



AFRICA AND THE INTERNATIONAL CRIMINAL COURT

Introduction

African countries were especially active during the negotiations for the establishment of the International Criminal Court (ICC). Their enthusiasm for the Rome Statute translated into detailed and extensive contributions to the negotiation process and reflected vigorous support for the timely creation of the Court. Senegal was the first country to ratify the Statute and become a State Party to the ICC. To date, 28 African nations have followed Senegal's lead, making Africa the most represented continent in the Assembly of States Parties (ASP). Since the Rome Statute entered into force in 2002, African states have continued to actively engage in the Court. Moreover, all of the current situations before the ICC concern African nations. The governments of the Democratic Republic of Congo (DRC), Uganda, and the Central African Republic (CAR) voluntarily referred the situations within their territories to the Court, seeking international investigation and prosecution of the grave atrocities committed on their territories. The fourth situation being addressed by the Court, in Darfur, Sudan, came before the ICC after a referral by the United Nations Security Council.

The ICC's Focus on Africa

State cooperation

The referrals by the DRC, Uganda, and the CAR, and the alleged atrocities committed within their borders, led the Prosecutor, Luis Moreno Ocampo, to select these situations as the Court's first cases. State referrals under Article 14 of the Rome Statute enhance the ICC's effectiveness in prosecution and trials because the Court is largely dependent on nations' assistance. Self-referrals, such as those from the DRC, Uganda, and the CAR, are especially advantageous for the work of the Court. They allow for more comprehensive investigations due the cooperation of the referring state's authorities. In particular, self-referrals facilitate access to witnesses and evidence, arrest of suspects as well as protection for the team of the Prosecutor and other involved parties.

Although Article 15 of the Statute grants the Prosecutor the ability to initiate an investigation on his own, the Office of the Prosecutor early on adopted a policy of encouraging States Parties to refer situations directly to the Court.¹ The Prosecutor has maintained this policy in the case of Sudan as well. Rather than act on his own initiative, the Prosecutor, aware that the Court did not have jurisdiction over Sudan and that the UN Security Council was preparing to take actions on Darfur, decided to wait for the Council's referral of the situation to the ICC. Moreover, the Prosecutor called for regional cooperation and emphasized the importance of an effective working relationship with the African Union (AU) in order to end impunity in Sudan.² In an effort to encourage regional involvement, Ocampo has sought opportunities to brief the AU's Peace and Security Council on the activities of the Court regarding Sudan.³ Sudan, a non-State Party, has refused to fully cooperate with the ICC in its investigation of atrocities committed in the region of Darfur.

¹ Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, p. 6, http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (last visited August 15, 2007).

² Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), December 13, 2005, p. 7, http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf (last visited August 15, 2007).

³ *Id.*





History of violent conflicts

Africa's painful past, marked by governmental failures to prevent and prosecute large-scale atrocities, is another reason for the ICC's focus on the continent. During the colonial era, the European Powers imposed artificially-created state boundaries, which forced different tribes to co-exist and accept one single nationality. Moreover, in many societies colonialism elevated the social status of one tribe over another, thus triggering ethnic hostilities. After the colonial powers withdrew from Africa in the 1950s and 60s, they left behind tribes struggling to cope with the legacies of their artificially-created societies. Ethnic hatred and mistrust that had accumulated for years suddenly erupted and engulfed numerous regions. The widespread heinous crimes committed during the genocide in Rwanda demonstrated how volatile and violent African communities could become.

ICC's jurisdiction and admissibility

In light of the political and social instability that plague the African continent, it is not surprising that the ICC has been paying special attention to the ongoing conflicts in African communities. However, African nations' violent past would not have been sufficient to warrant prosecutorial investigations, had the situations before the Court failed to satisfy the requirements for jurisdiction, gravity, and admissibility set out in the Rome Statute. The ICC's jurisdiction includes only the most serious war crimes, crimes against humanity, and genocide.⁴ Moreover, before deciding whether to open or accept investigations, the Prosecutor has to assess among things the scale, nature, manner of commission, and impact of the crimes, giving special consideration to whether they followed from a systematic or planned course of action.⁵

