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The International Criminal Court (ICC): When Will Western Leaders be Indicted for War Crimes?

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As government goes to court over the Omar al-Bashir incident, detractors ask why Africans are targeted when Tony Blair ran with an illegal war, writes Janet Smith.

The International Criminal Court (ICC) didn't get a date with Big Daddy. Idi Amin was already dying by the time the Rome Statute, the legal basis for establishing the court, was ratified by 60 countries.

When the former Ugandan dictator fell into a coma after multiple organ failure in hospital in exile in Saudi Arabia in July 2003, he was in his seventies. He was still a formidable figure edging on 2m, having once weighed up to 150kg.

SA's failure to arrest President Omar al-Bashir demonstrates the lack of trust the court has among African leaders. says the writer. File picture: Mohamed Nureldin Abdallah/Reuters

Human rights groups and Ugandan government officials were disappointed that Amin would never go on trial at home, at The Hague – the seat of the ICC – or anywhere else for his crimes. It is believed that around 400â€…000 people were murdered under his supervision. Activists would have especially liked him to be cross-examined about his penchant for the decapitation of enemies, by legend required to wear white to make the blood look more red on live TV.

But had the ICC been around in 1979 when Tanzanian troops and Ugandan exiles finally counter-attacked Amin, who had repeatedly sent his troops over the border, there's still a chance he would have managed to slip into exile. He first fled to Libya, then Iraq, then Saudi Arabia.

None of the three countries that offered Amin harbour are signatories today to the Rome Statute, but many other countries have signed, bringing the number of States Party to 122.

Of these, the highest number – 34 – are from Africa.

Since the groundwork was laid in 1998, the court has grown as much as it has been subject to criticism, and it has indeed drawn many detractors, especially – and increasingly – on the African continent. Arrest warrants for war crimes against Muammar Gaddafi, his son Saif al-Islam and head of Libyan Intelligence Abdullah al-Senussi by the ICC's then-chief prosecutor, Luis Moreno-Ocampo, for example, attracted anger from the ANC Youth League under

Julius Malema in 2011.

The youth league said it instead demanded charges against US President Barack Obama, then-French president Nicolas Sarkozy and British Prime Minister David Cameron for launching the foreign military intervention in Libya that led to the death of innocent civilians.

Others in favour of the court, would however say that antagonism towards it over its actions against heinous individuals like Gaddafi show little more than a pampering of ignorance.

It's a difficult one, if a good example of the divide over the court.

In Gaddafi's case, there were indeed many, including Westerners, horrified by the escalating conflict Nato perpetuated against the Libyan people, and contrary to the responsibility to protect civilian life as defined by UN Security Council Resolution 1973, which demanded an immediate ceasefire.

Certainly, there have also been persistent calls for fiendish Western leaders, including George W Bush, his vice-president Dick Cheney and former British Prime Minister Tony Blair, to also be charged for war crimes at The Hague. And this is an enormous frustration with the ICC.

Nearly 40 people have been indicted, almost all black Africans, while Blair took Britain into an illegal war with a sovereign state on spurious grounds, which, in turn, led to the deaths of around a million people.

That almost makes Sudanese leader Omar al-Bashir look like a quiet diplomat.

Yet, in order to have an opinion on the court, it's important to understand its workings.

It can, but generally does not, lodge its own charges, but any state party to the Rome Statute can request the prosecutor to carry out an investigation. A state not party to the statute can also accept the jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals, and request the prosecutor to carry out an investigation.

The UN Security Council may also refer a situation to the Court, as it did with Bashir and the Gaddafis.

Bashir's name will be all over the news on Friday as the Supreme Court of Appeal (SCA) hears the government's petition for leave to appeal against an order that it was obliged to arrest him while he was here in June last year.

A full Bench, including Gauteng Judge President Dunstan Mlambo, had issued an interim urgent order that the Sudanese head of state – who was attending the AU summit in Sandton – was to be immediately arrested and handed over to the ICC. But that, of course, did not happen.

Bashir is charged with war crimes, crimes against humanity and genocide and, in terms of the interim order, he was not to leave South Africa until the ICC matter was finalised. But by the time the parties were back in court, arguing the matter further, the suspect – who may not have enjoyed immunity from arrest, despite protestations to the contrary – was on his

way back to Khartoum.

The government – which was on Friday expected to say customary international law supports the personal immunity of a serving head of state – was then refused leave to appeal against the court's findings and is now turning to the SCA for relief.

Those who've used the dominant number of arrest warrants on Africans to fuel the belief that the court only targets Africans are gaining traction on our continent. But the ICC mostly takes referrals, and many of these have come from African state parties themselves.

That said, Bashir's warrant hasn't been enforced even though Sudan is regarded as an international capital for crimes against humanity.

While people died savagely in his country, he signed agreements on oil exploration and agricultural programmes, including with China as, at one time, Sudan supplied up to 7 percent of its oil. China has, however, said it has "serious reservations" about Khartoum's atrocities, but as China is not a signatory to the Rome Statute, it has had no obligation to arrest Bashir.

Other Central Asian nations which are signatories have instead refused to have him cross their airspace.

At least five cases at the ICC were referred to the court by Democratic Republic of Congo leader Joseph Kabila. Another was referred by the Central African Republic. The cases against Joseph Kony, the notorious commander-in-chief of the Lord's Resistance Army in Uganda, and another four LRA leaders, were referred by Uganda itself. A request also came from Ivory Coast, after post-election violence there left more than 3 000 dead.

It's not a simple process to have an individual indicted. ICC prosecutors have to justify at length their basis for a conclusion in a written submission which has to be presented to a panel of judges at a hearing.

At the same time, they may well be acting as activists on behalf of ordinary people. Although the African bloc is substantially divided, ordinary Africans may indeed see the ICC as an effective, if not the only, instrument in holding dangerous leaders to account.

There are those who, for instance, ask why, when Zimbabwean President Robert Mugabe has seen the deaths, torture, disappearances, displacement and starvation of hundreds of thousands of his citizens, neither the ICC nor the UN have turned their attention to him.

But this is where South Africa allegedly comes in. Analysts say we've effectively blocked Mugabe from being referred to the UN Security Council since Thabo Mbeki's days. And it's notable that, at the time of Mbeki's recall by the ANC in 2008, South Africa was already looking at blocking the Security Council's endorsement of the ICC's indictment of Bashir.

Referring an individual has to first be on the Security Council's agenda before it can even be considered for referral to the ICC. But if there isn't a belief that, say, Mugabe poses a threat to international peace and security, those charges are unlikely to ever be laid against him, just as that is the case with Bush, Cheney and Blair – examples of why the ICC can become an archly political device.

The US does not recognise the ICC. Yet it was quite happy to vote and allow the Security

Council to refer Gaddafi's crimes to the court. But that has never been South Africa's dilemma.

At the time of publication, we still acknowledged the ICC – despite Zuma's warnings late last month that we could pull out – and this has presented him with one of the most challenging foreign policy issues of his administration.

Acting against Bashir could have been used as a tool, broadly-speaking, by the domestic left. Malema certainly used Libya in 2011 to attack Zuma and the ANC, from whom he was growing increasingly estranged at the time.

But there's also the righteous issue with who, or which entity, is the more important power-broker when it comes to recalcitrant and violent African leaders. Is it the ICC or the AU, which certainly engages in its own processes for peace? The AU, for instance, had a high-levelad hoc committee on Libya before the ICC warrants were issued.

Friday's hearing at the SCA promises to be far-reaching.

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