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International Criminal Court

**'The International Law Commission and the fight against impunity'**

Keynote address

*[Delivered as part of the 70th anniversary of the International Law  
Commission]*

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1. 'Never again'. That was the defining global commitment that gave early impetus – 70 years ago – to the work of the 'International Law Committee' (as it then was called).
2. 'Never again' was the resolve that inspired the 'International Law Commission' (as it was later renamed and so remained), to rekindle and sustain hope in the world, that one day it would be possible to create a permanent international criminal court – as an assurance policy against impunity, when human beings subject one another to gross violations that shock the conscience of humanity – though that hope had been still-born in the Treaty of Versailles in 1919.
3. 'Never again' was given actionable affirmation when the international community acted upon ILC's encouragement 20 years ago, and adopted the treaty now famously called the 'Rome Statute' – creating and organising the International Criminal Court, which I am immensely honoured to serve as President.
4. AND, NOW, I ask: 70 years after the ILC encouraged the dream, and 20 years after the dream was made treaty, how are we doing with 'never again'? We must reflect on that question.

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Mr Counsel,  
Esteemed Commissioners,  
Excellencies,  
Ladies and Gentlemen,

5. It is truly a high honour for me to address you today. I thank the Permanent Missions of Brazil, Republic of Korea, Slovakia and Switzerland for inviting me. We are all indebted to them for commemorating, in this way, both the 70<sup>th</sup> anniversary of the ILC, as well as the 20<sup>th</sup> anniversary of the Rome Statute.

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6. With an emphasis on the fight against impunity, our discussion today is wholly timely, indeed. Sadly, perhaps, more so than we should have hoped. Regrettably, accountability for the gravest crimes under international law remains a seemingly disheartening challenge for the international community. But, it is a challenge that we must confront steadfastly – without trepidation: for as long as that challenge endures.

7. And, for as long as the world has not abandoned altogether the promise of ‘never again’, to cower before impunity for grave atrocities could never be an option.

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8. Today’s gathering is a welcome opportunity for serious reflection on how we may take that struggle a little further. And, in doing so, employ – to the fullest – the potentials of the organisations and bodies at our disposal. But, once more, I harken back in time.

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9. Article 13(1)(a) of the UN Charter contemplated that the General Assembly shall initiate studies and make recommendations for the purpose of ‘*promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.*’ This, of course, is the provision that fostered the conception and birth of the ILC.

10. But, did the drafters imagine that they were, by that provision, also planting the seed of a permanent international criminal court that would be established 50 years later? Such imaginings would have been regarded as much too fanciful at the time, if the fate of article 227 of the Treaty of Versailles was

anything to go by. [We may recall, of course, that it was in article 227 that Allied and Associated powers not only announced a public arraignment of Kaiser William II, but more importantly declared the revolutionary idea of establishing a special international tribunal to try him, for what in today's parlance would be described as violations of international criminal law.]

11. NOW, although the Charter's drafters may not have had the establishment of a permanent international criminal court in mind, in 1945. We, must, nevertheless give them due credit for their foresight that the progressive development and codification of international law would form an integral part of the UN's mandate.

12. And for 70 years, the ILC, as the UN's primary agent of that endeavour, has carried out highly significant work, in that regard, as – a veritable pillar of the international community's aggregate efforts toward a peaceful world based on the ideals of the rule of law.

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13. As early as 1950, at its second session, the Commission enthused ambitious aspirations, to the effect that 'the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes'<sup>1</sup> was both desirable and possible.

14. Constrained by the geo-political vagaries of the time, not least of which was the incidence of the Cold War, those aspirations remained highly improbable. But they were never abandoned. The testament to their endurance is evident in the ILC's inspirational draft instruments that laid the foundation for what would be adopted eventually as the Rome Statute, on 17 July 1998. Those draft instruments included draft codes of crimes and offences against peace and security of mankind

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<sup>1</sup> A/1316, paras. 128-145, at paras. 140 and 145

(1991 and 1996) and, in between them, the draft statute for an international criminal court (1994).

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15. Anyone working with the Rome Statute needs only to glance at the ILC draft statute for an international criminal court to recognise familiar themes and texts.

16. The Rome Statute does, of course, contain other innovations which were not present in the ILC draft, or significantly altered iterations of it. But all those innovations and variations were in the nature of things – and all in the day’s work of catalysts. Catalysts spur propulsion, and the resulting kinetic energy takes over and does the rest. ILC was that catalyst for the ICC.

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17. Today, the relationship between the ICC and the ILC continues through references to each other’s work. The Chambers of the ICC frequently cite the 1994 ILC draft when seeking inspiration for the interpretation of relevant provisions of the Rome Statute. There is frequent reference in our case law to the Nuremberg Principles – the Third Nuremberg Principle (which eschews immunity by virtue of office) being one of my personal favourites.

18. And the ILC’s current work on issues such as crimes against humanity is of course closely followed by all scholars and practitioners of international criminal law, including those of us working at the Bench and Bar of the ICC.

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19. As we strive to interpret the provisions of the Rome Statute dealing with crimes against humanity, we will hope for a cross-pollination of ideas: in ways

that will ensure that humanity is seen to enjoy the maximum dividends of the protection that was intended in the proscription of that crime.

