SPECIAL COURT FOR SIERRA LEONE
OUTREACH AND PUBLIC AFFAIRS OFFICE

An aerial view of some parts of Aberdeen.

PRESS CLIPPINGS

Enclosed are clippings of local and international press on the Special Court and related issues obtained by the Outreach and Public Affairs Office
as at:
Wednesday, 27 October 2010

Press clips are produced Monday through Friday.
Any omission, comment or suggestion, please contact
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The Nation
Wednesday, 27 October 2010

Taylor Defence Closes November 12

The Trial Chamber of the Special Court for Sierra Leone on Friday 22nd October sat on a Status Conference on the case of Charles Taylor's Defence. The Chamber in a late Friday afternoon report stated that it has ordered that Charles Taylor's Defence will formally

See page 11 for story

Taylor Defence

close soon after the end of the testimony of witness DCT 102 or at the very latest by 12 November 2010. Following that, the judges will have to recess for three weeks commencing close of business Friday 17 December 2010 and will resume on Monday 10 January 2011. The finale to the briefs of both arguments will be filed by close of business Friday 14 January 2011, by which means the parties are however welcomed to file earlier if they are ready well before the stated date. In the event a party wishes to make written responses, the release states that those ones will be filed by close of business Monday 31 January 2011. The oral arguments will commence on Tuesday 8 February with the Prosecution closing arguments. Wednesday 9 February, the Defence will make their closing arguments and there will be a one day hiatus on 10 February for the parties to consider any rebuttals that they may wish to make. On Friday 11 February: 09.00 - 11.00 the Prosecution is allowed for rebuttals, if there is any; followed by the Defence at 11.30 -13.30, if any. Finally, the length of the final trial briefs as agreed by the parties will be not more than 600 pages each. And the length of the written responses, if any, will not exceed 100 pages each. Meanwhile, Court has been adjourned to 1 November at 9.00 a.m. for the testimony of Defence witness DCT 102.

The Nation
Wednesday, 27 October 2010

Justice & Human Rights

ICC To Commence Jean-Pierre Bemba Trial November 22

The International Criminal Court in The Hague, ICC, has decided that the trial of Jean-Pierre Bemba Gombo will commence on Monday, 22 November, 2010. The situation involves the Central African Republic in the case of The Prosecutor v. Jean-Pierre Bemba Gombo.

In an oral decision issued on Friday 22nd during a status conference, Trial Chamber III of the International Criminal Court (ICC) set the date for the commencement of the trial in the case of The Prosecutor v. Jean-Pierre Bemba Gombo as Monday, 22 November, 2010, at 14:30 (The Hague local time). Jean-Pierre Bemba Gombo is allegedly criminally responsible, as a person effectively acting as military commander within the meaning of article 28(a) of the Rome Statute, for two crimes against humanity (murder and rape) and three war crimes (murder, rape and pillaging), allegedly committed in the territory of the Central African Republic during the period from approximately 26 October, 2002 to 15 March, 2003.

ICTR Appeals Chamber Hears Muvunyi Case Oral Arguments

The Appeals Chamber of the International Criminal Tribunal for Rwanda, composed of Judge Patrick Robinson, presiding, Judge Fausto Pocar, Judge Liu Daqun, Judge Theodor Meron, and Judge Carmel Agius, on Friday 22nd heard oral arguments in the appeals lodged by Tharcisse Muvunyi and the Prosecution against the Judgement pronounced by Trial Chamber III on 11 February 2010.

The Trial Chamber convicted Muvunyi of direct and public incitement to commit genocide based on his statements made at a public meeting at the Gikore Trade Center and sentenced him to 15 years of imprisonment. This conviction followed a retrial ordered by the Appeals Chamber on this allegation on 29 August 2008.

Muvunyi contends that the Trial Chamber committed a number of errors of fact and law, and accordingly requests the Appeals Chamber to overturn his conviction or in the alternative to reduce his sentence.

The Prosecution requests the Appeals Chamber to increase Muvunyi's sentence to 25 years of imprisonment.

Muvunyi was born on 19 August 1953 in Mukarange Commune, Byumba Prefecture, Rwanda.

In 1994, he held the rank of Lieutenant Colonel in the Rwandan army and was stationed at the Ecole des Sous-Officiers in Butare Prefecture.

