

Is the International Criminal Court Effective

By Professor Steven Freeland – Professor of International Law, UWS

On 11 August 2014, Professor Steven Freeland presented our first Information Night for 2014. Steven gave attendees some homework prior to the night – read two articles and come ready to argue for or against the proposition:

“International criminal law is ineffective with respect to crimes against the international community. The ICC only adds to this ineffectiveness.”

The surprise was that attendees didn't know what side they would get until the night. Following are the two articles that Steven asked to be read and the text from slides from the nights PowerPoint.

Some Criticisms of the ICC:

Justified?

- *A 'pressure to convict' mentality*
 - *A political (rather than legal) institution*
 - *Selective prosecutions*
 - *Relationship with the UNSC*
 - *Far removed from victims*
 - *Incompatible with Peace*
 - *Too slow - lengthy pre-trial detention / trials*
 - *Unfair / equality of arms / rights of accused*
 - *A trend towards deals done?*
 - *Too costly – money could be better spent*
 - *Lacking appropriate 'tools' for enforcement*
 - *Racist / Neo-colonialist*
 - *Incompetence / mistakes / egos*
 - *Lack of expertise / consistency / institutional knowledge*
 - *'Overreach'*
 - *'Underreach'*
 - *Uncertainty as to 'goals'*
 - *Can / does it really contribute towards 'ending impunity'?*
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**Revisiting the 'goals' of International Criminal Justice:
Are we fulfilling them?
If not – then how to do it?**

Macro level	Micro level
Reconciliation	Guilt / Innocence
Retribution	Revenge
Reparation	Justice
Rehabilitation	Individual memory
Deterrence / Prevention	Closure / satisfaction
Peace / Justice	A voice for victims
Historical record	Others?
Collective memory	
Individual responsibility	
A transparent process	
Others?	

The 'truth'? / 'justice?'

The International Criminal Court

Possible Measures of 'Success' (revisited)

Are We Clearer Now?

- The end to all Wars / Conflicts?
- A reduction in the number of Wars / Conflicts?
- Many Prosecutions by the ICC (and other international Courts)
- Greater accountability within State (Criminal Justice) Systems?
 - 'Complementarity' – a good idea ... or is it?
 - Can State systems work for mass atrocity crimes?
 - Other accountability methodologies (Truth Commissions etc) – complementary or supplementary
 - OR
 - Political negotiated 'solutions'?

Courts Can't End Civil Wars

By *Thabo Mbeki and Mahmood Mamdani*

Thabo Mbeki, president of South Africa from 1999 to 2008, has served as an African Union envoy to Sudan and South Sudan. Mahmood Mamdani is executive director of the Makerere Institute of Social Research in Kampala, Uganda, and a professor at Columbia University.

New York Times

The Opinion Pages | Op-Ed Contributors

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Credit André da Loba

The conflict in South Sudan is only the latest instance where extreme violence has erupted after a breakdown of political order. But rather than prioritizing political reform, the international community tends to focus on criminalizing the perpetrators of violence.

Since the end of the Cold War, the world has looked to the Nuremberg Trials as a model for closure in the wake of extreme violence; international criminal trials are the preferred response. This common sense should have come under scrutiny in recent months after a growing number

of countries in the African Union advocated withdrawal from the International Criminal Court. Instead, the debate has focused on the motives of African leaders, not on the inadequacy of court trials as a response to politically driven mass violence.

The International Criminal Court is built on the model of Nuremberg. But mass violence is more a political than a criminal matter. Unlike criminal violence, political violence has a constituency and is driven by issues, not just perpetrators.

The clearest alternative to the Nuremberg model since the trials ended in 1949 is the complex set of negotiations, known as the Convention for a Democratic South Africa (Codesa), which brought an end to apartheid in the 1990s. The Codesa negotiations involved the ruling National Party, the African National Congress and a variety of other political organizations. They succeeded in putting together a constitution that would inaugurate a new post-apartheid political order. 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.

Nuremberg unfolded as part of a contrary logic. In a short period of time, the Allies carried out the most far-reaching ethnic cleansing in the history of Europe, not only redrawing borders but moving millions across national boundaries. The overriding principle was that there must be a safe home for survivors. The term "survivor" was itself a post-Holocaust innovation: It applied to yesterday's victims. The assumption was that victims' interests must always be put first in the new political order.

