

# Pursuit Of Justice Or Western Plot?

*International indictments stir angry debate in Africa*

Mary Kimani



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*Sudanese demonstrators in the United Kingdom demand that those accused of mass atrocities in Darfur be tried by the International Criminal Court.*

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In July 2008 Luis Moreno-Ocampo, the chief prosecutor of the International Criminal Court (ICC), announced his intention to prosecute President Omar al-Bashir of Sudan for human rights

violations related to the conflict in that country's Darfur region. Less than a year later, on 3 March 2009, ICC judges confirmed that an arrest warrant had been issued for President Bashir on charges of

crimes against humanity and war crimes.

That indictment, among other actions by the ICC, has provoked

intense controversy, adding further heat to an often angry debate about the court's role in Africa. Critics argue that the ICC is placing undue emphasis on Africa and that indicting the sitting Sudanese president threatens that country's fragile peace process. Supporters of the ICC's actions worry that such arguments diminish the seriousness of the crimes and point out that some of the most powerful critics are other African leaders who fear they might one day face similar charges.

When 120 states first signed the Rome Statute establishing the court in July 1998, many saw its creation as a major diplomatic breakthrough. That support reflected broad agreement with the

affirmation of the ICC Statute that people who "bear the greatest responsibility for the worst crimes known to humanity" should be punished. By 2002, 60 countries had ratified the treaty — the minimum required for it to become law — a number that has grown to 110 today.

The new court has also met widespread support in Africa. Today 30 of the continent's 54 countries have ratified, forming the largest regional bloc among the countries that are party to the court. Many Africans work at the court, including as judges.

Chidi Anselm Odinkalu, head of the Africa justice program of the non-governmental Open Society

Institute, explains why many Africans initially embraced the ICC. "Most people in our continent are, like me, children of war, want and deprivation, caused mostly by bad government," he noted in an article posted online by the African publisher Pambazuka. "For us, justice for mass atrocities is intimately personal." Unfortunately, in most African countries, Mr. Odinkalu points out, dignity, peace and justice have proved illusory. "This is why most of us supported the establishment of the ICC. We believed the court would help to end high-level impunity for mass atrocities, enabling us to attain the best we are capable of."

## Focus On Africa

The ICC prosecutor has the power to investigate or prosecute cases referred by national governments or by the Security Council. The court received its first case in 2003, referred by the government of Uganda, and subsequently issued five indictments against leaders of the notorious Lord's Resistance Army (LRA), who remain at large.

It has also arrested several Congolese rebel leaders — and a former vice president — for crimes in the Democratic Republic of the Congo (DRC) or in the neighboring Central African Republic. In Sudan, warrants have been issued not only for President Bashir, but also for the country's interior minister, the leader of a

pro-government militia and a leader of the rebel United Resistance Front (who has voluntarily surrendered to the court). The court's prosecutor has also investigated in Côte d'Ivoire and been asked to look at allegations of ethnic cleansing in Kenya.



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*Sudanese protest in Khartoum against the court's indictment of President Omar al-Bashir.*

© Reuters / Mohamed Nureldin Abdallah

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None of the indictments has provoked as much debate as the warrant for the Sudanese

president. The African Union (AU), at a February 2009 summit in Addis Ababa, Ethiopia,

expressed concern over the prosecutor's intention to seek the warrant. The AU then asked the

Security Council (which referred the case) to defer proceedings against the Sudan leader, arguing that a legal process would undermine ongoing regional peace efforts in which Mr. Bashir was an active participant. "The search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting

peace," AU leaders stated. They also reiterated their concern about a possible "misuse of indictments against African leaders."

After the Security Council declined to defer the case, the AU Peace and Security Council on 14 July 2009 announced a decision by the AU Assembly not to cooperate

with the ICC warrant. The African leaders said they were unhappy with the "manner in which the prosecution against President Bashir has been conducted, the publicity-seeking approach of the ICC prosecutor" and the Security Council's refusal to defer the indictment against President Bashir.

## Anger And Alarm

Some African leaders expressed sharper anger. The ICC "has been put in place only for African countries, only for poor countries," Rwandan President Paul Kagame told reporters. "Every year that passes, I am proved right.... Rwanda cannot be

part of colonialism, slavery and imperialism." Jean Ping, the president of the AU Commission, told the French radio network RFI that the "ICC always targets ... Africans. Does it mean that you have nothing on Gaza? Does it mean you have nothing [on the]

Caucasus? Does it mean that you have nothing on the militants in Colombia? There is nothing on Iraq? We are raising this type of question because we don't want a double standard."



