A PUBLICATION OF THE

The Activities of International Criminal Tribunals in Africa: Lessons Learned

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Since the Nuremberg and Tokyo Tribunals, there has been an ongoing debate about the relevance of pursuing accountability to achieve justice and lasting peace. Following the London Charter, the Allied Powers established the Nuremberg Tribunal to try the Nazi leaders for crimes they committed during the Second World War. Pursuant to that, around 25most senior Nazi leaders were put on trial, out of whom 12 were sentenced to death. The International Military Tribunal for the Far East (IMTFE) or simply the Tokyo Trial was convened in 1946 to try the leaders of the empire of Japan for the crimes they committed during the Second World War in East Asia and the Pacific. Those who opposed Nuremberg and Tokyo Trials consider it "victor's justice".

Taking current conflict situations and the activities of the International Criminal Court (ICC) into account, some argue that the ICC exacerbates delicate situations in conflict areas. For Ambassador David Schefer, the US negotiator during the drafting of the ICC Statute, accountability is a major tool to build lasting democracy and peace. According to Scheffer's belief, the trials after the Second World War played a major role in making Germany and Japan the democratic nations we know today.

The debate gets momentum after the establishment of the ICC in 1998. Some people argue that the importance of the ICC is to build lasting peace and democracy through accountability and to pass a legacy of holding those who commit atrocious crimes responsible to the next generations. Others argue that if the ICC had been there, it would have been impossible to end Apartheid in South Africa. Transition in Spain, Portugal, Latin America and Eastern Europe would have been an illusion.

The purpose of this piece is not to pile up the praise and criticisms. It is not to support Henry Kissinger's idea of '[the international criminal tribunal] creates tyranny of judges." Nor to side with Kenneth Roth, the executive director of Human Rights Watch since 1993, who argued that Kissinger mischaracterized the whole concept of international criminal tribunal. It is not to recite the 'neo-colonialism' rhetoric as claimed by some African leaders. Above all, it is not to join the endless debate on *justice vs. peace,* but to identify what we can learn from the activities of the international criminal tribunals in Africa. In doing so, I will focus on six major areas of the tribunals: official immunity as a shield to commit atrocious crimes, rebel leaders as subjects of international law, meddling with the affairs of others, sovereignty and non-interference during a commission of atrocious crimes, pre, during and/or post election violence and child soldiers**(1).**

Official Immunity: No More

General Augusto Pinochet, in 1998 before he came to Britain. Photo: AP

Charles Taylor found guilty by the SCSL. Photo: The Economist

Sudanese President Omar al-Bashir. Photo: Global Solutions

Official immunity has and is still being used as a shield by leaders to exonerate themselves from criminal liability. It surprised many when Judge Baltasar Garzon, a Spanish judge, requested the extradition of General Augusto Pinochet by issuing a criminal indictment that charges the general with crimes against humanity. The document also includes allegations of genocide, torture and terrorism. It was even more surprising when the British court upheld the extradition request. That was a new chapter in the criminal responsibility of leaders under the principle of universal jurisdiction. In fact, it did not go the way it had started. Finally, Britain declared Augusto Pinochet unfit to stand trial and sent him back home. However, the good news was that the Chilean government withdrew the immunity that had been granted for Pinochet.

Similarly, under the guise of principle of universal jurisdiction, a Belgian investigative judge issued an arrest warrant in 2000 against Mr. Abdulaye Yerodia Ndombasi, the Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC). Citing the Charter of the United Nations and the Vienna Convention on Diplomatic Relations, the DRC took the issue to the International Court of Justice (ICJ) **(2).** Deciding in favor of the DRC, the ICJ came up with three rules by which immunity cannot be a defense. One of the basic rules is that: if an international criminal tribunal is established and an arrest warrant is issued, or chargers are filled pursuant to that end, official immunity cannot exonerate the accused from criminal liability.

In the cases of the *prosecutor v. Charles Taylor* and *Prosecutor v. al Bashir,* official immunity was one of the issues that had to be addressed.