Independent Observer
Wednesday, 27 October 2010

Making a case for Judiciary Activism in Post-Conflict Sierra Leone

Introduction

The essence of the existence of laws is to protect the people it is enacted to serve. Those laws can be more effective if they are reviewed at regular intervals to meet contemporary challenges. Post-conflict Sierra Leone still operates on laws that it inherited from its colonial master, Britain. It also has many laws that were enacted under dictatorship and whose framers intention was to suppress and not protect the citizenry. The conservative interpretation of some of these laws has led to the breach of human rights and limited the channels ordinary Sierra Leoneans could used to address their grievances. Consequently, it led to the decade long civil war costing Sierra Leoneans lives and properties.

Reform in the justice sector is supposed to be one of the priority areas of the government. Despite the fact that there exists a parliament, the Law Reform Commission, the recently established Constitutional Review Committee, and the efforts of partners and organizations such as the Law Reform Initiative, Justice Sector Development Programme, United Nations Development Programme, reform in the justice sector has been too slow in the face of the urgency the situation deserves. Given the challenges facing the sector, it is important that the Sierra Leone Judiciary explore the possibility of adopting more progressive and liberal ways of interpreting the laws, thus the need for judicial activism.

This article will examine the concept of judicial activism in the context of post-conflict Sierra Leone, how it will enhance the administration of justice and the integrity of the judiciary. Sierra Leone being an adherer to the Common law tradition, judges' decisions are largely guided by precedent. Sceptics of the concept would imply that the adoption of judicial activism is a shift from the Common law tradition. This article will therefore, analyse the views of some sceptics of the concept and will make a case for the contrary.

The Concept of Judicial Activism

Judicial activism as a concept generally refers to the tendency of judges to be flexible in using their powers in relation to their decisions. For instance, an activist judge may tend to give a decision that reflects the changing situation devoid of the fact that it may be a departure from a particular precedent and the intention of the framers of the affected law or policy. According to Black's Law Dictionary, judicial activism is "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy among other factors to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent." The Merriam-Webster's Dictionary of Law defines judicial activism as "the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent". Various legal scholars and judges may have different definitions. However, what is important is that the judge being referred to as an activist may not necessarily adhere to the restraint of the appellate judges; meaning may decide not to strictly abide by judicial precedence. Additionally, most activist Judges guide cases by taking a more active part in order to ensure the smooth running of the case and when there is no specific decision on a particular point of law, the judges may sometimes use their discretions to apply broader concepts from the constitution or human rights law. In view of the fact that there is no law reporting, the scope for judicial activism should be much greater than elsewhere.

Separation of Powers

In Sierra Leone, the role of the judiciary is set out in the Constitution, so also are the other branches of government namely the legislature and the executive. By virtue of the principles of separation of powers, one arm of government may not interfere with the function of the other, without prejudice to the doctrine of checks and balances. Furthermore, the various arms have an obligation to abide by the Constitution. However, section 124 of the Constitution of Sierra Leone, 1991 granted the Supreme Court the power to interpret the Constitution. Additionally, they have the power of judicial review, meaning they may declare a legislative decision ultra vires if it is repugnant to the Constitution. Nonetheless, judges are not expected to go beyond their jurisdiction i.e. interpretation. Sceptics of the concept have posited that the law making role is exclusively the prerogative of parliament and not of judges. As such when judges interpret legislation in a progressive manner, they have been accused of usurping the functions of parliament.

Judicial Activism v. Judicial Restrain

The phrase "judicial activist" was first introduced by Arthur Schlesinger Jr. when he wrote an article, The Supreme Court: 1947, in the Fortune magazine in 1947. Other people have traced the start of judicial activism to the ruling in the landmark case, Marbury v. Madison (1803). Although the decision itself was not a show of activism, it however sets the stage for activism in the United States when Justice John Marshall who wrote for the Court said "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

The Judiciary in Sierra Leone is much more familiar with the opposite view of judicial activism; judicial restraint since they have been confined more to interpreting legislations in a narrow and conservative way instead of progressive interpretation as judicial activists do. This is as a result of the fact that, Judges in Sierra Leone have inherited their judicial caution from the traditional English law system whereby Judges were wary of interfering with politics and unlike their European counterparts, shielded away from guiding cases through the courts and applying larger principles in their decisions. Since the time when Sierra Leone gained independence, English judges have however moved far from this lack of intervention.

