EVAP Ep. 13: Chile Eboe-Osuji

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SPEAKERS

Jaclyn Streitfeld-Hall, Chile Eboe-Osuji

J Jaclyn Streitfeld-Hall 00:12

Welcome to Expert Voices on Atrocity Prevention by the Global Centre for the Responsibility to Protect. I'm Jaclyn Streitfeld-Hall, Research Director at the Global Centre. This podcast features one-on-one conversations with practitioners from the fields of human rights, conflict prevention, and atrocity prevention. These conversations will give us a glimpse of the personal and professional side of how practitioners approach human rights protection and atrocity prevention, allowing us to explore challenges, identify best practices, and share lessons learned on how we can protect populations more effectively. Today, I'm joined by Dr. Chile Eboe-Osuji. Dr. Eboe-Osuji served as Judge at the International Criminal Court from 2012 to 2021, and was the Court's President from 2018 to 2021. He is currently a Distinguished International Jurist at the Lincoln Alexander School of Law at Toronto Metropolitan University, and a Visiting Professor at University of Windsor. Thank you for joining us today.

C Chile Eboe-Osuji 01:15

Thank you very much.

J Jaclyn Streitfeld-Hall 01:16

Dr. Eboe-Osuji, you have such a rich history in international law, so I want to just dive in and ask right away: What are your top recommendations to the international community to overcome challenges that have made justice for atrocities more difficult in recent years? And particularly in public lectures you gave recently, at the University of Toronto at ACL conference last year and the Stanford School of Law, you talked about adjusting international law in at least two ways. First, by amending the Rome Statute, and second by adopting a new covenant on the right to peace. How would those measures improve protection?

Chile Eboe-Osuji 01:56

Thank you very much, Jackie. It's a great honor to be with you. And the time of this podcast is particularly topical; we are at a time when we no longer speak about international criminal justice in the, as a matter of hypothesis, or as a matter of theory - we are seeing its value as we speak. The war in Ukraine, or the invasion of Ukraine to be more accurate, has brought the need of this discipline full square to everyone's attention. So it is in that context that I made the recommendation, or recommendations rather, that you alluded to in the question. Yes, I have strongly recommended adjustment of international law in two main ways. One would be in terms of criminal responsibility, and the second way would be civil liability. Criminal responsibility is about adjusting the Rome Statute in three ways I see, three ways. One of them would be to extend the criminal responsibility for the crime of aggression, to extend it to rank and file, the military and rank and file, in other words, officers and foot soldiers in the field also need to be held responsible for the crime of aggression. Currently, that is not so. Those who designed the norm of a crime of aggression, for some reason, decided that it was best to focus it on political and military leadership of states. If we want to really to put pressure against the instinct or rather the inclination of strongmen - usually, these are men to wage wars of aggression when they're in positions of power. If you extended criminal responsibility to foot soldiers and officers in the field, it will create pressure on the leaders who ordered them to go to war. There's pressure on them if the foot soldiers and officers are looking at the leaders and saying, "what are you doing? You are actually forcing me to commit an international crime. I don't feel comfortable doing that" or "no, I will not do that." So that is what I mean by pressure. So once that pressure is there, let the leaders deal with it, whether it's mutiny or whatever, so be it. But the point being that foot soldiers, and officers need to be put in a position to say, "look, we are not going to commit an international crime by invading another country on your order, Leader. So we're not doing that or we don't feel comfortable doing that." So that's what I mean by extending criminal responsibility to rank and file. The second way to adjust the Rome Statute, to amend the Rome Statute, is to delete a certain provision in the Rome Statute that has created a gap that is causing difficulty, everyone sees it. That gap comes by virtue of Article 15 bis, paragraph 5, of the Rome Statute that provides that the ICC does not have jurisdiction in respect of the crime of aggression, jurisdiction over the nationals or territory of a state that is not Party to the Rome Statute, except when the Security Council - UN Security Council - refers the case to the ICC. Now, the aggression crime is the only one of the four crimes in the Rome Statute that has that provision to it - that the ICC, no jurisdiction over nationals or territory of non-Member States to the Rome Statute, except when the Security Council refers it. Now what we have seen now is there's now a gap because Russia is not a State Party to the Rome Statute. And Russia has invaded Ukraine, but no Russian national including that President can be prosecuted at the ICC for the crime of aggression, because the Security Council has not referred the case and will not refer the case, because Russia would exercise a veto power to ensure that there is no such referral. But you have a scenario where there's an apparent international crime occurring on the territory of Ukraine, but the ICC cannot have jurisdiction over that. The ICC can have jurisdiction over war crimes, crimes against humanity or even genocide to the extent committed on the territory of Ukraine, but not the crime of aggression because of this provision, this gap in Rome Statute: Article 15 bis, paragraph 5. And because of that, you see countries, some leaders of them, specifically the former Prime Minister of the UK Mr Gordon Brown, scrambling efforts to create a new specific tribunal to prosecute the crime of aggression in Ukraine because of that gap. And I see we've seen the lessons from that gap. And that gap was not an accidental gap. It was a deliberate gap. Now time has come to delete it by deleting that provision. So that's the second way I say adjust international law. The third way would be to extend within the UN the power to refer cases to the ICC. Currently, the only way the ICC can receive referrals from the UN is when the Security Council refers that case to the ICC. That is what Article 13b of the Rome Statute says.