Due to political instability and ongoing violence, the legal systems in the DRC, Uganda, CAR, and Sudan have been unable or unwilling to prosecute the gravest crimes, committed on their territories. Thus, under the principle of complementarity, set out in Article 20 of the Rome Statute, the Court is exercising its jurisdiction to proceed with its own investigations. Moreover, the crimes reportedly committed in the four nations meet the ICC's gravity threshold. As a result of national judiciaries' failure to carry out criminal investigations and prosecutions, the alleged criminal conduct has been used as a way to keep and exercise power. The alleged crimes in these nations have grown to reach the level of atrocity, including thousands of killings, rapes, and abductions of civilians. Furthermore, the large number of victims in each situation demonstrates that the perpetrators believed they could use systematic brutality as a strategy of terror and with impunity. The alleged conduct also meets the requirement that the crimes be committed as part of an organized course of action, thus falling within the jurisdiction of the Court.

Why African States Support the ICC

Shortage of resources

Many war-torn African states do not have the financial or administrative capacity to punish the perpetrators of grave crimes. Often domestic courts lack sufficient resources to adequately investigate widespread criminal

⁴ Rome Statute of the International Criminal Court, art. 5.

⁵ Wasana Punyasena, *Why Are All of the ICC's Current Situations in African Countries?*, ICC-Africa, Newsletter of the Coalition for the ICC, Coalition for the International Criminal Court, Issue 6, July 2007, p. 6, <http://www.iccnw.org/index.php?mod=iccafrica&lang=en> (last visited August 15, 2007).





conduct. The most common deficiencies include shortages of personnel and finance, which hinder the courts' ability to gather and evaluate evidence appropriately. In addition, many African communities lack suitable infrastructure and facilities to conduct large scale trials and to provide victims and witnesses with necessary support and protection. There is a sense among many African states that the ICC, with its mandate and expertise to conduct large criminal trials, is more effective in handling the investigations and prosecutions. Thus, for instance, CAR's highest judicial body, the *Cour de Cassation*, recognized that it was unable to carry out the prosecution of widespread crimes of sexual violence committed on its territory, and stated that the ICC was better suited to find and punish the individuals who ordered the criminal conduct.⁶

Judicial concerns

National courts in Africa are sometimes reluctant to conduct prosecutions when the trial could raise sensitive political issues. Domestic judges may fear that their involvement in the prosecution of powerful political leaders could be viewed as biased and could open them to retribution, destabilize the government or result in serious political violence. Similarly, African national courts may decline to prosecute military commanders of rebel groups that are actively engaged in ongoing conflicts because of concerns that prosecution would jeopardize peace negotiations. In addition, many conflict-torn societies, in an effort to facilitate peace negotiations, offer blanket amnesty to individuals who commit serious crimes. The Uganda Amnesty Act of 2000, for example, offers the possibility of amnesty for all members of the rebel group Lord's Resistance Army, including to its leaders.⁷ As a result of amnesty laws, domestic courts may be unable to prosecute. However, the Rome Statute does not recognize national laws granting immunity and thus the ICC is able to try individuals who take advantage of national amnesty laws.

Failure of other methods to end impunity

Before requesting the intervention of the ICC, the DRC, Uganda, and CAR had sought other means of ending the ongoing violence and establishing lasting peace. Reconciliation mechanisms, such as amnesties, failed to persuade rebel leaders to come out of the bush and lay down their arms. Moreover, in some of the situations, such as Uganda, the interference of neighboring states made the political process particularly difficult. Thus, Uganda's government failed to prosecute or force the LRA members to the negotiation table partially because Sudan protected the rebels.⁸ Furthermore, in all of these cases the failure of domestic and regional diplomatic efforts to stop impunity convinced the three governments that the intervention of an independent international judicial body was necessary.

African States' Commitment to the ICC

Regional initiatives

Since taking on its first case from Africa, the ICC continues to expand its cooperation with African nations. In May 2005, the African Union and the ICC reached a cooperation agreement whose purpose is to enhance

⁶ Fédération Internationale des Ligues des Droits de l'Homme, *The Cour de Cassation Confirms the Incapacity of the National Justice System to Investigate and Prosecute Serious Crimes*, April 13, 2006.

⁷ Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, p. 409, *The American Journal of International Law*, Vol. 99.

