

The Fight over Impunity

How Political Forces are Misdirecting the Efforts to Establish Accountability in Africa

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Impunity is not so much a specific facet in the culmination of global issues, as it is a buzzword to represent the failure of the international community to adequately address the immunity perpetrators of heinous crimes have enjoyed. The inability of major actors to conjure the political will to hold leaders of states and other individuals accountable for their war crimes and/or crimes against humanity has created a causal-nexus culture of impunity that welcomes further atrocity and despair for those on every part of the globe¹. One part of the globe that has experienced a lamentably large portion of these atrocities is Africa.

As has become the tragic trend in states that have been host to the most extreme crimes against humanity, there are countries in Africa that have had to experience even further ordeal by not seeing the perpetrators of crimes of war, genocide, and extra-judicial killing, be held accountable for their actions. This impunity has negative effects that go beyond the punishment of individuals; (1) it hampers community reconciliation efforts as people feel they have not been given the necessary means to cope with what they experienced²; (2) it does not provide the legitimate authority in place the opportunity to officially recognize action taken against major criminals, thereby undermining confidence in the state and failing to force upon the institution the value of human rights and the individual under law³; (3) and failing to prosecute

for such crimes means no precedent is set against major crimes, nor is a deterrence presented to future perpetrators thereby leaving open the threat of future instability and insecurity⁴.

For these reasons, the problem of impunity in Africa—and around the world—is considered a serious hindrance and threat to global security, development, and universal recognition of human rights⁵. In more recent years there have been signs of impunity being addressed; with the establishment of the International Criminal Court (ICC) and the conflict-specific tribunals that burgeoned from its inception, prosecutions have begun and new international law precedent has been established⁶. These are indeed hopeful signs of the international community engaging with the menace of impunity. In terms of Africa itself, the ICC, International Criminal Tribunal for Rwanda (ICTR), Special Tribunal for Sierra Leone (STSL), and international bodies facilitating these bodies' work have made impressive strides to address breaches of humanitarian law⁷. These international bodies, in fact, have been the only valid actors to adequately address the problem of impunity, in Africa.

Two of the most disputed reasons for this will be discussed in this paper, as I argue that (1) reconciliatory commissions, that are more popular among African communities than punishment-based courts, have proven to not present deterrence for future crime, and (2) there are politically motivated forces within Africa that are misdirecting the justice system for individual and group political gain.

The legal framework behind humanitarian law, more specifically war crimes, crimes against humanity, and genocide, comes out of international

¹ Kofi A. Annan. Speech "The Effectiveness of the International Rule of Law in Maintaining International Peace and Security" The International Peace Conference. The Hague. May 18, 1999

² Kader Asmal. "Truth, Reconciliation and Justice: The South African Experience in Perspective" *The Modern Law Review*, Vol. 63, No. 1. Jan., 2000. (p. 3)

³ Payam Akhavan. "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment" *The American Journal of International Law*, Vol. 90, No. 3. Jul., 1996. (p. 505)

⁴ Kader Asmal.. (2000) p. 3

⁵ Rome Statue of the International Criminal Court. A/CONF.183/9. 17, July 1998. (p. 1)

⁶ K. P. Prakash. "International Criminal Court: A Review" *Economic and Political Weekly*, Vol. 37, No. 40. Oct. 5-11, 2002. (p. 415)

⁷ Hassan B. Jallow. Prosecutor of the ICTR, to the UN Security Council, 4 June, 2008. INTR/API273.

agreements and conventions⁸. While it was agreed that international intervention was not necessary to prosecute and try violators of humanitarian law, in the cases of Rwanda and Sierra Leone, the creation of internationally-established tribunals were deemed necessary⁹. There have been criticisms by those favouring truth and reconciliation methods over punitive courts, that trying the accused does not create a new community without impunity. Instead, they argue, there must be an emphasis on forgiveness, social regeneration, and not dwelling on the past.¹⁰ Indeed there is proof that the majority of African communities that have faced these atrocities, have felt a greater good has been served through truth commissions, and that this favouring is born out of traditional community culture that is simply at odds with Western perspectives on justice¹¹. Both African and international observers have argued that communities are better served—and more likely to come to terms and recover from the atrocities carried out—through reconciliatory and truth commissions¹². The following are expressed objectives attained by truth commissions:

- The rehabilitation of victims and the restoration of their dignity;
- The assertion of the rule of law and the building of a human rights culture;
- The legitimization of the State and its institutions;

- The establishment of an authoritative record of the past that can prevent future manipulation and distortion;
- The creation of a so-called “collective memory” that should contribute to a moral revival and provide the basis for national unity; and
- The education of the population and the deterrence of potential perpetrators¹³

Given the breadth of these objectives, proponents of truth commissions argue that they are more capable alternatives to punitive court institutions¹⁴. Conversely, while there is evidence of these commissions achieving their restorative goals within the communities affected¹⁵, there is further evidence suggesting that they cannot—and have not—provided adequate deterrence for future acts. The great majority of conflicts that have reached a wartime extreme that have breached humanitarian law, are politically motivated and then imbue themselves with ethnic, religious, and racial divide—rather than the other way around¹⁶. While truth commissions are excellent mechanisms to cope with atrocity and even—if one were to be generous with the assessment of outcomes—contribute to a ‘moral revival’ that may inhibit re-ignition of conflict¹⁷, political divides will remain and indeed have remained¹⁸.

Two examples of this are in Uganda and Sudan. Uganda was the first state to introduce a truth commission and in 2004, Sudan established a truth commission in response to the decades-long civil

⁸ K. P. Prakash. (2002) p. 415

⁹ In the case of each of these, there were two primary reasons given. The first being the lack of national legal infrastructure at the time that could adequately take on cases. The second being that since the violent groups involved in committing the illicit action were still operating, there were fears of safety or escape of any prisoners. Sources: (1) Payam Akhavan (2000) p. 502 (2) Elizabeth M. Evenson. “Truth and Justice in Sierra Leone: Coordination between Commission and Court” *Columbia Law Review*, Vol. 104, No. 3. Apr., 2004. (p. 733)

¹⁰ Helena Cobban. “Transitional Justice and Conflict Termination: Mozambique, Rwanda, and South Africa assessed” ed. Edel Hughes et al. *Atrocities and International Accountability: Beyond Transitional Justice*. United Nations University Press. Tokyo. 2007.

¹¹ Peter R. Baehr. “How to Come to Terms with the Past” ed. Edel Hughes et al. *Atrocities and International Accountability: Beyond Transitional Justice*. United Nations University Press. Tokyo. 2007. (p. 18)

¹² Michelle Pardevilet. “Considering Truth: Dealing with a Legacy of Gross Human Rights Violations” *Netherlands Quarterly on Human Rights* 1998. Vol. 16 (p.141-174)

¹³ Ibid.

¹⁴ Kader Asmal. (2000) p.24

¹⁵ See: Edel Hughes et al. “Atrocities and International Accountability: Beyond Transitional Justice.” United Nations University Press. Tokyo. 2007.

¹⁶ Geoffrey Robertson. “Crimes Against Humanity: The Struggle for Global Justice” Penguin Books. London. 2002. (p.21)

¹⁷ Indeed this would be a generous assessment as to prove or measure potentials and alternative courses of action given the plethora of potential human response and behaviour, would be exceedingly difficult to substantiate. This is why it is difficult for this author to fully comprehend the argument that truth commissions can act as a deterrent and even replacement to criminal proceedings in a court room.

¹⁸ Geoffrey Robertson. “Crimes Against Humanity: The Struggle for Global Justice” Penguin Books. London. 2002. (p.21-2)

war. In both cases “political forces continued to hamper the progress of reconciliatory programmes.”¹⁹ As current events show us, in both cases political turmoil has continued to plague these two states despite extensively funded and arguably successful²⁰ community reconciliation projects.

From a legal standpoint, if truth commissions are not addressing political actions nor are they providing institutionalized or authoritative deterrents²¹, then the principle motivator for future conflict has not been addressed nor has the breach of humanitarian law in that conflict been deterred. Conversely, if the potential for prosecution does prove to be a deterrent, then it is the court’s place to provide that deterrence and thereby eradicate perpetrators’ expectations of immunity. In this way, for truth commissions to be argued as an alternative to institutional justice in the courts is to redirect the perceptions of justice onto the victims rather than the perpetrators; and with no offering of substantive deterrence to future breach of humanitarian law, the problem of impunity is not practically or legally addressed. Therefore, while reconciliatory programmes have a valuable place in servicing the communities affected, it falls to the courts to address the problem of impunity at its core; the expectation of immunity by perpetrators of heinous crimes.