But I'm saying again, what has been happening since the war in Syria, and so forth, and now in Ukraine is we see that the Security Council cannot refer a case to the ICC when some powerful interest within the P5 exercise veto power to stop that happening. So this time has now come to consider, and I do strongly recommend adjusting that provision Article 13b of the Rome Statute so that the UN General Assembly can do something when the veto power has been, should I say, immorally exercised to stop justice being done and victims receiving justice, when justice cries out to be done? And the only way to do it would be when the Security Council refers that case to the ICC. Or the Security Council doesn't refer a case to the ICC, because someone decided to, as I say, immorally exercise the veto power. If that happens, that should be the possibility of the UN General Assembly taking up a question saying, "hang on, the Security Council hasn't done what it is supposed to do here. So we are going to try and correct that." So these are the three ways I think I strongly recommend adjusting international criminal law to attend to the need for justice in this time. In terms of the second way to approach it, being the civil liability fund, recommending the adoption of new convention or new treaty, an international covenant, on the right to peace, so as to make peace, recognize peace as a fundamental human right, which should have been done a long time ago. We have all these rights. We've seen the UDHR, Universal Declaration of Human Rights, and the ICCPR, and so forth. But none of them, in none of those instruments do you see peace recognized as a human right, and you ask yourself, which one of these rights you see in the UDHR, in the International Covenant on Civil and Political Rights, and all the other slew of instruments that contain international human rights, which one of those rights can you really enjoy without peace prevailing? Rarely any. Of course, if you're in the United States, perhaps you can say, well, you have a Second Amendment right, the right to carry weapons, but that's not an international human right. The point is to say, peace is a fundamental human right, it needs to be recognized as such and the time has come to do so. Now, when you do that, in a constrained way, to target wars of aggression - the idea being, anybody who launches a war of aggression is violating the right to peace, the fundamental right to peace, but you don't leave it at that. It becomes now a matter of the victims of that violation should have a right to remedy. In law we use the expression in Latin "ubi jus ibi remedium" - in other words, where there is a right, violation of that right entails an obligation for reparation. So you have a fundamental right to peace, somebody launches a war of aggression, that causes losses of life and property and mayhem in people's lives, then the victims now should be able to go after those who commenced or launched that war of aggression in civil courts around the world on the basis of an international convention that has been domesticated around the world.

J

Jaclyn Streitfeld-Hall 13:08

Thank you for that. And I think both of those proposals put a very different type of pressure on perpetrators than what currently exists. And in that regard, you know, international criminal justice is often described as a deterrent for mass atrocities partly because of the idea of pressure on perpetrators. Former ICC Chief Prosecutor Fatou Bensouda also described the ICC as the legal arm of R2P. Based on your experience, have you seen this deterrent effect to be true? And, you know, are some of the proposals you've put forward to address any gaps where it isn't true?