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*ICC Prosecutor Luis Moreno-Ocampo:  
Some hail his efforts to combat impunity in  
Africa, others accuse him of unfairly targeting  
the continent.*

© Alamy / Jeff Morgan

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Responding to charges that the court is "targeting" Africa, Sylvia Steiner, an ICC judge from Brazil, notes that three of the four cases currently before the court were referred by African governments. The Security Council's decision to refer the case of Darfur, she adds, followed an investigation by a UN commission. The ICC prosecutor's

office then investigated further before asking the court to issue the warrants. In making their decision, says Ms. Steiner, the "sole material" to which the three judges in the case had access was from that investigation.

However, Richard Goldstone, a former prosecutor of the tribunals

for Rwanda and Yugoslavia, acknowledges perceptions that the indictments are skewed. In an article published by the International Bar Association, Mr. Goldstone said that the ICC does appear "too focused on prosecuting crimes committed on the continent of Africa, while paying scant regard to similar

situations elsewhere in the world.” He observed that although the prosecutor’s office said it had looked at other cases in Afghanistan, Georgia, Palestine and Colombia, no warrants were issued for suspects outside Africa.

Mr. Goldstone noted that this is something that the ICC should be able to fix quickly and easily. “The ICC has a responsibility to ensure that there is balance in the investigation and prosecution of cases,” he said. To dispel notions

that the ICC is Africa-specific or Western-driven, the ICC prosecutor “needs to commence investigations ... in other parts of the world.” Where “appropriate and where there is sufficient evidence,” such investigations should “lead to timely prosecutions,” Mr. Goldstone said.

Human rights lawyers Olympia Bekou and Sangeeta Shah, who have written extensively on the court, counter that there would be less need for the ICC to engage in

Africa if the continent’s governments did a better job of bringing to justice those responsible for mass atrocities. For critics worried that the international community is intervening too much in domestic affairs, they answer that the best solution would be to strengthen domestic prosecutions so that the ICC does not have to intervene. That “should be the ultimate goal of every state.”

## Weak National Courts

Solomon Dersso, a senior researcher with the South African–based Institute of Security Studies (ISS), argues that the ICC’s concentration on African cases is the result of two realities coming together. First, Africa’s weak national judicial systems make it difficult to prosecute powerful people. Second, all states are part of an international system in which weak nations do not have much influence.

While the ICC was intended to be a court of last resort — to be used only after national systems proved

unwilling or unable to prosecute gross violations — this has not worked well in Africa, “where the capacity to try such crimes is needed most,” says Mr. Dersso. This contrasts with countries like Argentina and Chile that have successfully prosecuted leaders accused of similar crimes. One factor in that regional discrepancy, Mr. Dersso argues, is that while donor countries have invested millions of dollars in building ad hoc tribunals and international courts, they have not given much support to Africa’s national judicial systems.

Consequently, in Africa, “there seems to be more resort to the international system,” Mr. Dersso says. This reliance makes the ICC appear to be overly active in Africa. Such dependence, Mr. Dersso maintains, also denies Africa’s national systems an opportunity to develop their own capacities to try crimes, in turn making it harder for a culture of human rights and respect for the rule of law to take root nationally, “where these commodities matter most.”

## Power Imbalances

The inherent power imbalances in the international political system contribute to Africa’s sense of being targeted, Mr. Dersso notes. Specifically, he cites Article 13 of the ICC Statute, which gives the Security Council the power to refer cases to the ICC or to defer the court’s proceedings, even for countries that have not signed on to the ICC, as in the case of Sudan.



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*Joseph Otti, one of the indicted leaders of Uganda’s notorious Lord’s Resistance Army. Will the ICC warrants impede talks to end the fighting in northern Uganda?*

© Redux / Vanessa Vick

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According to celebrated Columbia University professor Mahmood Mamdani, from Uganda, “Giving the Security Council power to refer cases from a non-signatory country to the ICC was against the Law of Treaties, under which no country can be bound by the provisions of a treaty it has not signed.”

Compounding the problem is that three of the Security Council’s veto-wielding permanent members, China, Russia and the US, have not ratified the Rome

Statute creating the ICC. Many believe those countries would never allow the Security Council to refer any cases related to their nationals. “Granting powers to the Security Council to refer cases to the ICC, or to block them, was unacceptable, especially if [Council] members were not all signatories to the treaty,” as this “provided escape routes for those accused of serious crimes but with clout in the UN body,” Mr. Mamdani points out.

Mr. Dersso agrees, noting that “unlike weak African states without such privilege, powerful states are in a better position to shield their leaders from the arm of justice.” This ability to protect their nationals from prosecution has lent “credence to the claim [that] the ICC system [engages in] selective justice, or that it is biased or discriminatory against the weak in the international system.”

## Fighting Impunity

Mr. Goldstone, the former international tribunal prosecutor, notes that such political considerations apply not only at the international level, but also nationally. Cases referred to the ICC by African leaders have so far been “disproportionately focused on rebel leaders,” he says, a fact that has led to the referrals “being seen as political tools in the hands of leaders who wished to remove their opponents.”