20. Notably, one of the questions that have troubled us in the recent jurisprudence of the Court is whether an aggregate entity – specifically an organisation or a State – must really be proven to be complicit in criminal conduct before that conduct can qualify as a crime against humanity triable at the ICC. Though some of us have done our best to answer it, that question remains at large for now.

21. I must hope that there will be a convenient opportunity in the nearest future for a get-together between ICC judges and the Commissioners, in Geneva or The Hague, for such exchange of ideas.

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Excellencies,  
Ladies and gentlemen,

22. I could go on with this discussion, but time gets in the way. Suffice it to say, however, that we will always be indebted to the Commission for its historic contribution to the adoption of the Rome Statute – a moment that will remain one of the greatest landmarks in the development of international law in the 20<sup>th</sup> century.

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23. Twenty years after the adoption of the Statute, the ICC has come quite far, probably much farther than most of us expected in 1998.

24. The ICC was created to ensure accountability for the gravest crimes and to afford the consolation of justice to victims of those crimes. And it is doing so. With 123 States Parties, the Court enjoys broad support across the world – though we

strive for universal ratification. International criminal justice, for the purposes of accountability, is here to stay.

And yet, we cannot rest content. And while we must and do commemorate the 20<sup>th</sup> Anniversary of the Rome Statute this year, we do not celebrate.

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25. In their hit song of the 1980s, the Australian rock band, Midnight Oil, sang the questions:

*'How can we dance, When our earth is turning?'* and

*'How do we sleep, While our beds are burning?'*

26. Indeed, in the 20<sup>th</sup> year of the Rome Statute, the world has turned upside down and the beds are in flame – in more ways than by mere metaphor – for many a thousand parts of our humanity who are apparent victims to the very crimes that the Rome Statute was adopted to deter.

27. How, then, can we chant 'cheers' this year, when those many thousand parts of our humanity look in the mirror in our behalf – and we in theirs – as we collectively ask ourselves: are we still sure about 'never again'?

28. That is a question that must trouble us at the ILC and at the ICC; it must trouble us at the UN Security Council and at the General Assembly and at the African Union and the Arab League; and, it must trouble us everywhere that allows resonance to Dr Martin Luther King's injunction that 'injustice anywhere is a threat to justice everywhere'; and, if I may add ... every time.

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29. In a moment of magic 20 years ago, the world came together with a shared commitment to ensure accountability for the gravest crimes. No doubt, that spirit

of magic has left us now. Enchanted moments never last 20 years. But, has the enthusiasm surrounding international criminal justice also gone?

30. I should like to insist that the enthusiasm is still there: even if in a condition of suspended animation. But, we have reason to worry that the enthusiasm for international criminal justice is often obscured nowadays by budgetary anxieties on the part of even some of the Court's foremost supporters, about how much the Court costs; and, the enthusiasm is frequently distracted by emotive political concerns often based on misinformation about the work of the Court.

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31. And, then, we must add to all of that the ugly reality that the enthusiasm for the ICC is often under calculated onslaught, on account of certain preferences of individuals, pursued in the name of Government or State: which preferences find the existence of the ICC acutely inconvenient.

32. The repose of decency often discourages imagination from associating these preferences – especially in their incubatory stages – with the preferences of those whose conducts informed the very *raison d'être* of the ICC. That *raison d'être* being to PREVENT or DETER 'unimaginable' atrocities that shock the conscience of humanity.

33. But, forgive me for asking this: what use is there for impassioned outrage against 'unimaginable' atrocities after the fact – with eminent tables pounded for added measure – if imagination is to be discouraged from conceiving the possibility of those atrocities, before the fact? Perhaps, it is time to yield to the rude realism that the history of evil that we all share – whether as victims or witnesses, perpetrators or prosecutors – should wean us off our much cherished – yet much over-aged – innocence, which pretends that we should still find any atrocity to be 'unimaginable' in this day and age.

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34. At the Court, our most fervent hope – for the sake of ‘never again’ – must be that the enthusiasm of 20 years ago, conceived by the aspirations of 70 years ago, is not overcome by the worries described above.

35. On the 20<sup>th</sup> anniversary of the Rome Statute, we must re-energise the mission of the ICC, which the ILC launched 70 years ago.

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36. That is to say: let us use the occasion of the 20<sup>th</sup> anniversary of the Rome Statute – and the 70<sup>th</sup> anniversary of the ILC – to reflect on the enduring value of the Rome Statute to humanity.

37. Victims of atrocities everywhere deserve justice. And that is what the ICC is ready to deliver. We are grateful to the ILC for starting the discussion that catalysed the long process that eventually realised that readiness.

38. But there is still much to do. We invite the ILC to continue its leading role in the discussion, in ways that encourage every State, every international organisation, and every individual, to reflect more deeply on how that global project of accountability must remain robust. And in so doing, to renew – in an actionable way – the pledge of ‘never again’, a concern that actuated the very first work programme of the ILC 70 years ago.

39. For the sake of humanity, and on behalf of the ICC, I wish the ILC a most productive 70<sup>th</sup> anniversary.

I thank you.

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