its president could only be charged through a referral process by the UN Security Council, which is itself no stranger to accusations of unfairness, and whose composition manifests the reality of global unequal power relations referred to earlier.

Against this background are perceptions that powerful global players are both referees and players, making rules they do not abide by. We have heard similar questions asked about the impunity of some global players regarding the war against the Saddam Hussein regime in Iraq and the subsequent occurrences in Guantanamo Bay. The list continues…

Examples in terms of this type of double standards in how the world is governed abound, as the case of Liberia under former President Charles Taylor attests. Arguing in the article ‘Opening the other Eye’: Charles Taylor and the Selective Accountability, Richard Falk, American professor emeritus of international law at Princeton University, submits that many of the blood diamonds for which former Liberian President Charles Taylor was charged and convicted found ‘their way eventually on the shelves of such signature jewellery stores as Cartier, Bulgari,

and Harry Winston', and thereby circumventing some rather weak international initiatives designed to protect what was then considered the legitimate diamond trade.'[2] What this means is that western business interests are often party to if not fuel for African conflict. Yet no Western company has ever been charged with culpability where evidence for such exists.

Indeed, Africa has turned into a playground of foreign business interests falling over themselves in an indecent lust for her minerals, fully confident of the impunity they enjoy.

Clearly, there are demonstrable cases 'where disputes and civil strife in African nations have a global dimension as a covertly driven impulse. For instance some multinational companies have been reportedly implicated in the on-going strife in Nigeria, CAR, DRC, Sudan, Cabinda Enclave in the Angola and, Sierra Leone.

At stake are African resources such as oil, diamonds, timber, copper, uranium and coltan, among other minerals.

By its very nature the global context of these underlying conditions would suggest a continental approach to address this complicated internal African conflict. Without imputing the wholesale causes of African conflict to an extraneous source, it is imperative to appreciate the urgent need to cut off this invisible outside hand that stokes the fires of African conflict from which it continues to reap the benefits'[3].

Embedded Western interests cannot be divorced from some if not many on-going African conflicts…though they escape justice. Crudely put, one can argue that such outside interests that benefit from African mineral resources, whether during

[2] Falk, Richard: 'Opening the other Eye': Charles Taylor and the Selective Accountability, All Jazeera, May 1 2012.

[3] Address by the Deputy President of the Republic of South Africa Kgalema Motlanthe at the 15th African Renaissance, Durban, KwaZulu-Natal, 23 May 2013

conflicts or not, are not unknown to the Western bodies often leading the charge of prosecuting African parties to the conflict.

On this account, Falk shows that the Special Court set up for the nation of Sierra Leone following the Taylor inspired regional war was funded by Western nations, some of which have vested interests in a politically legitimate Sierra Leone which holds out potentially lucrative mining operations.

Particularly concerning for many African nations are the apparent double standards on display when powerful Western nations commit same political crimes for which African leaders are prosecuted. Writer Tim Murithi states that on the issues of genocide, war crimes and crimes against humanity permanent members of the UN Security Council should be held accountable the same way as Africans are.[4]

Worrying still is that Western nations are seen as swift in formulating laws governing the international criminal justice system to which they themselves are exempt. According to Falk 'it might be well to remember that the United States – more than any country in the world – holds itself self-righteously aloof from accountability on the main ground that any international judicial process might be tainted by politicised motivations'.

When such blatantly unequal power relations are at play, who could be blamed for refusing to wilfully submit to such dominant paradigms that uphold mono-thematic global agenda? Falk continues to contend that 'given the structure of influence in the world, there exist more reasons for Africans to be suspicious of such procedures than for Americans who fund such efforts, and who are so influential behind the scenes.'[5]

[5] ibid

Indeed the African Union passed a resolution in 2008 asking all its member states to adopt a policy of non-co-operation with the ICC after the indictment of President Al Bashir.

As yet the ICC has not come round to the understanding that issues of conflict in Africa are often not just black and white issues, but involved a vast spectrum of shades of grey. In fact, it has often been argued that most of African conflicts are rooted in colonial history. For instance, the Tutsi-Hutu conflict that culminated in the genocide of the former traced its historical roots to colonial relations, whose character pitted the one group against the other thus, leaving a legacy of inter-ethnic bitterness in its wake. As such, there are times when pure legalistic instruments are not enough to end conflict, at least not on sustainable basis.

It is often forgotten that the concept of modern state in Africa did not evolve organically within African conditions. Colonialism imposed borders on African societies, whose ethnic make-up it disregarded. As such post-colonial Africa inherited a difficult legacy. One party statehood as a means of preventing ethnic conflict was partly explained through this historical prism. Many African countries did not have well-functioning arms of the state, with serious implications for the independence of the judiciary. The inter-relationship between the arms of state was almost always warped.

In a perceptive argument in the New York Times, former South African President Thabo Mbeki and the African intellectual Mahmood Mandani show that legalistic approaches as espoused by the ICC, based on Western assumptions, have often proven inadequate to the peculiar African conditions. Contending that 'human rights may be universal but human wrongs are specific', they hold that '…rather than prioritising political reform, the international community tends to focus on criminalising the perpetrators of violence'[6].