Mr. Goldstone notes the discrepancy between African leaders’ silence when the ICC chose to prosecute “erstwhile rebel leaders and political opponents of national governments,” and their stringent protests against proceedings directed at a fellow president. “The ICC is not a court of convenience, to be supported only when it is politically expedient,” Mr. Goldstone argues.

For the many victims of atrocities in Africa, such political considerations are beside the point, notes Kofi Annan, a former UN Secretary-General and now a member of the Africa Progress Panel, a group that advocates for the continent’s development. In an op-ed article published in various newspapers in June, he noted that

some African leaders see the ICC actions as “an imposition, if not a plot, by the industrialized West.” In his view, their outcry “demeans the yearning for human dignity that resides in every African heart.” He noted that the world has little hope of preventing atrocities or “reassuring those who live in fear of their recurrence, if African leaders stop supporting justice for the most heinous crimes just because one of their own stands accused.”

Mr. Annan, who in 2008 mediated a peace agreement following post-election violence in Kenya, continued: “The African opponents of the international court argue that it is fixated on Africa because its four cases so far all concern alleged crimes against African victims. One must begin by asking why African leaders shouldn’t celebrate this focus on African victims. Do these leaders really want to side with the alleged perpetrators of mass atrocities rather than their victims? Is the court’s failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?”

Not all African governments aligned themselves with the AU’s position on Mr. Bashir’s indictment. Botswana’s Foreign Affairs Ministry noted that the ICC was set up specifically to deal with human rights violations committed by powerful people, those most likely to otherwise go unpunished. “The people of Africa and Sudan in particular have been victims of these crimes. Botswana strongly holds the view that the people of Africa, including the people of Sudan, deserve to be protected from the perpetrators of such crimes,” the ministry stated.

After the AU announced that it would not cooperate with the ICC, more than 130 civil society groups from 30 African countries called on their governments to rethink their position. “We urge our governments to reaffirm their commitment to fighting impunity by supporting and cooperating with the ICC,” said Oby Nwankwo of Nigeria’s Civil Resource Development and Documentation Centre. Comfort Ero of the International Centre for Transitional Justice in South Africa said that civil society groups across Africa are united in their “determination not to allow leaders to forfeit Africa’s

commitment to justice for victims of atrocities.”

Nor does the broader public in Africa share their leaders’ worries.

## Peace Versus Justice?

Some critics argue that ongoing peace processes must take precedence over concerns for justice. From that perspective, they maintain that the ICC warrants may worsen the humanitarian crises in countries under investigation.

The warrants for Joseph Kony and other leaders of the LRA were seen as impeding a peaceful end to the conflict in northern Uganda. However, even after offers of amnesty to all rebels not named in the ICC indictment and of local instead of international trials for the leaders, LRA rebels continued to attack villages and abduct children in Uganda, Sudan and the DRC. The warrant against the Sudanese president was also said to risk impeding the Sudanese peace process.

Mabvuto Hara, president of the Southern African Development Community Lawyers Association, responds that the “peace before justice” argument serves to perpetuate impunity. “When our leaders are under pressure or when there is a change in government,

According to World Public Opinion, an international polling agency, 77 per cent of Kenyans polled approved of the ICC indictment against the Sudanese

they come to the negotiation table blackmailing their counterparts and asking for amnesty. What they are actually saying is: ‘Let’s have no accountability for criminal acts.’”

Mr. Annan urged the African Union to “not abandon its promise to fight impunity. Unless indicted war criminals are held to account, regardless of their rank, others tempted to emulate them will not be deterred, and African people will suffer.”

Mr. Odinkalu of the Open Society Institute fears that the debate is becoming counterproductive. “Criticism of the court, no matter how constructive, risks being denounced as endorsing impunity,” he notes, while “support for it, no matter how reasonable, is easily branded imperialism.” In the meantime, “the deadly business of mass atrocities continues unchecked, its victims in Africa fret and the credibility of the ICC suffers.”

Others worry that the current controversy may overshadow important legal innovations by the

president, as did 71 per cent of Nigerians, while 52 per cent of Egyptians disapproved.

court. The trial of Thomas Lubanga, a Congolese militia leader, is the first international case to prosecute the use of child soldiers as a war crime. There have also been important precedents for the rights of victims. Unlike trials before the international tribunals for Rwanda and the former Yugoslavia, trials at the ICC allow victims the right to be represented by an attorney and to apply for reparations to be paid through an international victims’ trust fund.

Rather than opposing the court’s warrants, argues Mr. Odinkalu, the AU could better address its unease by ensuring closer coordination among African governments, the ICC and the UN to make sure the court works better and addresses Africa’s concerns. More importantly, he argues, “the African Union must translate its rhetoric against impunity into a program of action, showing that African lives matter and that it will not issue a free pass to those — big or small — who violate Africans.”

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