C

Chile Eboe-Osuji 13:44

Fatou Bensouda is quite correct to say international criminal justice is the legal arm of R2P. And more specific your question, whether there's evidence of deterrence, it is a question that gets

asked a lot. And I'm gonna answer it in two parts. Part one would be to select some... it's important for us to keep our eyes on the ball. Now, by that I mean this - deterrence is basically a corollary value of international criminal justice. It's a corollary of value, in my view. The primary value is actually retribution, you know, punishing those who have violated core norms that the international community feels, we need to apply punishment to these kinds of violation. So that is, in my view, the primary value of international criminal justice. And that value is immediate. The victims of the violations see a measure of justice that may be only consolatory, so be it, but at least the victims are seeing that someone paid attention to their plight, as opposed to whoever committed the violations enjoying impunity in that regard. So we see, again, retribution is the primary value of international criminal justice, exactly in the same way that retribution is the primary value of criminal justice in the domestic setting - the same thing to the international setting, we extrapolate that onto the international plane. And oftentimes people get lost with that question, well, how can we assess the value of international criminal justice, specifically the value of the ICC? Do we see deterrence? I'm saying, first of all, let's focus on the primary value and not necessarily on the deterrent value. So that's what I mean by "eyes on the ball" - punishment of those who committed atrocities, we call this "jus puniendi". Jus puniendi - the right of society to exact punishment upon those who violate its core norms. So that is the primary value. Now, to its corollary value, deterrence. Again the same thing in national settings, does the criminal code, or the criminal justice system in the US and Canada and UK and wherever it is, does the criminal code deter people committing crimes? Well, the same question we can answer it in relation to the ICC, and whatever value we give to that answer in the national setting, we are free to give the same answer to the ICC or the international setting. But more specifically, in terms of beyond those normative considerations, specifically, on the evidence. Yes, indeed, I am able to speak to the deterrent value of international criminal justice, at its level. Now there are some research, by the way, that has been done by some political scientists and social scientists on this subject. And they answer that question, yes, there is, and so we have evidence, they've done research and published, showing the appreciable or tangible evidence of deterrence, the research is there. But from my experience, as well, at the ICC, I am able to share some information in that regard. Now, I was presiding a case out of Kenya for the post-election violence in Kenya. I was the presiding judge during the trial of the vice president of Kenya, Mr. Ruto. In the course of that trial, we had explored evidence from an expert who testified that before the post-election violence of 2007-2008, which eventually came to the ICC, as a matter to be prosecuted. Before that, previous elections in Kenya had seen political violence that kept going up and up until that bubble of 2007-2008 passed, and the matter ended up at the ICC, and ICC started prosecuting people. Now, the subsequent elections in Kenya have seen significantly less political violence. And this expert attributed that declining violence to the fact that the ICC stepped in and was prosecuting people. So that is concrete information I thought I could share. The second concrete information I could share was in my position as the President of the Court. I was in the position of meeting senior leadership of countries - Presidents and Ministers, and so on. And I can tell you that some political leaders, some of them presidents, vice presidents from the African region, actually told me, as well as civil society leaders, told me that the presence of ICC, the work of ICC, has had a significant impact in the reduction of political violence during elections in their countries. This is firsthand information given to me by those who lived the experience. So I'm able to share that much. So, yes, indeed, there is tangible value. But again, I return to the original premise that I started, let's keep our eyes on the ball, the ball being the primary value is retribution. And as we ask ourselves, do we value international criminal justice for deterrent value, we must also ask ourselves, should we say, the one point of departure for that view would be how we also appraise the criminal justice system in the national setting.

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Jaclyn Streitfeld-Hall 21:04

I think in that response, you touched on something that I think we struggle with, and R2P, which is the you know, similar to, how do you talk about deterrence? How do you talk about prevention that has worked? And I'm glad that you raised the Kenya case, because Kenya is often referred to as the first real example of R2P in action. So I was wondering, in this context, from an international criminal law perspective, what is your assessment of the continuing value of R2P as a norm?

