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The Prosecutor of the ICC: Too Political, Not Political Enough, or Both?

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The Prosecutor of the ICC: Too Political, Not Political Enough, or Both?

Abstract

Much of the criticism of the behavior of the prosecutor of the International Criminal Court, Luis Moreno-Ocampo, revolves around two apparently contradictory criticisms, although both may well be true: that he is too political, and that he is not political, or politically savvy, enough. Certainly, his rush to pursue high-profile indictments, contemporaneous with his pursuit of the “low-hanging fruit” (supposedly easy cases such as that of Thomas Lubanga Dyilo), suggest a prosecutor with sharp political instincts and a recognition of the need for a new institution to have a few “quick wins.” Yet, simultaneously, his blundering approach with respect to investigations and prosecutions arising from Darfur, and insistence in the context of the debates over the appropriateness of pursuing indictments of leaders of the Lord’s Resistance Army during active peace negotiations that his job was a legal one, rather than a political one, suggests the opposite.

Keywords

Human rights, International Criminal Court (ICC), United Nations (UN), Management, Leadership

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The Prosecutor of the ICC: Too Political, Not Political Enough, or Both?

by Chandra Lekha Sriram

Much of the criticism of the behavior of the prosecutor of the International Criminal Court, Luis Moreno-Ocampo, revolves around two apparently contradictory criticisms, although both may well be true: that he is too political, and that he is not political, or politically savvy, enough. Certainly, his rush to pursue high-profile indictments, contemporaneous with his pursuit of the “low-hanging fruit” (supposedly easy cases such as that of Thomas Lubanga Dyilo), suggest a prosecutor with sharp political instincts and a recognition of the need for a new institution to have a few “quick wins.” Yet, simultaneously, his blundering approach with respect to investigations and prosecutions arising from Darfur, and insistence in the context of the debates over the appropriateness of pursuing indictments of leaders of the Lord’s Resistance Army during active peace negotiations that his job was a legal one, rather than a political one, suggests the opposite. It appears that he willfully seeks to avoid, not politics, but rather an open acknowledgement of the political impact of his actions. His decision to announce investigations into crimes in northern Uganda alongside the President of Uganda, notwithstanding allegations of abuses by the country’s army, may have heightened the perception of his politicization and apparently intentional ignorance of his [political effects](#). In this, he is very much political and politicized, and his attempt to insist on his purely legal role is, not surprisingly, unconvincing, whether to international NGOs or his own legal staff. Certainly, the mishandling of evidence in the Lubanga case suggests a failure of attention to legal detail in an attempt to complete a first prosecution, and rightly caused Human Rights Watch and others to [raise concerns](#).

At the core of the criticisms, I would argue, is prosecutorial strategy and case selection, including both choices about where to investigate and where not to investigate. And at issue is not only the apparent pursuit, albeit in a clumsy fashion, of high-profile defendants such as Sudanese President Omar al-Bashir and relative small-fry Lubanga, in an apparent desire for cheap or quick wins and high-profile (if apparently doomed) indictments. Under scrutiny also is a strategy that has involved, to date, formal investigations and prosecutions only in Africa, generating the criticism in some quarters that it has become an “International Criminal Court for Africa.” These concerns may well be overstated, particularly given the high percentage of African states which have ratified the statute of the ICC and the number of countries on the continent currently in or emerging from conflicts in which crimes under the jurisdiction of the court have taken place. And thus leaders in Africa, a continent where many countries embraced the Court quite early on, have become suspicious. While, of course, such leaders may be suspicious of the court because they themselves bear responsibility for crimes falling within the Court’s jurisdiction, they nonetheless united in a 2008 request by the Peace and Security Council of the African Union to the UN Security Council for a deferral of ICC activities in Sudan out of concern that “[a prosecution might not be in the interests of justice](#).” Thus, one concern is that a prosecutor both concerned with political impact and oblivious to it has chosen to pursue his aims only in Africa.

This is not to say that the prosecutor has not looked into situations elsewhere, and indeed the Office of the Prosecutor has issued public statements as to why it chose not to take up cases regarding abuses in places such as Iraq and Venezuela. The legal rationales offered in each were solid, but given the political controversies surrounding the prosecutor and the all-Africa caseload of the court, skeptics may remain unconvinced. The prosecutor has continued to monitor the

situation in Colombia, undertaking several visits to the country, but has been far less vocal about the possibility of opening formal investigations there, much less the possibility of indicting [state officials](#). While comparisons across very different types of conflict are unfair, the relatively muted approach of the prosecutor is noteworthy. In a rare official public statement on a non-African situation, the office of the prosecutor issued a two-sentence statement on [Georgia in 2008](#), simply stating that it was a state party to the statute of the Court and that the Court considers all information pertaining to crimes within its jurisdiction. This is notable in comparison to the public statements indicating the willingness of the prosecutor to pursue investigations into post-election violence in Kenya if local or hybrid investigations do not go forward, which have been far more forceful. Two other situations which public statements by the office of the prosecutor indicate are “under examination”—Palestine and Afghanistan—have not been the subject of comparable public scrutiny, and indeed reference to examination of them can only be found in [public documents](#) from the office of the prosecutor at the end of a press release on Kenya investigations.

None of this is to suggest that the cases which are underway are not significant, or indeed that there should be an unconsidered rush to prosecute non-African defendants just for the sake of having done so. Rather, it is to suggest that the prosecutorial strategy—in terms of situations and individual cases, and in terms of timing of crucial steps and engagement with peace negotiations—illustrate an approach that is both highly political and strangely blind to its political impact.

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