Today, while abiding by the law, judges act as a balance against the government when it introduces changes for example in anti-terrorism legislation. Judicial review has also expanded rapidly, and many judges take it on themselves to guide cases through although this tends to rely on the personality of the judge. Sierra Leone's judges have largely remained as inactive as English Judges were back in the 60s.

Why Judicial Activism in Sierra Leone?

Sierra Leone is currently recovering from a decade long civil war of which the lack of the rule of law was one of its root causes. On the eve of the war, the once reputable judiciary was more renowned for rendering justice to the few political elites and their wealthy friends than the poor Sierra Leoneans. "Lack of courage on the lawyers and judges over the years paved the way for the desecration of the constitution, the perpetuation of injustice..."[i] People became disgruntled with the justice system and some of them decided to use extra-judicial means to seek recourse, thus the decade long civil war.

The Judicial system had become infamous not only for its ramshackle application of laws, but was also for the obnoxious and archaic character of the laws themselves. Given the centrality of the judiciary to the balance of powers, the lack of a functioning judiciary will certainly have ripple effects on the proper

functioning of state institutions, and it is thus important that more attention is accorded to the reform of the judiciary including the laws. The judiciary has been able to record some considerable success in the reform process.

However, law reform has nevertheless been slow. Parliament has been too slow in effecting changes to the laws especially those that will guarantee protection to the country's citizens. For instance, a group of civil society organizations sponsored the drafting of an omnibus bill comprising of important elements of the TRC recommendations. This bill was presented to Parliament in a public ceremony in 2005. Parliament took no action to ensure that the bill was passed; not even a first reading done. The process of passing the bills relating to women and children into law was also too long and arduous.

The Law Reform Commission on its part, while quick to respond to issues brought to its attention by the Government rarely initiates issues on its own. The Government on its part is less than mesmerized by human rights issues despite the hue and cry by human right groups and civil society organizations to repeal certain laws such as the death penalty and seditious libel. Moreover, in the absence of a law reporting mechanism, there is no recent formal precedent on many issues.

Amidst all this, it is a pity that the Judiciary has only been interpreting the available laws in a restrictive fashion. The judiciary needs to grasp the opportunity to adopt a judicially active approach by interpreting the laws in a progressive manner to protect rights instead of continuing to restrain itself. Some judges may report that they are already referring to other commonwealth cases and human rights law when considering their decisions: this needs to be embraced more widely, and in a system when many indigents go unrepresented, not only when cases are drawn to their attention by defence lawyers. This will not only help protect rights but will also enhance the integrity of the judiciary in post-conflict Sierra Leone. In its Report, the TRC suggested legal activism by calling on members of the Sierra Leone Bar to initiate pro bono service for indigent persons. Much as the Sierra Leone Bar was encouraged to partake in legal activism by offering pro bono services, so too should the judiciary contribute what it can to the enhancement of human rights protection in the country.

Judicial Activism towards What?

Generally, apologists of the concept posit that the activist judges engage in judicial activism in the following:

·Decide to adhere to more forward looking precedent when there is an option between conservative and progressive precedent;

Contd. Page 10

Making a case for Judiciary Activism

·Declaring legislative decisions unconstitutional by way of judicial review as provided for under section 124(1)b of the Constitution. "...whether an enactment was made in excess of the power conferred on Parliament or any other authority or person by law or under this Constitution." Following this, activist judges could refer cases to the Supreme Court for such review.

·Ruling against the framers intention of certain legislations where the intent was not for but against the interest of public good. This often happened in the United States.

·Judges using their powers to make orders providing for the close management of cases, so as to ensure their smooth running through the system. For example, refusing to adjourn on the request of one of the parties unless there are exceptional reasons.

In Sierra Leone, judges may need to apply activism in all three scenarios because there are certain verdicts of certain courts whose ratio decidendi (reasoning) are too weak to be compelling precedents, albeit the fact that they are superior courts. In some countries such as the United States, the Bench expressly compels the legislators to amend a particular law within a specific timeframe. For instance, the Massachusetts Supreme Court in Goodridge v. Department of Health (2004) compelled the legislators to rewrite their gay marriage law to be consistent with the Court's decision within six days.

Sceptics of Judicial Activism

For the sceptics, the court's work is to take negative action, meaning it jurisdiction stops at where it strikes down a particular law and must not extend to taking a positive action by way of directing the legislature to amend the laws. Furthermore, sceptics believe that legislation from the Bench is gross abuse of authority and usurpation of the authority of the other arms of government.