[6] Mbeki, Thabo and Mamdani, Mahmoud: 'Courts Can't End Civil Wars',

The result is compounding an already explosive situation in that the whole shebang of historical and cultural nuances that shape modern socio-political identifies and self-consciousness are left out of account. Such consideration motivated the AU to ask the ICC for deferral of the arraignment of President Al Bashir, without much fruit. Hence the freezing of relations between the AU and the ICC. The authors of the above argument further demonstrate that 'the lesson of Codesa is that it is sometimes preferable to suspend the question of criminal responsibility until the underlying political problem has been addressed'.[7]

In light of this analysis where issues pertaining to history come into play, one may very well ask, especially in the light of the case for the African Court that we are making, as to whether the same limitations imposed by history will not hamstring the African Court given its legalistic orientation as a court of law? Indeed the answer is in the positive.

In this context the African Court is as much vulnerable as the ICC. However, there is a measure of elasticity in the case of the former that can allow the possibility to deal with matters in a pragmatic fashion. For instance, the African Court would have been sensitive to the unique nature of conditions of the Sudan for which appeals for deferral were made so as to prevent the scuppering of the peace process.

Of course it is equally true that this approach may render the African Court vulnerable to the machinations of powerful forces, a scenario not beyond the realm of possibility. However, the AU, as do all African nations and the masses of African people, move from same conceptual basis; that perpetrators of gross human rights violations have to answer for their crimes. On this account there is no let up.

[7] ibid

This is the reason we submitted earlier on, that victims of human rights violations should have unfettered access to the ICC as a court of last resort. For this reason the principle of complementarity remains critical. Our argument about the flexibility of the African Court is based on the fact that it will be an African entity, amenable to peculiar African conditions. Take for instance, the case of Codesa in South Africa. As Mbeki and Mamdani show, imagine a scenario where the ICC insisted on charging all the key players to the Apartheid conflict purely on legalistic grounds, disregarding the historical conditions at play before 1994[8].

In such a case the simplistic legalistic approach may mete out justice but not guarantee long term national reconciliation a la Truth and Reconciliation Commission, nor finding a lasting solution that lays the basis for post-conflict peace-building and reconstruction.

Programme Director;

So far we have tried to demonstrate current limitations of the ICC as it relates to the African situation. It bears repeating that the ICC is an ideal international judicial institution to help humanity access justice for crimes that should have never been committed in the first place. At the same time, we have argued that Africa needs a Court which, located within its existential experience, will readily dispense justice on matters of genocide, crimes against humanity and war crimes.

Efforts are afoot for the jurisdiction of the African Court on Human and People's Rights to extend to the three core international crimes (genocide, crimes against humanity and war crimes) which are also found in the Rome Statute of the ICC. Yet this process is held up by other complications.

[8] ibid

The Commission dealing with this process decided to also include crimes contained in other AU instruments, e.g. corruption, mercenarism, terrorism, piracy, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and unconstitutional changes of government.

There were long debates on whether the other crimes, apart from the core international crimes, must be included, many states feeling that this should not be the case. However, the Commission could not be moved and interpreted Summit's decision to the effect that they must be included. Of course, if only the three core crimes were included, which have internationally-accepted definitions in the Rome Statute and in the domestic law of states, the negotiations could have been concluded by now.

It appears that the negotiations will now again be re-opened in September. In the light of all these development my view is as the negotiations have now stalled, it will take some time to finalise a text.

Should agreement on the text be reached, it must be ratified by at least 15 member States of the AU to enter into force (and then only for those who ratified) and this may take several years. Nonetheless, I am confident that with time an agreement will be reached, breaking new ground for Africa. If the new structure is established, it may be called the African Court of Justice and Human and Peoples' Rights.

Meanwhile as a country South Africa supports the international criminal tribunals working on African situations and the work of the AU to develop a criminal jurisdiction for the African Court. We look forward to the day when our efforts to protect human rights and promote democracy in Africa will result in these tribunals having an empty caseload.

In conclusion, I would like us to remember that tragic and needless loss of life on our continent has been happening so long that it now has the appearance of a natural human landscape.

These fragile human conditions for Africans should be stopped dead in their tracks. It is an indictment on the human race that such inhuman acts as genocide, crimes against humanity and war crimes can continue in the one part of the world contemporaneous with decadent enjoyment of the riches resulting from self-same dehumanising theatre of war.
We therefore have the duty to build institutions attuned to our yearning for peace, stability, human security, as well as development and social advancement.

In this regard we support the ICC, albeit aware of its inadequacies. We look forward to the day when right relations emerge between the ICC and the African Court, focusing on the mandate of punishing perpetrators of human rights violations. We also look forward to the day when such African Court is well equipped to address judicial conditions on our continent and this way secure a better life for Africans.

I thank you.