This refocus on the courts offers further insight to the second force misdirecting efforts to establish individual accountability; political agendas undermining the establishment of valuable legal precedent. As already mentioned, a state is promoted to seek justice in its own court system should crimes of humanitarian law occur within its own jurisdiction, provided the necessary legal infrastructure is in place²². The ‘necessary infrastructure’ to speak of is some legislative

recognition of the Geneva Convention and some formal definition as to what genocide, crimes against humanity, and war crimes are and how they may be prosecuted upon an individual²³.

In many of the cases in the global south including Africa, however, the necessary infrastructure does not exist²⁴, and yet states have headed prosecutions against individuals who have allegedly committed such crimes largely for political gains. An example of this is in the Democratic Republic of the Congo (DRC), where, in 2007, the transitional government led by President Joseph Kabila began rapidly rounding up political enemies—those involved, or not, in the violence of previous year. The complexities of power in the DRC present a challenge to fully describe the situation in a case study, however the theme of the cases has been for the transitional government to feed immediate perpetrators to the ICC, while conducting their own trials of political enemies in hopes of removing the ‘transitional’ from the government’s title.²⁵

In 2005, the extra-judicial killing of nine UN peacekeepers resulted in the peace operation there (MONUC) to issue an ultimatum for disarmament of all rebel groups, or face prosecution. The transitional government at the time took advantage of the opportunity and “arrested the leaders of all the groups, with little regard for whether or not they might have been involved in the incident.”²⁶ Most of those prisoners remain in Kinshasa prisons to this day.

²³ Stephen Macedo, ed. “Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law” University of Pennsylvania Press. Philadelphia. 2004. (p. 32)

²⁴ While all African states have at least accessed (not signed but ratified by default) to the Geneva Convention, only twelve states have legislative jurisprudence that addresses humanitarian law. Source: Dinah Shelton. “Remedies in International Human Rights Law” 2nd Ed. Oxford University Press. Oxford. 2005. (p.465)

²⁵ International Crisis Group. “Congo: Consolidating the Peace” Africa Report N°128. 5 July 2007

²⁶ Stephanie Wolters. “Selective Prosecutions Could Undermine Justice for Congo” Institute for War and Peace Reporting. Mar. 7, 2007
<http://www.iwpr.net/?p=acr&cs=f&o=333874&apc_state=henpacr>

¹⁹ Dumisa Buhle Ntsebeza “Can Truth Commissions in Africa deliver justice?” *Human Rights in Africa*. 2008.

<http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/12_Ntsebeza.pdf>

²⁰ Ibid.

²¹ See footnote 16.

²² See footnote 9.

In this same time frame, President Kabila delivered Thomas Lubanga, leader of the Hema-led UPC rebel group, to the ICC, making Lubanga the first person to be tried by the international court. This move, however, showed later to be a strategic step, as it resulted in the UN's further praising of the transitional government, MONUC's agreement to allow the Kabila administration to establish a military tribunal to "extend the fight against impunity", leading to the extensive and rapid prosecution of some 57 "rebel sympathizers" (non-coincidentally self-described political enemies of the Kabila administration), in only two months²⁷. The process went widely unnoticed by the UN and ICC, as attention was turned to their single case against Lubanga, and later the pre-case processing of Germain Katanga and Mathieu Ngudjolo, both militia leaders accused of war crimes.

Further indications of corruption come out of the trial of Chief Kahwa Panga Mandro, leader of the Ituri militia group. He had been tried in the DRC on ten counts of murder, found guilty, and then granted amnesty by the domestic (not military) courts. The court's use of Congo's amnesty law in connection with the massacre of civilians, said UN spokesperson in Congo Kemal Saiki, was a "worrying [development] in the fight against impunity in the DRC".²⁸ Reports of corrupt courts in the DRC have become common in recent years; largely criticized for playing political games with the government, at the expense of justice itself. In the Chief Kahwa case, this was evidentially at play as part of a judiciary strike against President Kabila's forced retirement of over one hundred public prosecutors and judges.²⁹

The problem of corruption and the politicizing of courts is a common symptom of impunity in

Africa³⁰ as well as a consequent factor for continued breach of humanitarian law. In the case of Uganda, the government has dragged its feet in the passing of an 'ICC bill' that would ratify the Rome Statute and jurisprudence within Uganda to try crimes against humanity and genocide. Meanwhile, Uganda has begun proceedings against Thomas Kwoyelo, a former Lord's Resistance Army (LRA) commander, on twelve counts of kidnapping with intent to murder.³¹ The reason for the lesser charge is, evidentially, to speed up proceedings, however, the more apparent reason is that the government is looking to gain from the conviction of an LRA commander in the midst of new conflict, while avoiding to ratify the ICC³². There are strong pressures being put on the

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government, both within the administration as well as from political elites throughout Uganda, that are insisting the ICC bill not be passed for fear of an international body holding those within the

government accountable for previous actions that have thus far been met with impunity³³.