However, in Sierra Leone the balance of power between the executive and the judiciary is unclear. For instance, subsections 3 and 5 of section 136 of the Constitution of Sierra Leone, 1991 empowers the President to fire judges who are hired on contract basis after retirement as stipulated in section 137 of same. The security of tenure of office for judges hired under sub sections 2 and 4 of same may not be guaranteed, which in effect undermines their independence. By adopting judicial activism therefore may show that in fact, they are not controlled by the executive.

Conclusions

The main contention between judicial activism and judicial restraint especially in a country which is in urgent need of reform lies in the institutional mandate with the discretional power to effect those changes. Not that judges should exert their power to legislate but that they should take advantage of a time when there are not much forward-looking precedents and try to manage cases more closely so as to speed up trials and ensure that people's rights are protected throughout. It is vital that Judges take on this responsibility in a system where legislative reform is slow and the chance of an indigent having effective legal representation in court is so slim.

New Democrat (Monrovia)
Monday, 25 October 2010

Sierra Leone: Is Ex Junta Leader Johnny Paul Koroma Dead or Alive?

Charles Taylor's lawyers contend that former Sierra Leone junta leader who teamed up with RUF rebels to topple the government, and is widely believed to have been executed some where in Lofa County near the Sierra Leone border, could be alive. They want document from prosecutors in the case to prove their case.

From the court: "In their motion, defense lawyers argued that based on the information provided to prosecutors by DCT-032, Mr. Koroma may well be still alive. They argued further that based on information provided to them by DCT-032, the payments that were made to him and the indemnity letter that was written to him by prosecutors were meant to induce him to provide false testimony against Mr. Taylor.

"The details of the information provided to prosecutors by DCT-032, the results of the DNA tests, the payments, and the indemnity letter provided to the witness by prosecutors "suggest the innocence of the Accused or mitigate his guilt or may affect the credibility of the prosecution evidence," defense lawyers said. Such information must have been disclosed by the prosecution to the defense according to the Court's Rules of Procedure and Evidence, defense lawyers argued. They therefore asked the judges to now order the prosecution to make the necessary disclosures and provide an explanation as to why such material details were never disclosed to the defense."

Report from the trial say on October 20, 2010, the Special Court for Sierra Leone judges in The Hague ordered prosecutors to disclose exculpatory evidence in their possession that suggests Charles Taylor did not order the execution of Johnny Paul Koroma, the former leader of Sierra Leone's military junta, the Armed Forces Revolutionary Council (AFRC).

The decision stems out of the "Defense Motion for Disclosure of Exculpatory Information Relating to DCT-032" that was filed by Mr. Taylor's defense lawyers on September 24, 2010.

From the court, courtesy Alpha Sesay: In the motion, defense lawyers alleged that DCT-032, a defense witness for Mr. Taylor, was previously a potential prosecution witness who spoke extensively to prosecution investigators about the alleged death of Mr. Koroma. The witness, who later became a defense witness informed defense lawyers about the information he gave to prosecutors regarding the alleged death of Mr. Koroma, payments made to him by prosecutors for him to cooperate with their investigators, and a letter that was written to him by the former Chief Prosecutor of the Special Court for Sierra Leone, Stephen Rapp, indemnifying him of any criminal prosecutions for his cooperation. These actions by prosecutors, defense lawyers said, were meant to induce the witness to give false testimony against Mr. Taylor. The witness himself admitted to defense lawyers that he was "making up the story in order to get money from the Prosecution."

During the presentation of the prosecution's case, it was alleged that Mr. Taylor ordered the execution of several persons who had knowledge of his dealings with Sierra Leonean rebel forces. One such person who was allegedly executed on Mr. Taylor's orders was AFRC leader Mr. Koroma. Witnesses who testified about the execution of Mr. Koroma on Mr. Taylor's orders included Mr. Taylor's former Vice President Moses Blah, former member of Mr. Taylor's National Patriotic Front of Liberia (NPFL) rebel group Joseph Zig Zag Marzah, and a protected witness, TFI-375. Though these witnesses did not claim to be present when Mr. Koroma was executed, their evidence implicated several other persons who were subordinates to Mr. Taylor. One subordinate mentioned as being among those who carried out the murder of Mr. Koroma in Foya, Liberia, was DCT-032, the witness who is the subject of the defense motion.