Charles Taylor was indicted by the Special Court for Sierra Leone (SCSL), a joint endeavor of the United Nations and the Government of Sierra Leone. But, the road toward the final result was not smooth. The defense counsel challenged the international nature of the court. If the court was found to "*not [be] an international tribunal,*" it would be difficult to prosecute Taylor without the prior approval of the Liberian government **(3).** Even though it was not very convincing, the judges concluded that the SCSL is an international tribunal and hence can prosecute Charles Taylor. Finally, the court successfully convicted and sentenced Charles Taylor, the first African head of state to face justice before the international tribunal.

Head of state immunity was raised again with the situation in Darfur concerning al-Bashir. The Republic of Sudan signed the Rome Statute in 2000, but it was not yet ratified. Accordingly, it was through the UN Security Council Resolution (Res 1593/2005) that the situation in Darfur was referred to the ICC Prosecutor, thereby triggering ICC jurisdiction over the matter. The argument by the government lawyers was that al-Bashir has state immunity and should not be tried. The Africa Union (AU) officially requested, at least, deferral of the arrest warrant. Many states, including states party to the ICC failed to arrest al-Bashir during his visit to those countries.

However, things started working the other way. Recently, some state(s) are showing indications to abide by their treaty obligation. A Kenyan High Court judge ruled, "as a member state, Kenya has an obligation to arrest al-Bashir once he steps his foot on Kenyan soil." In July 2012, the AU had to cancel its scheduled Summit in Lilongwe, Malawi because the President of Malawi stated that "As a state part to the ICC, Malawi will not host a leader who is indicted by the ICC." The two incidents show that in Africa, even if the AU rejects the ICC arrest warrant against al-Bashir in some states, al-Bashir has become *persona non grata* **(4).** This certainly will have an impact on the behavior of African leaders.

In conclusion, official immunity has been one of the well-developed principles under international law. Some officials have used immunity as a shield to commit atrocious crimes. However, the past two-decade's movement by the international community and activists brought a significant change in curbing this problem. Consequently, official immunity, even for heads of state, is no longer a legitimate defense.

Meddling with other's internal affairs to perpetuate or help commission of atrocious crimes will not go unpunished

One of the main problems that African states are facing is meddling with each other's affairs. Fueled by resource control and problems of settlement of population **(9),** meddling with affairs of neighboring states has been common practice in Africa. Some leaders were equipping rebels, or even mercenaries, to shape policies of their neighboring states. In doing so, they train, equip, lead and even accompany the rebels to destabilize and create humanitarian crisis. This was the issue in indicting, prosecuting and convicting Charles Taylor, the ex-President of Liberia. He was sentenced to 50 years imprisonment for *aiding and abetting* the atrocious crimes in Sierra Leone during the civil war **(10).**

Rebel Leaders are Subject of International Law

For many years, rebels have been outside the ambit of international law. For good or bad, the legal duties on rebels during armed conflicts were not as rigorous as that against state and its officials. Governments do not want the rebels to get recognition. The consensus was that, the issue of dealing with rebel leaders was reserved to the respective nations. In most cases, government and rebels compromise, which would eventually grant immunity for the crimes committed regardless of the nature and the degree of the crimes. If not, one of the parties will defeat the other, which enables the winner party to punish the losers and give immunity to itself: "The Victor's Justice"!

The recent developments show that there is another way, especially with the establishment of the ICC and the SCSL, to enable us to directly deal with the issue.

The ICC has indicted many rebel leaders or ex-rebel leaders in Africa.