C

Chile Eboe-Osuji 21:41

I think it's a very, very important norm. And you when you began talking you referred to, which I completely agree with, that international criminal justice is the legal arm of R2P. The R2P in my view continues to be important. One thing it does that stands out, in my view, is it stresses to states that the idea of sovereignty of states, and that is a fiction, that political legal fiction called sovereignty of state. R2P stresses it as it is not a one way street, that seen only in terms of the right of the leader of a state or leaders of state, to do whatever pleases them with their national population - R2P tells us no. Sovereignty also entails an obligation, an obligation on leaders of states, to protect their people and to respect the rights of their people. Whereas failing in that regard, it is a matter of concern to the international community. And the international community will intervene under the coordinated efforts of the United Nations to try and resolve the problem. Basically, international community will intervene, of course, R2P being a UN concept. You can see how it was pointed to the efforts of the United Nations. But because we very well see, variants are found under the ICC as well as the Rome Statute. It's not strictly speaking part of the UN, but at talks, it's also an effort of the international community to intervene, to protect populations that have been subjected to severe violations where the national leaders have failed to give that protection or where indeed, the national leaders are the culprits of the violations. So, it is an important point for R2P to again stress it. Sovereignty is not all about the right of those who lead states. It also entails a modulating Responsibility to Protect, if not, international community will do it after all and that expression, we use in law, respect for human right is an obligation erga omnes, so "obligation erga omnes", an obligation on the whole world, that's what that Latin stands for. So because it is an obligation to the whole world, whether leaders of state or also a duty to the whole world to account for how they treat human beings who happen to be within borders drawn around certain land territories. So that was on the importance of R2P. And the idea, by the way, returning to Fatou Bensouda take of international criminal justice being the legal arm of the R2P, we can actually trace this notion back to the origins of the idea of criminal responsibility in international law. And that goes back to 1919 - the Paris Peace Conference of 1919, there was a debate at some point when the Prime Minister of the UK David Lloyd George, the Premier of France George Clemenceau, the Prime Minister of Italy Vittorio Orlando, and President Woodrow Wilson, they were called the Big Four during the Paris Peace Conference of 1919. And they were debating the decision to prosecute the Kaiser of Germany as something that Clemenceau and Lloyd George were insistent upon that must happen. The debate was, well, that hadn't happened up until then, well this is a new precedent, an unknown idea in international law. Clemenceau and David Lloyd George say, "yes, we know that it's a new idea, but we want to change that. From now on, we want to make sure that even leaders of states who do these sorts of things, that commit war crimes or engage in wars of aggression, must be held accountable."

J

Jaclyn Streitfeld-Hall 27:04

It is incredible to see how the seeds of these ideas evolve over time. And we keep coming back to things that may have been proposed many, many decades earlier. I want to turn to something that I find interesting about your career, I sort of did a very short bio at the beginning and undersold how incredible your career has been. You've spanned roles from UN-mandated tribunals, to OHCHR, and then to the ICC most recently. And I think this question actually touches a little bit on one of your proposals from the beginning regarding that issue with the UN Security Council and international justice, because we have a similar challenge with R2P, that so much of R2P has to go through or so much of international action under R2P has to go through the Security Council. And so in recent years, we've seen the General Assembly become creative on R2P and become creative on investigative mechanisms. We've seen this kind of evolution from UN-mandated tribunals like what you had served on to the ICC to now these sort of broader investigative mechanisms like the mechanism on Syria. So I'm curious, how have these mechanisms contributed to the landscape of international justice in your view?