⁸ *Id.*





regional cooperation with ongoing investigations by the Court.⁹ Although the two bodies have not yet signed the agreement, African states reiterate that cooperation with the ICC is necessary and consistent with the Constitutive Act of the African Union, which recognizes the need to deal with crimes against humanity, war crimes, and genocide.¹⁰ Moreover, the African Commission on Human and People's Rights urged Member States of the AU that had not yet ratified the Rome Statute to do so and to adopt a national action plan for the effective implementation of the Statute at the national level. The Commission also called on African civil society organizations to work in collaboration and develop partnerships in order to further respect for international law and to strengthen the Rome Statute.¹¹

National initiatives

African states have demonstrated their commitment to the Court by making efforts to introduce national legislation implementing the Rome Statute. While South Africa is the only African country which has fully enacted implementing legislation, the DRC, Uganda, Ghana, Benin, Lesotho and Senegal have introduced draft bills.¹² In addition, the governments of Burkina Faso, Botswana, CAR, Congo, Gambia, Kenya, Namibia, Niger, and Nigeria are at different stages of preparing draft texts.¹³ Burundi and Mali have begun the process of bringing their national criminal codes in conformity with the Rome Statute.¹⁴ Moreover, by choosing to request ICC investigations, countries such as Uganda have consented to the Court proceeding with investigations and prosecutions, notwithstanding national amnesty laws.¹⁵

Emerging concerns

Some critics of the Court's work in Africa insist that the ICC should step back and allow regional tribes to resolve their conflicts in accordance with African traditions.¹⁶ These critics argue that the Court imposes western standards of judicial prosecution on African nations, which traditionally prefer reconciliation as the key peacemaking and peacebuilding strategy.

One can hardly characterize the International Criminal Court as a western court for Africa. Many African nations made extensive contributions to the provisions of the Rome Statute. African values and legal traditions are fairly represented on the ICC,¹⁷ three of whose eighteen judges are African nationals.¹⁸ Fatou Bensouda, the

⁹ Second Report, *supra* note 2, at p. 7.

¹⁰ Permanent Mission of South Africa to the United Nations. Statements and Speeches, *Release Date* October 9, 2006, <http://www.iccnw.org/documents/00SouthAfricaGAICCStatement.10Oct06.pdf> (last visited August 15, 2007).

¹¹ Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court, African Commission on Human and People's Rights, December 5, 2005, <http://www.iccnw.org/documents/ACHPR-ResolutionEndingImpunity5Dec2005eng.pdf> (last visited August 15, 2007).

¹² Status of the Rome Statute Implementation in Africa, ICC-Africa, p. 9, <http://www.iccnw.org/index.php?mod=iccafrika&lang=en> (last visited August 15, 2007).

¹³ *Id.*, pp. 8-9

¹⁴ *Id.*

¹⁵ Akhavan, *supra* note 7, at p. 410.

¹⁶ Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, Ethics and International Affairs, pp. 190-94, Vol. 21.2, 2007, http://www.cceia.org/resources/journal/21_2/features/001.html (last visited August 15, 2007).

¹⁷ Honorable Fatou Bensouda, Seminar: The North-South Aspects of International Justice and the International Criminal Court, April 2005, http://iccnw.org/documents/AfricaLegalAidNarrativeReport_7-8Apr05.pdf (last visited August 15, 2007).





ICC Deputy Prosecutor, is Gambian herself. Therefore, criticisms that the Court is inherently predisposed to disregard alternative forms of justice when devising strategies of investigation and prosecution cannot be substantiated. Moreover, many African countries have made efforts to establish legal systems based on international judicial models in order to harmonize their systems with those of the international community.

Conclusion

The International Criminal Court is a world court established to address atrocities such as those which continue to plague the African continent. It is a court that represents world values and judicial traditions. Thus far the Prosecutor has determined that the gravest crimes to have been committed within the jurisdiction of the Court have occurred in African countries. Despite some criticism that the Court has selected Africa due to the continent's political and economic weaknesses, the DRC, Uganda, and the CAR sought the ICC's intervention, and are willing to cooperate with the Court in order to bring justice to victims and to end impunity. Moreover, it was the international community's strong determination to put an end to the heinous crimes committed in Darfur that brought Sudan before the Court, not any politicized prosecutorial agendas.

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¹⁸ The Judges of the Court, International Criminal Court, http://www.icc-cpi.int/library/about/ataglance/ICC-Judges_en.pdf (last visited August 15, 2007).

