

# The International Criminal Court and Accountability in Africa

*Recently, there have been calls from several African leaders to withdraw from the International Criminal Court (ICC), but such actions will only result in fewer options for ordinary citizens to hold their leaders and governments accountable, writes GLOBUS researcher [William Gumedé](#).*

## Sovereignty over accountability

Lack of accountability has been one of the single biggest reasons for Africa's continued underdevelopment, failed states and civil wars.

In Africa, the protection of corrupt, murderous and dictatorial leaders are often more sacrosanct, than the rights of ordinary citizens, the public interest and the well-being of the country.

In fact, impunity, lack of consequences for, and ordinary citizens' acceptance of African leaders' autocratic behaviour, corruption, and stoking ethnic divisions to stay in power, are some of the main reasons for instability in Africa.

The failure of the Organisation for African Unity (OAU) and the current impotence of the African Union is mostly due to their own reliance on the principle of external sovereignty. As a consequence, errant African leaders cannot be held accountable by peers because interfering in another African country will supposedly undermine that country's independence.



The International Criminal Court at The Hague

The ICC, however flawed, offers ordinary Africans a real alternative to hold their leaders accountable, to finally end the impunity, and stop leaders from getting away with the most brutal crimes.

Since independence from colonialism, the judiciaries in many African countries are controlled, suppressed or manipulated by often corrupt presidents, leaders and governing parties. As a case in point, last year, seven senior judges were arrested in Nigeria by the State Security Service (SSS). The media, civil society organisations and democracy campaigners condemned the arrest. However, Nigerian President Muhammadu Buhari publicly supported the arrests, saying they were 'surgical'.

Continental and regional African judicial tribunals, courts and commissions, such as the African Court of Justice and Human Rights are often dismissed, ignored or laughed-off by African leaders.

In 2010, Zimbabwe's President Robert Mugabe led a charge to suspend the Southern African Development Community Tribunal (SADCT), because it, in 2007 and 2008, ruled that the expropriation without compensation of the Zimbabwean farmer Mike Campbell was illegal. Campbell had approached the regional Tribunal because he was refused the right to approach Zimbabwean courts.

The SADC Tribunal was set up to ensure that member states adhered to the regional bloc's SADC Treaty, which obliges members to act 'in accordance with human rights, democracy and the rule of law'. However, SADC leaders in 2012 decided that their own citizens could not lay complaints against their own governments at the Tribunal.

The ICC's mandate is not to replace national courts – it only intervenes when national governments and leaders refuse or are unable to prosecute war crimes, genocide and crimes against humanity.

### **Biased against African states?**

At a national policy conference in 2017, South Africa's governing African National Congress said that it was determined to pull out of the ICC, arguing that it is biased against African States. This came after the South African government in March 2017 pulled back from its plans to leave the ICC. On 6 July 2017, the pre-trial chamber of the ICC found that South Africa had a duty to arrest Sudanese President Omar Al Bashir when he was in the country in 2015 to attend the African Union Summit. However, South Africa was spared sanctions.

Sudanese President Omar al-Bashir has been sought by the ICC since 2009 for alleged genocide and war crimes in Darfur.

South Africa is a signatory to the Rome Statute, which created the ICC in 1998 at the inaugural conference in the Italian capital. Africa, with 34 countries, is the largest regional grouping within the 124 member ICC. South Africa was the first African country to incorporate the Rome Statute into national laws. Crimes designated by ICC jurisdiction become statutory crimes under South African law.

In the first session as chair of the AU, Zimbabwean President Robert Mugabe proposed that African countries withdrew from the AU and instead formed a new African court. At the African Union Summit in January this year, leaders adopted a non-binding resolution calling for African countries to leave the ICC.

In 2016, Burundi and the Gambia announced their withdrawal from the ICC, because they said the ICC only focused on prosecuting African leaders. Gambia reversed its decision in February 2017. Nine of the ten cases of the ICC since it was launched involved former African leaders. The ICC's first successful conviction in March 2012 was against the Congolese strongman Thomas Lubanga for gang-pressing child soldiers into his military campaigns.

Kenyan President Uhuru Kenyatta was indicted by the ICC for crimes against humanity related to violence following the 2007 elections, where more than 1000 people died. However, the case collapsed because the Kenyan government refused to cooperate with the ICC.