C

Chile Eboe-Osuji 28:37

The perhaps one big takeaway from that question, really is how difficult it can be, and how now it ordinarily is, to establish ad hoc mechanisms to accountability. I say that because the project of creating the ICC, which is now the permanent International Criminal Court, started soon after the Second World War, soon after the Nuremberg experiment. That's when the UN mandated the ILC, the International Law Commission, to study the question of visibility and desirability of creating a permanent international jurisdiction for international crimes - in other words, a permanent, you know, mechanism creating a Chamber within the International Court of Justice, or establishing something apart from the International Criminal Justice being an International Criminal Court. So that project started soon after the Nuremberg experiment, but you know what else happened soon after the Nuremberg experiment - the Cold War. So what happened was that the Cold War literally as well as figuratively froze these efforts to create permanent International Criminal Court. Then mid 1980s to early 1990s, we experienced that spring of hope, on the international plane. And it was in that context that the UN Security Council now got together and created the ad hoc Tribunal for the Former Yugoslavia, and ad hoc Tribunal for Rwanda in 1993 and in 1994, respectively. And while that spring of hope prevailed, those who had always wanted to have an International Criminal Court now use the opportunity to bring back that project and quickly realize it. And knowing that we cannot be doing ad hoc tribunals all the time, there's a need for justice in the circumstances of heartbreaking atrocities. So now there is a permanent International Criminal Court that will do justice in every instance, which gives ad hoc tribunals... that's not the way to go. So that ICC, we saw it was created in 1998. But then, we're now back to the Cold War. I now speak about the "first Cold War", and then we are in what I call the "second Cold War," right. But what we now see in this second Cold War is back to what things used to be before the former or the first Cold War: nothing is moving anymore in the Security Council, they cannot create new ad hoc tribunals anymore, and the ICC has not received the optimum support that it should have received from states. The United States government occupied without tackling the Court, and that played into the hands of people who traditionally didn't care too much about human rights respect, and all that. So that's, you see, that's what I mean by ICC has not received optimum support that it needs to receive. By now, one would have expected the situation in Syria would have been referred to the ICC, but that didn't happen because people use the veto power to block that happening. So that's how we ended up with making do. And the making do was the Office of the High

Commissioner for Human Rights basically instigating the UN to create these investigative mechanisms - i n international law in general, you refer to them as effectively commissions of inquiry. So their purpose is to gather and preserve evidence that could be used at an opportune moment - could be states that want to use it, states who want to exercise for instance universal jurisdiction or even future if there is a change of government in the countries and they want to do a prosecution, the evidence is preserved, or if for some reason, the ICC is given jurisdiction, so the evidence is preserved. So that is the purpose of these mechanisms, collect and preserve evidence, because that's the best that could be done in the circumstances. The mechanisms...we cannot speak about them in terms of evolution as such, as if it is something different from what exists now. It is basically, effectively the same sort of thing. I guess, given the different ways that the information from these inquiries and mechanisms can be used, I'm also curious what your thoughts are on the place for universal jurisdiction over international crimes? It is a very important question. Again, it is oftentimes people tend to think about universal jurisdiction as a "by the way idea" in international criminal justice. I tend to have a different view of that. I do think that it is a central idea to the project of accountability. Basically, in the ecosystem of accountability, using the law, universal jurisdiction is a critical element of it. And as I said here, we say about the work of the Syria investigative mechanisms and all that will help exercise of universal jurisdiction. We see that happening now in Germany. Germany is now playing a leading role in putting, injecting new life into the idea of universal jurisdiction. In 2021 or so, a German court in Koblenz rendered its documents in the prosecution of a Syrian official who had been implicated in war crimes in Syria. We have another court in Frankfurt I think, also engaged in the trial. I don't know whether they're finished now. But I know that was a case going on there. German courts have been, you know, basically leading the current efforts on universal jurisdiction. And within the last few days, I believe, and no, I think it was last week, or earlier this week, there was news about the Swedish court rendering judgment in a case that happened during the 1980s, early 1990s, in Iran during the reign of the Ayatollah Khomeini, a massacre that occurred in that country - somebody was prosecuted for it in Sweden recently. So that is universal jurisdiction, and it is an important piece of the justice project, not a side show. Let us remember that the Rome Statute in creating the ICC, it stressed that the primary responsibility of states, it is the primary responsibility of states to do justice. The ICC's jurisdiction is only complimentary, a court of last resort when justice is not done at the national level, and the ICC cannot do all the cases, that cry out to be done by way of justice. The ICC can't, there's not a budget to do that. If the ICC is supposed to do that, it's gonna be a huge, huge, huge operation indeed. So states have to step up and discharge their primary obligations to do justice. Naturally, the first port of call would be the states on whose territories those violations occurred. But if they cannot do it, then other states should step in and do it. And the way to do it would be through universal jurisdiction. And we see that now fully in play. Again, let's remember that even the Geneva Convention places an important place for universal jurisdiction. If you look at article, I think it's Article 50, or 49, somewhere 49-50. Oh, Geneva Convention #1 of 1949, you see through universal jurisdiction that states, member states to that convention, obligated to search for, and prosecute those who have committed grave breaches of the Geneva Conventions and punish them. And if they don't do that, unless you do that, regardless of the nationality of the culprit, by the way, that they fail to do that, then they should hand over to another state that has established a prima facie case who wants to do the prosecution itself. And so there is no limit. So that is universal jurisdiction for you. So it is the notion that's very much part of international criminal justice system, as it should be.