Central to the kind of justice dispensed at Nuremberg was the widely shared assumption that there would be no need for winners and losers (or perpetrators and victims) to live together in the aftermath of victory.

But South Africa's whites and blacks did have to live together in a single country — just as Hutus and Tutsis had to live together after Rwanda's genocide.

South Africa's Codesa talks represented a recognition by both sides that their preferred option was no longer within reach: Neither revolution (for the liberation movements) nor military victory (for the regime) was in the cards. Both sides were quick to grasp that if you threaten to put your opponents in the dock, they will have no incentive to engage in reform.

Rather than criminalize or demonize the other side, as was tempting, they sat down to talk. The process was punctuated with many a bloody confrontation, like the assassination of the popular South African Communist Party leader, Chris Hani, but the eventual outcome decriminalized the alleged perpetrators and incorporated them into the new political order. Yesterday's mortal enemies became mere adversaries.

Just as the violence in South Africa in the early 1990s was a symptom of deep divisions, the same is true of extreme violence in today's Kenya, Congo, Sudan and South Sudan. Nuremberg-style trials cannot heal these divisions. What we need is a political process driven by a firm conviction that there can be no winners and no losers, only survivors.

South Africa's transition was preceded by a political settlement in Uganda at the end of the 1980-86 civil war. The political solution took the form of a power-sharing arrangement known as the "broad base," which gave cabinet positions to opposition groups (including leading members of Idi Amin's regime) that agreed to renounce violence.

The peace process in Mozambique decriminalized Renamo, a guerrilla opposition group aided and advised by the apartheid regime, whose practices included the recruitment of child soldiers and the mutilation of civilians. Renamo's commanders and figureheads were brought into the political process and invited to run in national and local elections.

The "broad base" deal in Uganda, the South African transition and the postwar resolution in Mozambique were all achieved before the International Criminal Court came into existence.

There is a time and a place for courts, as in Germany after Nazism, but it is not in the midst of conflict or a nonfunctioning political system. Courts are ill-suited to inaugurating a new political order after civil wars; they can only come into the picture after such a new order is already in place.

Because criminal trials are driven by a winner-takes-all logic — you are either innocent or guilty — those found guilty and punished as perpetrators are denied a life in the new political order. And this can be a dangerous outcome, as South Africans on both sides realized when they sat down to negotiate the end of apartheid.

In civil wars, no one is wholly innocent and no one wholly guilty. And extreme violence is seldom a stand-alone act. More often than not, it is part of a cycle of violence. Victims and perpetrators often trade places, and each side has a narrative of violence. To call simply for victims' justice, as the I.C.C. does, is to risk a continuation of civil war.

Human rights may be universal, but human wrongs are specific. To think deeply about human wrongs is to wrestle with the problems that give rise to acts of extreme violence, which means fixating less on perpetrators and particular atrocities, and being more alert to issues that drive continuous cycles of conflict from which communities need to emerge. For this to happen, there can be no permanent assigning of victim and perpetrator identities. Instead, there must be a political process where all citizens — yesterday's victims, perpetrators and bystanders — may face one another as today's survivors.

Most colonized societies have at some point experienced one or another form of civil war — often as a result of debates over who was complicit in colonial rule and who was not. These societies tend to fracture further over who does or does not belong to the nation, and who qualifies for citizenship.

The United States also had a civil war. Its fault lines were already visible nearly a century before, at independence. Americans would do well to remember that the country's political leadership was wise enough to rule out court trials for the defeated at the end of the Civil War and instead opt for Reconstruction.

In Africa, Seeking a License to Kill

By Desmond Tutu

Desmond Tutu, the Anglican archbishop of Cape Town from 1986 to 1996, won the Nobel Peace Prize in 1984 for his contribution to opposing apartheid.

New York Times – 10 October 2013

The Opinion Pages | Op-Ed Contributors

CAPE TOWN — MEMBERS of the African Union will meet in Addis Ababa, Ethiopia, today to discuss recent calls by some African leaders to withdraw from the International Criminal Court. These calls must be resisted. The continent has suffered the consequences of unaccountable governance for too long to disown the protections offered by the I.C.C.