The situation in Central Africa Republic (CAR) is all about Jean-Pierre Bemba Gombo. The ICC's jurisdiction was triggered by the referral of the matter by the government of the CAR **(5).** The ICC found that there are substantial grounds to believe that from October 26, 2002-March 15, 2003, an armed conflict of an "international character" occurred in CAR. According to the court's document, Bemba, operating as the President and Commander-in-Chief of the Movement for the Liberation of Congo (MLC) over which he exercised effective authority and control, joined the national armed forces of Ange-Felix Patasse (President of the CAR at the time of the conflict) to fight a rebel group in CAR. According to the prosecutor, over the course of the conflict, MLC forces committed crimes of a widespread and systematic nature against the civilian population of the CAR. There are substantial grounds to believe that Bemba was aware of the crimes committed by MLC troops, but did not take reasonable measures to prevent the crimes **(6).**

The ICC has also been doing a lot regarding the situation in DRC **(7).** Out of six suspects it has indicted so far, it has successfully convicted and sentenced Thomas Lubanga Dyilo. Two of them, Bosoco Ntaganda, and the newly indicted Democratic Forces for the Liberation of Rwanda (FDLR) commander Sylvestre Mudacumura are at large. Pre-Trial Chamber I decided by a majority to decline to confirm the charges against Mbarushimana. The trials of Germain Katanga and Mathiew Ngudgolo Chui are in progress.

Triggered by the referral of the Ugandan government in 2003, the situation in Uganda is also exclusively dealing with rebel leaders. The ICC indicted the five of the LRA commanders, including the infamous Joseph Kony. So far, the prosecutor arraigned none of them before the court. Raska Lukwiya and Vincent Otti reportedly died.

Government officials aside, the ICC indicted Bahr Idriss Abu Garda, the leader of the United Resistance Front, a rebel group fighting against the Sudanese government in Darfur. Charged with three counts of war crimes, he voluntarily appeared before the court.

The same is true with the Special Court of Sierra Leone (SCSL). The SCSL indicted three leaders of Civil Defense Forces (CDF), five leaders of Revolutionary United Front (RUF) and three leaders of Armed Forces Revolutionary Council (AFRC). Some of the indicted suspects, Foday Sanko, Sam Bockarie and Samuel Norman died and thus proceedings against them were terminated. While some are awaiting sentences others are appealing against convictions and sentences **(8).**

To conclude, unlike what used to be the case in the past, today international law is not only for states. Its heavy hand is also reaching rebels and rebel leaders. Thus, dealing with rebel leaders who have committed atrocious crimes is no more an issue that should be entirely left for respective governments. Thus, either through state's referral or the UN Security Council's intervention, rebel leaders will be held accountable for what they do.

Sovereignty and Non-Interference cannot hold The International Community Back

Photo: InternationalRelations.com

At the time of writing this series, the headline issue is about the indecisiveness of the international community concerning the situation in Syria. Thus, it is not unreasonable if one believes that the international community will act if there is a common interest among the five permanent members of the UN Security Council (P-5). But, I argue that despite this blatant disregard of the sufferings of the Syrian civilians by some members of the P-5, the pressure the international community is putting on the Syrian government and other countries, either through direct intervention, referral to the ICC or economic sanction, should not be underestimated.

In Africa, the international community has taken some serious steps in dealing with atrocious crimes. Of course, here too, the issue of "why only Africa?" could be raised. As stated in the introductory part, the purpose of this series is not to discuss the propriety, impartiality or partiality of the tribunal(s).

Photo: InternationalRelations.com

Photo: InternationalRelations.com

The UN Security Council, after its diplomatic efforts failed to stop the ongoing crimes against civilians in Darfur, adopted Resolution 1593 (2005) with 11-in favor-to none-against, with the abstentions of Algeria, Brazil, China, United States to refer the situation in Darfur, Sudan, to the Prosecutor of the ICC.

In February 2012, the UN Security Council unanimously passed a resolution to refer Libya to the prosecutor of the ICC. The Security Council also put a *no-fly-zone* in place to protect civilians from bombardment by Gaddafi's Air Force. Eventually, Gaddafi was killed at the hands of the rebels. Saif al-Islam Gaddafi, son of Muammar Gaddafi and one of the key figures in Libyan politics under Gaddafi, was captured in Libya. Abdullah Sensussi, intelligence chief under Gaddafi, was arrested in Mauritania.

Photo: InternationalRelations.com

The political and legal implications of the referral in both cases could vary. It might have paved the way for rebels in Libya to get ammunitions. Or it might have forced the Sudanese government to downscale its attacks on civilians.