According to the defense motion, when prosecutors were investigating the alleged murder of Mr. Koroma in 2008, they contacted DCT-032, who provided them with information regarding the death of the former AFRC leader and his burial site somewhere in Lofa County, Liberia. Following the disclosure of such information, prosecutors carried out exhumations at two burial sites which were identified by DCT-032. DNA tests were carried out on the remains that were exhumed, but they did not match Mr. Koroma's DNA.

In response, prosecutors asked the judges to dismiss the defense motion as it was "unfounded and [that] the information requested is not exculpatory." Prosecutors further argued in their response that while they had honored all their disclosure obligations under the court's rules, such disclosure obligations do not require them to operate an "open door policy." Prosecutors also said that DCT-032 was never listed as a prosecution witness. He was only used as a source, and there is no obligation that payments or promises made to sources must be disclosed, prosecutors argued.

On October 20, 2010, the judges dismissed the prosecution's arguments and ruled in favor of the defense.

According to the judges, the fact that DCT-032's name was mentioned as a key player in the alleged execution of Mr. Koroma and the subsequent information provided by him to prosecutors about his background, his role in the Sierra Leone and Liberian conflicts, and his participation in the alleged murder of Mr. Koroma, including the latter's burial site (whether true or false), proves that he was a potential prosecution witness and not merely a source.

The judges further said that based on the payments that were made to the witness and the letter that was written by the former Chief Prosecutor assuring the witness that he would not be prosecuted, it is clear that the prosecution intended to seek DCT-032's cooperation, including his testimony. These actions by prosecutors, the judges said, were not done because DCT-032 was a source, but rather because he was a potential prosecution witness.

"The Trial Chamber opines that the Prosecution payments were not used to buy information from a source, but rather were given to a potential witness for his own benefit," the judges said in their decision.

"Accordingly, the Trial Chamber holds that prior to his listing as a Defense witness, Witness DCT-032 was for all intents and purposes, a potential Prosecution witness, notwithstanding that he was never listed by the Prosecution as such."

The judges also agreed with defense lawyers that "the fact that the Prosecution interviewed this alleged murderer and that he led them to a grave or grave sites that later turned out not to be that of Johnny Paul Koroma is relevant to the issue of whether Johnny Paul Koroma is dead or alive, and may affect the credibility of the Prosecution evidence."

The judges said the fact also that DCT-032 was unable to provide the prosecution with adequate information regarding the death of Mr. Koroma "despite being promised 5000 United States Dollars and indemnity against criminal prosecution, is potentially exculpatory in that it may affect the credibility of the Prosecution evidence" alleging his (DCT-032) involvement in the alleged killing of Mr. Koroma.

"This information with respect to the Prosecution investigation should therefore also have been disclosed to the defense," the judges said.

0. The judges concluded their decision

Full details of all investigations carried out by the Prosecution into the alleged death of Mr. Koroma including results of DNA tests carried out on corpses exhumed from graves identified by DCT-032.

Full details of all monies that were given to DCT-032.

An original duplicate copy of the letter of indemnity against criminal prosecution that was written to the witness by former Chief Prosecutor Stephen Rapp.

In another motion, defense lawyers have asked the judges to order the setting up of an investigation into the conduct of the Office of the Prosecutor during the gathering of evidence against Mr. Taylor. Defense lawyers allege in their motion that prosecution investigators bribed witnesses to testify against Mr. Taylor and that in some cases, potential witnesses were intimated and physically assaulted to elicit information from them against Mr. Taylor. A decision on this motion is expected soon.

The Lubanga Trial

Tuesday, 26 October 2010

Lubanga Trial Marred By Unavailability Of Witnesses

Daily Report

By Wairagala Wakabi

Thomas Lubanga's war crimes trial at the International Criminal Court (ICC) today stalled as none of the witnesses who had been expected to give evidence this week were ready to take the witness stand.

Although hearings had been scheduled for Monday to Friday this week, during today's proceedings Presiding Judge Adrian Fulford announced that because no witness was ready to give evidence, the trial would resume on Monday next week.

Mr. Lubanga has been on trial from January 2009, although he has been in ICC detention since March 2006. He is accused of enlisting, conscripting, and using child soldiers in armed conflict during 2002 and 2003 when he allegedly headed the Union of Congolese Patriots (UPC) and its armed militia.

Trial judges last July halted the trial when prosecutors failed to implement an order to disclose the identity of an individual who had helped to contact former child soldiers that testified against Mr. Lubanga. Appeals judges on October 8 ordered a resumption of the trial, and since then, one witness has given evidence. This witness, who testified yesterday, is a field liaison officer for the Office of The Prosecutor (OTP) in the Congo. He initially testified last June but was called back at the bidding of Mr. Lubanga's defense.