These fears of current governmental actors and political elite being prosecuted should they ratify

³⁰ (1) Payam Akhavan. "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *The American Journal of International Law*, Vol. 95, No.1. Jan., 2001. (p. 23) (2) Martin Meredith. "The State of Africa: A History of Fifty Years of Independence" The Free Press. London. 2006. (p. 222)

³¹ Bill Oketch. "Kampala puts former LRA commander on trial – but not for war crimes." Institute for War and Peace Reporting. 29, July 2009. <http://iwpr.net/?p=acr&s=p&o=-&apc_state=henh>

³² William Burke-White. "Peace vs. Justice in Uganda" *Foreign Policy Digest*. July 2009.

<<http://www.foreignpolicydigest.org/20080604103/Regional-Archive/Africa-Archive/special-report-peace-vs-justice-in-uganda.html>>

³³ Rachel Irwin. "Uganda's Ability to Try Rebels Questioned" 21, Nov. 2008. International Centre for Transitional Justice. <<http://www.ictj.org/en/news/coverage/article/2150.html>>

²⁷ Ibid.

²⁸ Eddy Isango. "Congo DRC: Chaos in the Courts" Institute for War and Peace Reporting. Jan. 28, 2008.

²⁹ Ibid.

the Rome Statute have only been confirmed with the recent indictment of Sudanese President Omar al-Bashir³⁴.

In this fear, nations are not only applying the law unfairly to meet their own agendas, as seen above, but—perhaps more importantly—the legal precedents they’re setting establish motive for their political rivals to more resolutely remove them from power and utilise the courts in a similar fashion, while establishing immunity for themselves. Cases of this political upheaval have been seen in Idi Amin’s Uganda, Colonel Jean-Bedel Bokassa’s Central African Republic, Soglo’s Benin, and Lamizana’s Burkina Faso (Upper Volta)³⁵ and each shows that this form of precedent-setting has become a learned and shared practice of African governments across the continent. Indeed, while state action to ‘bring justice’ to legitimate perpetrators of heinous crimes has been seen within many parts of Africa as a positive, the methods and motives that have been presented here point more towards politics than to the law.

There has been a more direct manner by which certain national governments are misdirecting efforts to fight impunity. Despite the infrastructural limitations of their national courts, many leaders have denounced the activities of the ICC and international tribunals; the criticism reached a new level when the African Union (AU) formally denounced the ICC following the indictment of al-Bashir³⁶. It should be pointed out that this does not

mean the whole of African states disparage the ICC; the AU votes by closed consensus Benin’s Foreign Minister explained following the vote, “consensus usually means unanimity, but in this case there was some dissent.”³⁷ The general feeling amongst African states, however, has become clear. Whether disagreement with the ICC arises from a legitimate lack of confidence in the body’s capacity to establish an African-suited precedent of justice, or that there is enormous pressure from interest groups within their individual states and governments that fear the possibility of tribunals with equal accountability, is a question yet to be answered³⁸.

The ‘African-suited precedent of justice’ referenced has been widely described by state leaders as truth and reconciliation commissions³⁹, has already been addressed in this paper as a valuable institution, however not one that has proven to address the problem of impunity. From a legal standpoint, this seems to have been acknowledged by the framers of the African Union as well, for the African Union Court of Justice (AUCJ) is an intended body of the AU. Questions therefore arise as to the intended purpose of this not-yet existing body which is meant to be an extension to the African Court on Human and People’s Rights (ACHPR).⁴⁰ The ACHPR has only been ratified by fifteen states, and there has been no progress on the official creation of the AUCJ⁴¹; both strong indications that there is little motivation of national bodies to ratify any legal institution that follows precedents currently set.