Pre, during and/or post -elections violence may Trigger the Jurisdiction of the ICC

In Africa, few leaders leave the statehouse by stepping down after losing an election. Violence, mass arrest and killing have become a common trend before, during and after elections in Africa. Few years ago, election related violence in Ethiopia, Kenya, Cote d'Ivoire, and DRC claimed the lives of many civilians. In Ethiopia, more than 200 people were killed following the 2005 general election violence. Thousands were arrested. Hundreds forced to exile. During the violence of post 2007/8 general election in Kenya, more than 3000 people were killed. In Cote d'Ivoire, violence claimed hundreds of lives following the 2011 presidential election. In DRC, a similar thing happened during the 2006 general election and the same happened on a smaller scale in 2011 and that triggered the issuance of a warning by the ICC prosecutor Mr. Ocampo.

Not all of the problems went unnoticed, however. What happened in Kenya and Cote d'Ivoire grabbed the attention of the international community. The ex-president of Cote d'Ivoire has become the first African ex-head of state to be arraigned before the ICC. The way the jurisdiction of the ICC was triggered in the case of Cote d'Ivoire was neither through ordinary state nor the UN Security Council referral. Côte d'Ivoire signed on to the Rome Statute in 1998, but has not yet ratified it. However, in April 2003, it accepted the jurisdiction of the ICC under the provisions of Article 12 (3) of the Rome Statute. The ICC prosecutor then opened an investigation and indicted Laurent Gbagbo. On November 30, 2011, Mr. Gbagbo was transferred to The Hague.

The situation in Kenya is about those who were responsible for the violence that claimed the lives of more than 3,000 Kenyans after the 2007/8 general elections. The case was not referred by the government of Kenya or by the UN Security Council **(11).** Thus, it is the first instance in which the Prosecutor acted *proprio motu* (by its own initiative) (article 15, Rome Statute). The ICC judges authorized an investigation based on a recommendation from the Prosecutor. As a result, Francis Kirimi Muthaura (the positions of Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya), Uhuru Muigai Kenyatta (Deputy Prime Minister and Minister for Finance of the Republic of Kenya), Mohammed Hussein Ali (Chief Executive of the Postal Corporation of Kenya), William Samoei Ruto (a suspended minister of higher education, science and technology of the Republic of Kenya), Henry Kiprono Kosgey (member of the Parliament and the Chairman of Orange Democratic Moment), and Joshua Arap Sang (the head of operations at Kass FM in Nairobi) were indicted by the ICC.

As Kenya prepares itself for the 2013 general elections, the charges against those politicians have huge political implications. In fact, some of those who were charged were suspended from public office. To their dismay, for future presidential candidates, the issue at the ICC has become a barrier.

Election violence in Cote d'Ivoire in 2011
Photo: Africa Times

Laurent Gbagbo: from Head of State to ICC detainee
Photo: Justice in Conflict

Kenya's new constitution was promulgated in 2010 establishing the governance of the country
Photo: Aljazeera

Child Soldiering as a Crime under International Law

In today's world, research shows that there could be as many as a half million child soldiers. Despite the 1999 African Charter on the Rights and Welfare of the Child, the only regional treaty in the world that outlaws child involvement in armed conflicts, Africa takes the lion's share of problems pertaining to the child soldier. This is particularly a case during civil wars. A typical example could be child soldiers during the civil wars in Sierra Leone, Eastern DRC and in the Northern Uganda (LRA). The SCSL and the ICC have both dealt with the issue in detail.

In *prosecutor v. Sam Hinga Norman,* before the SCSL, the defense counsel argued child soldiering was a crime neither under international treaty nor under customary international law. Though unconvincingly, it was held even if there was no specific treaty that criminalizes enlisting, conscripting or using them to actively participate in hostilities, child soldiering was a crime under customary international law. **(12)** However, the suspect died in custody before the final verdict and hence the proceeding against him terminated.

