

DECRIMINALISATION OF MASS MURDERS, RAPE AND SEXUAL VIOLENCE — A CRITIQUE OF PRESIDENT MBEKI AND PROF MAMDANI

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In an opinion article titled "Courts can't end civil wars" by South African President Thabo Mbeki (1999-2008) and Prof Mahmood Mamdani of Makerere and Columbia Universities published in the *New York Times* (5 February 2014), the two argued that civil wars can only be ended by peace talks where former foes sit together at the negotiating table and hammer out political settlements. They suggested that threat of criminal prosecution can stifle peace efforts, presumably as leaders and warlords facing possible life sentences before International Criminal Court (ICC) calculate that they have nothing to lose by continuing to fight. Mbeki and Mamdani forcefully argued that the mass crimes committed in armed conflicts are political rather than criminal. They suggest it is preferable to suspend questions of criminal accountability until the underlying political problems are resolved. The argument fails to address the rights of victims and fair trial issues. It is a blueprint for impunity.

At a public debate on 14 February 2014 on the subject "Can Courts end civil wars?" organised jointly by Kenyatta University and the *Nation Media Group's* East African University Debate Series, Mamdani argued for decriminalisation of mass murder and drew a distinction between what he described as 'political violence' and 'criminal violence'. Mamdani rejected what he termed a false divide between 'victims' and 'perpetrators', and submitted that there is a need for recognition of victims, perpetrators and bystanders as 'survivors' who have to live in peace. The lumping of victims alongside perpetrators is particularly

disturbing for victims of rape and sexual violence. Arguably, Mamdani's logic that sustainable peace-making requires a "political process where all citizens — yesterday's victims, perpetrators and bystanders — may face one another as today's survivors", may politically sound persuasive, but it is disrespectful to victims.

Mamdani's other argument that "in civil wars no one is wholly innocent and one is wholly guilty [because] victims and perpetrators often trade places and each side has a narrative of violence", is flawed. Victims of rape do not trade places with their perpetrators. My experience at the International Criminal Tribunal for Rwanda (ICTR) is that many victims of rape who testified at Arusha before the Chambers do not consider perpetrators to be survivors.

Mbeki's and Mamdani's arguments that if the underlying motivation for mass murder, rape and sexual violence is political, then the resulting murder of innocent civilians must be treated as political rather than criminal, and that victims and perpetrators are all survivors, ignores basic legal principles that govern proof of guilt and individual criminal responsibility for crimes committed in internal armed conflict. Significantly, the fact that a perpetrator has a political constituency does not make his criminal acts legal. It is neither a lawful defence nor a reasonable excuse for a perpetrator of mass murder or rape to argue that he is a survivor by virtue of his political belief. The elements necessary to prove guilt of an accused, as well as the principles that govern individual or superior responsibility, are based on law, not on the political constituency to which an accused belongs.

Mbeki's and Mamdani's reasoning that "unlike criminal violence, political violence has a constituency and is driven by issues, not perpetrators" tends to justify criminal acts of the likes of General Mobutu of Zaire (Democratic Republic of the Congo — DRC) and General Amin of Uganda. These 'leaders' were responsible for mass murders in their respective countries yet, according to Mbeki and Mamdani, because they had 'political constituencies', they would not be held to account. Does this mean that Rwanda's genocide-era Prime Minister Kambanda and Liberia's war time President Taylor who had 'political constituencies' arguably should have been included in the post-conflict political arrangements?

Second, Mbeki's and Mamdani's reference to South Africa, Uganda and Mozambique as examples of the irrelevance of courts in solving post-conflict political conflicts in Africa is disingenuous and mis-

leading. In South Africa, the African National Congress (ANC) traded power for peace; the leaders of the *apartheid* government accepted freedom from prosecution for human rights abuses in exchange for power sharing. The ANC acquired power through peaceful and legitimate elections and few, if any, senior *apartheid*-era officials have been punished for the crimes committed during *apartheid*. It is too early to conclusively state whether the choice not to prosecute perpetrators has been a success. Only time will tell.

In Uganda, President Museveni recognised early in 1986 that the National Resistance Army (NRA) military victory did not translate into a political constituency. Museveni lacked political support in most of the country and, for political survival of the National Resistance Movement (NRM), he absorbed all manner of suspects, including former soldiers of the Amin regime responsible for mass murders in his army and government. However, the absorption of these criminal elements did not end armed conflict which continued in northern Uganda for a further 26 years. In that context, absorption of suspects in government did not bring an end to civil war. Indeed, when it suited Museveni, he used the criminal process to solve his political problems. For example, he referred his political opponents to the ICC when it was convenient to do so. In later years, Museveni evolved into one of the greatest critics of the ICC. Ironically, President Museveni appears to recognise that both reconciliation and criminal accountability are necessary for maintaining political power but not for dispensing justice. Hence, he regularly uses Military Tribunals to get rid of his military opponents, and the civilian courts, to rid himself of his political opponents.

At another level, Mbeki and Mamdani, perhaps by choice, ignore successful examples of the use of courts alongside reconciliation. In Rwanda, for example, the ICTR played a positive role. While the ICTR prosecuted those most responsible, the Rwanda government, through *Gacaca* courts as well as its Reconciliation Commission addressed political causes of the conflict. In Sierra Leone, the government signed an agreement with the United Nations (UN) and established the Special Court for Sierra Leone (SCSL) to prosecute those most responsible for crimes committed during the armed conflict. The government also established a commission to address issues related to the armed conflict. Without an effective international criminal justice system, many of the top leaders and those most responsible for crimes in Rwanda and Sierra Leone would not have been arrested by

the national governments and brought to justice.

Overall, it is my submission that international criminal law is not a stand-alone tool to address all issues relating to internal armed conflicts. It is only one of the tools, albeit an important one, in the tool kit. Professor Laura Nyantung Beny of Michigan University Law School is correct when she poses the question: "Think Courts Aren't Relevant? Ask the victims". It is to international criminal law that the victims turn when domestic courts are controlled by perpetrators and their agents. Mbeki and Mamdani are in error in suggesting that when the underlying motivation is political, then the resulting murders of innocent civilians are not serious criminal offences. On the contrary, their submission, to decriminalise politically motivated crimes, is to give a new lease of life to impunity. It is wrong for public intellectuals to advocate for decriminalisation of mass murder, rape and sexual violence based on the political motivation of the perpetrators.