Those leaders seeking to skirt the court are effectively looking for a license to kill, maim and oppress their own people without consequence. They believe the interests of the people should not stand in the way of their ambitions of wealth and power; that being held to account by the I.C.C. interferes with their ability to achieve these ambitions; and that those who get in their way — the victims: their own people — should remain faceless and voiceless.

Most of all, they believe that neither the golden rule, nor the rule of law, applies to them.

But they know that they cannot say these things in public without repercussions. Instead, they conveniently accuse the I.C.C. of racism.

At first glance, the claim might seem plausible. The I.C.C., founded in 2002 and based in The Hague, has so far considered only cases against Africans. But this is partly because independent tribunals that were established to handle cases concerning the former Yugoslavia, Cambodia and other countries have naturally led to a reduction in the scope of the court's activities.

So far, 32 people have been publicly indicted by the court, with only one conviction, of Thomas Lubanga, for war crimes in the Democratic Republic of Congo. But many of the investigations were not initiated by the court or a foreign body; they were referred to the court by African governments themselves. The judges and investigators were invited in.

So the African focus of the court should not be seen as an indictment of its neutrality but of the quality of leadership and democracy in many African countries. When thousands of people are murdered and displaced in any country, as in Sudan, for instance, ideally the country's own system of justice will redress the wrongs. That is not in dispute. But when that country is unwilling or unable to restore justice, as is the case in many African countries, who should represent the interests of the victims? Critics of the I.C.C. say, "Nobody." They simply vilify the institution as racist and unjust, as Hermann Göring and his fellow Nazi defendants vilified the Nuremberg tribunals following World War II.

While some African leaders play both the race and colonial cards, the facts are clear. Far from being a so-called white man's witch hunt, the I.C.C. could not be more African if it tried. More than 20 African countries helped to found the I.C.C. Of the 108 nations that initially joined the I.C.C., 30 are in Africa. Five of the court's 18 judges are African, as is its vice president, Sanji Mmasenono Monageng of Botswana. The court's chief prosecutor, Fatou Bensouda, who has huge power over which cases are brought forward, is from Gambia. The I.C.C. is very clearly an African court.

Leaving the I.C.C. would be a tragedy for Africa, as leaders like the former United Nations secretary general Kofi Annan, of Ghana, have noted. Without its deterrence, countries could and would attack their neighbors, or minorities in their own countries, with impunity. When Lubanga was arrested to face charges of enlisting and conscripting child soldiers, the threat of the I.C.C. undermined his support from other militias. After the Ivory Coast strongman, Laurent Gbagbo was taken to face justice in The Hague, the country was able to rebuild.

Without this court, there would be no brake on the worst excesses of these criminals. And these violent leaders continue to plague Africa: the Great Lakes, Mali, northern Nigeria and Egypt all give reason for concern. Perpetrators of violence must not be allowed to wriggle free.

Moreover, where justice and order are not restored, there can be no healing, leaving violence and hatred ticking like a bomb in the corner. We know too well that long, painful road to healing in South Africa, as do the people of Kenya. As Africa begins to find its voice in world affairs, it must strengthen its commitment to the rule of law, not undermine it. These principles are part of our global moral and legal responsibility, not items from a menu we can choose only when it suits us.

Along with thousands of others, I have joined a campaign by Avaaz, an international advocacy group, calling on Africa's leaders to stay in the I.C.C. The alternatives are too painful: revenge, like what happened in Rwanda, Kosovo and Bosnia, or blanket amnesty and a national commitment to amnesia, like what happened in Chile. The only way any country can deal with its past is to confront it.

We need loud voices in Addis Ababa to deliver this message, to shout down those who want us to do nothing. We also need the continent's heavyweights, Nigeria and South Africa, to exercise leadership and stop those who don't like the rules from attempting to rewrite them. Far from a fight between Africa and the West, this is a fight within Africa, for its soul.

This article has been revised to reflect the following correction:

Correction: October 15, 2013

An Op-Ed article on Friday about Africa and the International Criminal Court misspelled, at one point, the surname of a warlord convicted by the court. He is Thomas Lubanga, not Lubunga. The article also misstated the year of Mr. Lubanga's arrest. It was in 2005, not two years ago.

Brothers freed after 30 years in jail amid new DNA evidence.