Judge Fulford stated today that the chamber had been informed that 'witness 38', who was among those expected to testify this week, had been unable to travel to The Hague-based court because his passport was not ready. He was now expected to testify in the week of November 8.

Prosecutors last June stated their intention to call back this individual, who was the first witnesses to testify for the prosecution. He stated that he was a former child soldier in the UPC. Prosecutors said he was introduced to the OTP by 'intermediary 316', who is himself due to give evidence at the behest of judges.

The prosecutors have stated that 'witness 38' would testify that there was nothing untoward that took place between him and the intermediary. The OTP has said that he would be called as a rebuttal witness to affirm that he was never asked to lie to the court.

Judge Fulford also reported today that the OTP had informed him that no confirmation had been received regarding whether 'Witness 555' was willing to testify. The prosecution had therefore not yet decided on whether or not they wished to call him. The OTP has in the past indicated that it would call this witness to give evidence relevant to the alleged climate of fear and intimidation amongst persons in Bunia in eastern Congo in relation to UPC and its supporters, "specifically if they were alleged to have cooperated with the ICC."

Prosecution lawyer Manoj Sachdeva stated that 'witness 555' would not testify next week. "We have not been in contact with the witness since last Thursday. We hope to be able to speak to him today to essentially ascertain whether he is going to testify," Mr. Sachdeva said.

Mr. Sachdeva also told the court that it would not be possible for an OTP investigator, who goes by the pseudonym ‘witness 582’, to testify next week. The plan is for this witness to testify via video link.

Judge Fulford directed that if the video link would be difficult to set up or would delay the process, consideration should be given for a deposition to be taken with all interested parties present and able to ask questions.

Finally, court heard that ‘intermediary 321’ who was supposed to give evidence this week via video link from Congo had instead travelled to The Hague due to miscommunication. This witness, whose time on the witness stand was interrupted by the imposition of the stay of proceedings last July, will need five days of orientation before he commences his testimony.

The trial is expected to resume on Monday next week with the evidence of ‘intermediary 321’.

Afrique en Ligne
Wednesday, 27 October 2010

International Criminal Court asks Kenyan govt to arrest President Bashir

Nairobi, Kenya - The International Criminal Court (ICC) has asked the Kenyan government to arrest Sudanese President Omer Al Bashir, if he travels to Kenya to attend a regional summit to discuss the planned referendum on the independence of Southern Sudan.

The Court said its Pre-Trial Chamber I issued a request to Kenya to inform the Chamber, by 29 October, about any problem which would impede or prevent the arrest and surrender of the Sudanese leader, in the event that he visits the country on 30 October, 2010.

'The Chamber, being seized on a notification of the Prosecutor informing the Ju dges of the possibility that Omar Al Bashir might travel to Kenya for an Inter-governmental Authority for Development (IGAD) summit on 30 October, renewed its request to Kenya to take any necessary measure to ensure that the President of Sudan...in the event that he t ravels to Kenya, be arrested and surrendered to the Court in accordance with its obligations as a State Party to the Rome Statute since 1 June, 2005,' the ICC statement said.

In August, the ICC issued two decisions informing the UN Security Council and the Assembly of States Parties to the Rome Statute about Al Bashir's visits to Kenya and Chad, 'in order for them to take any measure they may deem appropriate'.

President Bashir visited Kenya to attend the country's inauguration of a new constitution on 27 August and left freely, despite the arrest warrant against him.

The arrest warrant was issued on 4 March, 2009, with the Court saying there are reasonable grounds to believe that the suspect is criminally responsible for five counts of crimes against humanity and two counts of war crimes.

A second warrant of arrest was issued against Mr Al Bashir on 12 July, 2010, for three counts of genocide.

The Christian Science Monitor
Tuesday, 26 October 2010

Kenya missing its chance for justice, say top international lawyers

The International Criminal Court's investigation of ethnic clashes that left 1,300 people dead in Kenya will fall short of what a hybrid court could accomplish, says a team of top lawyers.

By Mike Pflanz, Correspondent

Nairobi, Kenya

Kenya is missing its best opportunity for bringing those responsible for post-election violence to justice, a team of senior international lawyers tells the Monitor, adding that it's not too late for the country to establish a UN-backed hybrid court.