Jaclyn Streitfeld-Hall 39:18

Thank you for that. That was really fascinating. And so since we've just observed recently, World Day for International Justice as well as the 20th anniversary of the Rome Statute, given your extensive experience with the Court, what do you think are some of its biggest achievements in its short life so far?

C Chile Eboe-Osuji 39:40

Thank you. I would say there's a lot of things. We can get to the micro level of what the Court's been able to achieve. We can talk about some of the decisions people have talked about. One of them would be the one that finally clarified in 2019 that under international customary law never recognized immunity for heads of state who got charged before international tribunals or courts for international crimes - so international law never recognized immunity for them. So that is an important decision. But I think normatively speaking, or taking you to a broader level of abstraction, the fact of the existence of the ICC itself is an achievement in the sense that it is there reminding everyone that it is no longer a free for all for people who want to commit international crimes. There is a live risk that those who commit international crimes will be gone after by the ICC somehow. So that is the live risk, of course to realistic extent of those who are not States Parties to the Rome Statue. But the point is to say, the ICC being there has now filled the gap that existed before its creation. So that is in itself the major achievement of the system. But beyond just the matter of being there, the Court also has demonstrated that it can do justice and take it seriously in the sense that the Court has registered some convictions. The Court has also registered some acquittals, just to say that the Court is not a one-way street "this does only one thing, anybody who comes to the court must expect to the convicted" - now the Court has said, this is a serious project, it is about justice, and those who come to the Court will expect to receive justice, and justice includes acquitting accused persons where the evidence is not strong enough to convict, they must be acquitted. And the Court has demonstrated that that is justice and that is an achievement, regardless of the unfortunate view of those who protest whenever there is an acquittal at the ICC. It is really unfortunate, but justice includes acquittal of people who for whom the evidence is not strong enough to achieve a conviction. So the ICC has also demonstrated that it will do its work without being, and will not succumb to being bullied. The Court - when I was there the height of efforts by states to bully the court, be it the Government of Kenya at the time t ried to bull y the Court. Some leadership on the African Union - when I say African Union, I need to stress that not all of Africa, and there are many African states who believe in the Court and support it as always. But on the AU level, there were some leaders of AU, who were not pleased with the Court because the Court was going after Omar Bashir and the President of Kenya at the time, but the ICC stood firm in doing justice, because it should. But not only from the African Union, you saw efforts being made to bully the court from the government's part, I must stress that when I say governments it's important, it's often times when people speak in terms of countries, they extend conducts to citizens - no. But we saw efforts being made by certain governments of the United States, specifically the Trump administration, to bully the court. We saw specifically the Government of Israel at the time, Prime Minister Netanyahu tried to bully the court. Between all of this, the Court stood firm to say, look, we are going to do justice as we see it. So that is a demonstration of the mettle of the Court, it's seriousness to do its work. So those, in my view, are important achievements, something that international community should be proud of.

J Jaclyn Streitfeld-Hall 45:05

Thank you for joining us for this episode of expert voices on atrocity prevention. If you'd like

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