

## **Justice Richard Goldstone**

The field of international criminal justice is a relatively new one. It has grown rapidly. International criminal law really developed as a result of catastrophes; without the Holocaust and the other crimes of the Nazi leaders there would have been no Nuremburg trials; similarly with the Japanese leaders and the Tokyo trials. However, international criminal law really came into being as a result of the catastrophic wars in the former Yugoslavia during the first half of the 1990s.

The international community had ignored, from a legal point of view, other catastrophes, such as the murder of two million people in Cambodia and the genocide committed by Saddam Hussein against the Kurds in Iraq. Those did not result in international tribunals, but the war crimes committed in the former Yugoslavia did. Those events took place in Europe and the European powers felt that something had to be done.

The United Nations Security Council, to the surprise of international lawyers, decided that it had the power to set up an International Criminal Court for the former Yugoslavia, using its powers under the UN Charter.

A few months later, there was a terrible genocide in Rwanda. Rwanda requested an international court to look into this. Had the Rwanda genocide happened before Yugoslavia, there would not have been a criminal tribunal for Rwanda. The European situation gave rise to the precedent and Rwanda came on its back, as it were.

Nuremburg was not an international court. It was a multinational court set up by the victorious powers. Nevertheless, the Nuremburg legacy affected the way international criminal law has developed from the 1990s until the present. Nuremburg resulted in important developments in 1949 Geneva Conventions, which recognised universal jurisdiction – the idea that some crimes are so terrible that they can be brought before the courts of any country that has jurisdiction to hear universal cases. It resulted in the Genocide Convention, the Universal Declaration of Human Rights, the Human Rights Conventions of the 1960s and the international convention that declared apartheid a crime against humanity – though, unfortunately, not a single country used that convention to launch such an investigation. The Torture Convention of 1984 led to General Augusto Pinochet being arrested in London.

Following Yugoslavia and Rwanda, tribunals were set up for East Timor, Sierra Leone, Lebanon and, though it was 20 years later, for Cambodia. These courts got huge attention in the media. This is something new. There was not a law school in the world before the mid-1990s with a course in international criminal justice. Today, most law schools have such courses.

The successes of the UN tribunals led to a movement to set up a permanent ICC. Kofi Annan, then UN Secretary-General, called a diplomatic conference in The Hague in 1998 and a statute was agreed to setting up a permanent ICC. The parties in The Hague set a high threshold before the court could begin its work – 60 nations had to ratify what was called the Rome Statute. Optimists thought this would take at least a decade. It took less than four years. In 2002, the 60th ratification was made and today 120 nations have ratified the statute – nearly two thirds of the members of the UN General Assembly.

South Africa played a key role in getting the support of the first 60. I know from personal experience that the Nelson Mandela government felt very strongly that the ICC was important.

Nine or ten southern African countries ratified the statute. South African lawyers and South Africans generally can be proud of the role our government played here.

The difficult country, of course, is the United States. Like other powerful countries, it does not like international courts second-guessing its leaders' decisions. But without the US there would have been no Yugoslavia, Rwanda, Sierra Leone, Cambodia or Lebanon tribunals. Serbian leader Slobodan Milosevic would not have gone to The Hague without the US threatening to withdraw aid from Serbia.

However, the US got cold feet when it came to the ICC. The Pentagon told the Clinton administration and later the Bush administration that if its generals were to be investigated they had to be investigated at home. So the US's attitude – and I don't think I'm being unfair – was to say to the rest of the world, "We think this ICC is a great idea – for you. But leave us out."

The George W Bush administration made it a criminal offence for any US official to assist the court. It passed ridiculous legislation authorising the US Army to rescue any American brought before the court in The Hague – and you can imagine how popular that was in Europe. Things began to change when genocide and other war crimes occurred in the Darfur region of The Sudan. Colin Powell, then the US Secretary of State, said what was happening in Darfur was genocide. Two weeks later the US Congress passed a unanimous resolution agreeing with him.

The UN set up a commission of inquiry, presided over by a former president of the Yugoslavia tribunal, Antonio Cassese. He reported that serious war crimes were being committed – perhaps not genocide, but certainly crimes against humanity. He suggested the Security Council refer the case to the ICC under the Rome Statute.

The Bush administration threatened to veto this in the Security Council but it ended up abstaining. A year later, the US agreed to assist the ICC.

I am teaching a course this coming March at Yale, a course I will call "The Political Dimensions of International Criminal Justice". It is all about politics. If you do not understand the politics of international justice, you do not understand international justice.

Politicians are responsible for seeing the ICC succeed. Arrests need to be made but the ICC has no police force or army. It has to rely on governments, and that is a problem. According to Cassese, international courts were like a body with no limbs. They had a head and a brain, but no arms or legs. The limbs had to come from governments.

The first three cases to come before the ICC were referred by African governments. Cases can only come to the ICC from governments, the Security Council, or by the ICC prosecutor using his or her own powers of investigation.

The first case came from Uganda. President Yoweri Museveni referred to the ICC the so-called Lord's Resistance Army (LRA) and its terrible war crimes – limbs being cut off and children being forced into armies. The second case came from the Democratic Republic of the Congo and the third from the Central African Republic. The fourth case, Darfur, came from the Security Council. The fifth was referred by the Côte d'Ivoire government and the sixth, Libya, by the Security Council. In the Libya case, remarkably, support was unanimous – the US, Russia, China – all of them – 15 to nothing. The seventh and last case before the court, to do with

crimes allegedly committed in Kenya during the recent elections, comes via the ICC prosecutor using his own powers.

What has happened since then? When the LRA people were indicted and arrest warrants issued, African governments found that acceptable. But they got irritated and fearful when a head of state was indicted. The ICC issued a warrant of arrest against President Omar al-Bashir of Sudan and the African Union (AU) became apoplectic.

The AU and some African leaders accuse the ICC of being anti-African. I understand the perception. The ICC is nearly 11 years old and all seven cases before it come from Africa. It is unfortunate but it is hardly the fault of the court. Only one case (Kenya) was not referred by an African government or the Security Council.

As a strong supporter of the ICC, I will sleep easier when there are cases before it that come from continents other than Africa. And it will happen.

The ICC has demonstrated that international courts can work. Generally speaking, there is acceptance in the international community that the trials before the ICC have been fair. Compare international criminal law in 1994 to international criminal law in 2012. It is a different animal. Laws have been advanced, interpreted, applied. That has made a huge difference to the whole body of international law.

Most importantly, these courts have withdrawn impunity for war criminals. Before the ICC, war criminals felt they were beyond the law. War criminals are often seen as heroes in their own countries and, if there was no ICC, they would have impunity. It can put a brake on war crimes only if leaders are aware that what they do could end up with them in the dock at the ICC. That is the challenge, particularly for the reasons I have mentioned, for African countries. Fortunately, South Africa has been a firm supporter of the ICC.

The court's work has been slow. It started its work in 2002 and the first judgement in the first trial is about to be given. It has taken a long time.

From the middle of this year, the Chief Prosecutor of the ICC will be an African – and a woman. This is important. Fatou Bensouda, a former Minister of Justice in the Gambia, will take office in June. Hopefully, her leadership will make a difference as far as our continent is concerned.

**This is an edited version of a lecture given by Justice Goldstone at the University of the Free State on February 2, where he received an honorary degree. Justice Goldstone served in the Constitutional Court from 1995 to 2006 and was the Chief Prosecutor in the UN's Yugoslavia and Rwanda tribunals.**