Currently, only the International Criminal Court (ICC) is investigating ethnic clashes that left 1,300 people dead and the country's reputation for stability in shreds after the disputed 2007 election. While Kenya has a Truth, Justice, and Reconciliation Commission attempting to highlight those responsible for that violence, there is no domestic criminal investigation.

To establish a Kenya-based hybrid court of international and national lawyers it "would be up to the Kenyan government to make an approach to the Secretary General of the United Nations," Desmond de Silva, former chief prosecutor at the Sierra Leone court and one of Britain's best-known international lawyers, told the Monitor during a visit to Kenya this week.

"There is no reason why the Secretary General shouldn't agree," he says, adding that he and other international lawyers are willing to help establish a hybrid court here.

Hybrid court originally dismissed

Plans for proceedings in Kenya's own notoriously corrupt courts were originally dismissed, with local and international critics arguing that judges could be bought off and cases bogged down in bureaucracy.

But having the ICC handle the matter without involving Kenya's justice system is now seen to have its shortcomings.

Fewer than six of the most senior figures are expected to be indicted for inciting and planning the ethnic violence, for instance, which means that the middlemen and machete-wielding foot-soldiers are likely to avoid prosecution. There are fears that such impunity could spark more violence ahead of the next national vote in December 2012. And the international team of lawyers argues that Kenyans may trust the process more if they see the trials unfold closer to home.

"I don't think all the possible options were properly debated here," Courtenay Griffiths, the British lawyer defending former Liberian President Charles Taylor at his war crimes trial, tells the Monitor. "It seemed to be a straight choice between Kenyan courts or the ICC. There seems to have been very little debate about the model of a hybrid court in [Kenya], under the United Nations."

Benefits of a hybrid court

Such a court was set up in the West African country of Sierra Leone after the civil war there ended in 2002. The Special Court for Sierra Leone indicted 11 people – mostly rebel leaders – eight of whom have been convicted and handed jail sentences of between 15 and 52 years. Mr. Taylor is still on trial, and the remaining two indictees died.

“[A hybrid system] is the preferable system for Kenya, too. There’s no question about it,” says Mr. de Silva. “There is public participation in the administration of justice, they can see it happening first hand, that things are not being swept under the carpet. When something happens in a distant country far, far away, of which the average villager here knows little, they can easily feel that justice is simply not being done.”

If a hybrid court is established, he adds, then the ICC's investigation will "fade away."

But Kenyans have little trust in any local mechanism to bring those responsible for one of the country’s darkest hours to justice. A poll last year found almost 70 percent favored trials at the ICC.

Why many Kenyans prefer the ICC

Even if a hybrid court were established in Kenya under the UN, people fear that powerful politicians – said to be behind the violence – would be able to influence hearings or intimidate witnesses.

“We’ve had ethnic clashes here going back to the 1990s, and they have never resulted in any domestic process to bring people to account,” says Mwalimu Mati, director of the human rights watchdog Mars Kenya.

There have been recent attempts to establish a special tribunal to investigate the 2007-08 violence – a kind of special court for Kenya – but they have all failed to pass through Parliament.

“The fact is the momentum is rolling with the ICC,” says Mr. Mati.

“That’s what Kenyans want, it’s what they believe will be credible, something that can’t be tampered with. A true UN-Kenya special court was never an option that’s been suggested, and it is probably too late to start it all now.”

The Daily Nation (Kenya)
Tuesday, 26 October 2010

Saitoti tables rules on ICC evidence taking

Internal Security minister George Saitoti tabled in Parliament a gazette notice with rules that will guide the procedure in obtaining evidence during International Criminal Court investigations into the poll chaos.

A Cabinet sub-committee chaired by the minister worked on the rules that state, among other things, that all records and documents relating to any proceedings before the ICC shall be confidential and kept under seal unless the judge, for good cause, orders otherwise.

The International Crimes Procedures for obtaining Evidence Rules 2010 were concluded on October 19 and are contained in a special issue of the Kenya Gazette Supplement dated October 22.

The rules further state that a witness may decline to answer any questions if, in his or her opinion, the answer may incriminate him or her or compromise national security.

They apply where the attorney-general has authorised the taking of evidence and production of evidence under Section 78 and 79 of the International Crimes Act 2008.

Under the same rules, summons shall be served on witnesses personally and there shall be a period of 15 days between the date of service of the summons and on which they would be required to testify.