In the matter between *Prosecutor v. Thomas Lubanga Dyilo*, the ICC decided a landmark case in the history of child soldiering. Mr. Dyilo was convicted of "*the enlisting and conscripting of children under the age of 15 years into the Patriotic Force for the Liberation of Congo (FPLC) and using them to participate actively in hostilities in the context of an armed conflict, punishable under article 8(2)(e)(vii) of the Rome Statute as a co-perpetrator."* On July 10, 2012, he was sentenced to 14 years of imprisonment. It has to be noted that the failure of the prosecutor to charge Mr. Dyilo with crimes related to sexual slavery and rape, the fact that he was only given a light punishment, and that his trial cost around 900 million US dollars should not undermine the value of this decision.

Lesson learned: as one of the major problems during armed conflict in Africa, this decision sends a message that enlisting, conscripting and using child soldiers to participate actively in hostilities in the context of an armed conflict will be punished.

A boy loyal to Charles Taylor, then president of Liberia, fought on a bridge littered with shell casings in 2003. Photo: Nic Bothma/European. Pressphoto Agency

About the Author: Ashagrie G. Abdi

He holds a Masters degree in international human rights law from Northwestern University School of Law in Chicago, Illinois. Ashagrie G. Abdi is an Ethiopian residing in the United States. At school, he has been focusing on how to reduce the gap between the theoretical framework and practice with regard to the human rights in developing countries, especially in Africa. In November 2011, at Northwestern University School of Law, Ashagrie assisted Ambassador David Scheffer on preparing a memo on "The Atrocity Crime Litigation Review- 2011" for a conference held on March 14, 2012 in The Hague. It was during that time that Ashagrie came across the work of AFJN. During his research, he found AFJN's different views about the role of the judicial sector in bringing peace to post-conflict areas. Inspired by the idea of human rights, justice and peace in conflict resolution and post conflict reconstruction, he joins AFJN as an intern the Summer of 2012.

End Notes (ENT):

1. For the purpose of this research, the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) are discussed .

2. For further explanation see "case concerning the arrest warrant of April 11, 2000 (Democratic Republic of Congo v. Belgium [THE YERODIA CASE], International Court of Justice, General List, No. 121, February 14, 2002.

3. Based on the decision of the ICJ in the matter between DR *Congo vs. Belgium*, another means of prosecuting officials with immunity is if their respective states decide to prosecute them or allow the prosecution.

4. *Persona non grata* is a legal and diplomatic term countries use against an individual or individuals, basically diplomats form other states from entering their country. Literally, it means unwelcome person.

5. The CAR ratified the Rome Statute on October 3, 2001, and referred the crimes committed on CAR territory to the ICC on December 21, 2004. After determining that the conditions required by the Rome Statute to launch an investigation had been satisfied, an investigation into the crimes was opened on May 10, 2007.

6. ICC-01/05-01/08-1590 - http://www.icc-cpi.int/NR/exeres/7951D71B-DF46-4AEE-9CA3-C1731066C9F6.htm

7. The DRC government referred "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC" to the Prosecutor in April 2004**.**

8. So far the maximum punishment that The SCSL passed is 52 years, a punishment that was passed against Issa Sesay, who is serving his prison term in Rwanda.

9.The issue of settlement of population here is referring to the way boundaries between two states are demarcated during the colonial period. During the demarcation of boundaries, the colonialists did not take the settlement issue in to account. Thus, one ethnic group might be divided into two or even more and thus may belong to different nations. Some, even if they physically belong to, assume country 'X', they may feel that they belong to country 'Y'. Such sentiment has been exploited by the other side of governments. . .

10. Charles Taylor was transferred to the SCSL on March 29, 2006. Due to security reason should he be tried in Sierra Leone, the Special Court arranged for the trial to be held at The Hague in the Netherlands. Thus, he was transferred to The Hague on June 30, 2006.

11. Kenya Joined the ICC Statute in 2005. As per article 15 of the Statute, the Prosecutor can initiate investigation by its own motion. Like the case against al-Bashir, the AU has condemned the involvement of the ICC In the Kenyan domestic affairs.

12. It has to be noted that, child soldier is a crime under the ICC statute and the SCSL was dealing with the matter outside the context of the ICC Statute.

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