The Ugandan warlord Joseph Kony, the leader of the Lord's Resistance Army (LRA), known as the 'Butcher of Uganda' is being sought by the ICC for allegedly kidnapping as many as 70 000 children. Kony founded the LRA in 1986 with a goal of creating a Christian theocratic state in Uganda based on his interpretation of the Bible and the Ten Commandments.

Ironically, all the cases at the ICC, except Kenya, were either brought by African governments themselves or by citizens. The ICC took its own initiative to open the now collapsed case against Kenyatta.

Former UN General Secretary Kofi Annan says that of the 'nine investigations on the African continent, eight were requested by African states'.

Ironically, all the cases at the ICC, except Kenya, were earlier brought by African governments themselves or by citizens

Zimbabwe's Robert Mugabe was applauded by many Africans when he told the UN's General Assembly: 'The leaders of the powerful Western states guilty of international crime, like Bush and Blair, are routinely given the blind eye. Such selective justice has eroded the credibility of the ICC on the African continent'.

### **Unequal in international law**

Of course, Mugabe and many African leaders do like to point to such Western hypocrisy to deflect their own crimes, corruption and mismanagement. The fact is that African countries are unequal in international law. The reality is, that almost all African leaders criticizing the ICC do so, not necessarily because of the lopsided global power in international law, governance and economic, market and political architecture; but because they fear they will be prosecuted for their crimes against their own people.

Nevertheless, as the British analyst George Monbiot puts it: 'If you run a small, weak nation, you may be subject to the full force of international law; if you run a powerful nation, you have nothing to fear'.

The US, China and key industrial countries have not signed up to the ICC, and their leaders and citizens are not subject to its jurisdictions. That is unfair. Industrial countries' security, intelligence and police forces often operate across the borders in African and developing countries, something which developing and African countries cannot do.

US-led coalitions, for example, have frequently used their power in the UN to push through invasions in developing countries' regimes perceived to be anti-Western – in Iraq, Libya and elsewhere – under the disguise of defending human rights. Ironically, these countries support equally evil regimes in other developing countries as long as they are pro-Western. Such decisions are often based purely on protecting industrial countries' commercial interests.

The ICC as it stands may be without important industrial countries, but it is crucial for ordinary Africans, who have very few avenues to hold their leaders accountable. The reality is that currently, many of the most brutal crimes against their *own* people are committed by African and developing country leaders. Ordinary citizens in Western countries not part of the ICC have well functioning judicial systems that can be used to hold their leaders and governments accountable.

## **An opportunity to influence international law**

African countries are the majority bloc in the ICC and can, in partnership with other developing countries and sympathetic industrial countries, influence international law to become more equitable, fairer and transparent.

Every African citizen must have the right to approach regional, continental legal bodies and international ones, such as the ICC, if their leaders and governments act with impunity.

Gambian Fatou Bensouda, the chief prosecutor of the ICC, was appointed in 2012 following strong lobbying from African countries to have an African in the position. The former ICC chief prosecutor, Luis Moreno-Ocampo, was accused by some African leaders of overly concentrating on the prosecution of Africans.

African countries can for example push the ICC to initiate action against Western leaders, individuals and organisations involved in human rights abuses. The African Union, regional bodies and individual countries must respect, defer to, and enshrine the independence of their own judiciaries, tribunals and prosecuting authorities. The continental African Court of Justice and Human Rights, and regional tribunals must be similarly accorded with an independent status.

Most importantly, every African citizen must have the right to approach regional, continental legal bodies and international ones, such as the ICC, if their leaders and governments act with impunity.

African continental and regional organisations must jettison the principle of 'sovereignty', which respects African leaders rather than ordinary citizens, and gives African leaders and governments the license to brutalise their own citizens without any consequences.

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African governments and leaders, using the rule of law, democracy and inclusive development, have more leverage against both industrial and developing countries in a world where global power is skewed towards industrial countries and larger developing countries.

Given that Africa's own domestic, regional and international judiciaries currently are being manipulated by leaders and governments; and African leaders are protected by their peers and regional and continental organisations, the ICC remains, as former UN General Secretary Kofi Annan puts it, 'the continent's most credible last resort for the most serious crimes' of leaders, governments and non-governmental strongmen.

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