The issues addressed here are profoundly layered and often dive into the complexities of individual

³⁴ William Burke-White. “Peace vs. Justice in Uganda” *Foreign Policy Digest*. July 2009.

³⁵ While it should be pointed out that certainly there have been circumstances beyond corrupt and politically motivated courts that have brought about these major coups, the source points out that in each of these events, the perpetration of rebel groups by military and civil courts puppeted by the state, was one of the distinct factors that drove the rebellion into a full out coup. It should also be noted that several of these occurred within only days of each other, as the language of coups, in the sources words, “resonated with many despotic groups and...after seeing the table of immunities turn to the victors, undoubtedly spurred them on.

Source: Martin Meredith. “The State of Africa: A History of Fifty Years of Independence” The Free Press. London. 2006. (p. 233-4, 277-8)

³⁶ Impunity Watch: Africa. “African Leaders Denounce ICC” 7, Apr. 2009.

³⁷ http://www.impunitywatch.com/.m/impunity_watch_africa/2009/07/african-leaders-denounce-icc.html?p=2

³⁸ Ibid.

³⁹ Bruce Baker. “Twilight of Impunity for Africa’s Presidential Criminals” *Third World Quarterly*, Vol. 25, No.8. 2004. (p. 1487)

⁴⁰ Carole Henderson-Tyson. Lecture “Truth and Reconciliation-Lessons Learned”. African and Middle Eastern Studies Institute. 7 Mar. 2009.

⁴¹ Timothy Murithi. “The African Union: Pan-Africanism, Peacebuilding and Development” Ashgate, Hampshire. 2005. (p. 120)

⁴² Ibid.

states' pasts while also spanning across the entire continent. This paper is not meant to access nor analyse all the cases surrounding the question of impunity, so much as take a critical pulse of Africa's efforts to address it. What becomes clear is that there is far greater support for truth and reconciliation commissions following major conflicts. This is an understandable reaction, as communities are being addressed and mechanisms for coping and moving on are realised. These commissions do not, however, offer deterrence to future perpetrators of war crimes and crimes against humanity, and therefore do not address the fundamental goal to combat impunity.

Furthermore, while individual states have expressed their own successes to fight impunity through their own trials, a deeper examination shows many of these cases to be fraught with corruption, politically motivated prosecutions, and double standards to the application of law. Not only are these trials deeply unjust, they establish negative precedent that has shown to in fact encourage further conflict, and with it the possibility of greater crimes against

humanitarian law. Finally, the more direct indications of states' unwillingness to address the question of impunity are seen in the public displays of anti-ICC legislation and resolution.

Both of these factors are politically motivated and have substantive explanation that goes beyond simply addressing or not addressing impunity. But once again, those concerned must return to the fundamental danger of impunity itself; it is not an isolated enigma, but instead the representation of a culture of ambivalence towards the fundamental rights of individuals. While every state and nation has the right to question the founded principles—in this case the necessity of individual accountability under law—the 'alternatives' presented by African states and scholars alike have shown to not halt or hinder the heinous crimes against their own people. The 'fight against impunity' is not so much being fought, as it is being *fought over*; the forms of justice being pursued in Africa will need to produce substantive precedent with tangible outcomes before this fight will be adequately addressed.

Africa & Climate Change

The realities of climate change's implications – paving the way to Copenhagen

Susan Humphrey

Many would argue that climate change has become the defining issue of our generation. Discussion of its implications, consequences, and potential solutions floods the airwaves of radio and television, filling the pages of newspapers, magazines, and journals. At this particular moment in time, with the United Nations Climate Change Conference set to take place in Copenhagen next month, talk of climate change is everywhere. There is talk about how newly elected US President Barack Obama will act in light of the constraints imposed on him by Congress and

Senate, and about what we might expect the European Union's position to be. Everyone is concerned about the stances that China and India's representatives will adopt once they arrive in Copenhagen on December 7, and Canadians are wondering if their Prime Minister will make Canada a leader and not an impediment to the debates this time around.

But very little discussion is taking place around the subject of Africa and what *its* position will be. Little to no academic literature has been written or published on the topic, and one must dig deep within the pages of the leading media sources to find mention of the world's poorest continent and how it plans to represent itself in Copenhagen. There is, however, a great deal of research and writing being done on the subject of how climate change will affect the countries and regions of Africa, and the results are nothing short of horrifying. There exists, then, a disconnect; much is