

How the Presidents of Uganda and Sudan manipulated the international system to avoid prosecution by the ICC

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Abstract Through analyzing cases of the International Criminal Court (ICC), this paper investigates how African elites sought to use their political agency to manipulate international mechanisms for their own benefit. The analysis is done by describing the cases of presidents Yoweri Museveni of Uganda and Omar al-Bashir of Sudan. In the first case, Museveni's manipulated a relationship of dependency with the ICC, which favored him against prosecution, to the detriment of justice in Uganda. In the second case, al Bashir played with the international community, including African states, to raise political support and armor himself against charges of genocide, war crimes, and crimes against humanity which were issued by the ICC. Both cases are explored following the understanding of African agency in international relations, in which these political leaders actively engaged with the international community rather than follow an approach of passive bystanders in the global political arena. The paper concludes by suggesting pathways for research on how criminal justice in Africa depends on finding a solution to justice and peace that go beyond local political conspiracies that benefit political elites rather than victims of serious crimes under international law.

Keywords Political Science, International Relations, Agency, ICC, Public Policy, African Elites, Uganda, Sudan

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Introduction

In 2003, in a move he claimed would bring peace to a bloodshed civil war in the north of his country, President of Uganda Yoweri Museveni, in power since 1996, referred the case of the Lord's Resistance Army (LRA) to the International Criminal Court (ICC).¹ Member of the Rome Statute since 2002, Museveni was the first president to self-refer a case to the court.² In 2005 the court issued its first arrest warrants against five rebels in what was the court's first case.³ The ICC's intervention was criticized by many: some claimed it would put at stake a needed peace agreement between the Ugandan forces and the LRA; others were concerned that the conflict would escalate and victims would be at risk; and there were claims the referral was a way of shielding Museveni against prosecutions.⁴ It's on this last point that this research paper will focus.

Through analyzing cases of the ICC, this paper explores how African elites sought to use their political agency to manipulate international mechanisms for their own benefit. Focus will be given to Presidents Yoweri Museveni of Uganda and Omar al-Bashir of Sudan. The first case demonstrates Museveni's ability to create a manipulated relationship of dependency with the ICC, to the detriment of justice in Uganda and in favor of his impunity.⁵ Opposite to the Ugandan case, in Sudan al-Bashir played with the international community—including African states—to raise political support and armor himself against charges of genocide, war crimes, and crimes against humanity issued by the ICC.⁶ Both cases help illustrate that, contra to the notion that Africa is a passive bystander in the global political arena, African elites have proven themselves skilled arch-manipulators of the global system.

Both cases will be explored following the understanding of African agency in international relations, as proposed by William Brown, looking at the role of active African engagement with the international community—here through the ICC—rather than passive actors in the global political arena.⁷ It also draws from Jean-François Bayart's theory of African

¹ "Uganda | Coalition for the International Criminal Court." Accessed May 28, 2018. <http://www.coalitionfortheicc.org/country/uganda>.

² "Darfur, Sudan," accessed May 28, 2018, <https://www.icc-cpi.int/darfur>.

³ Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics & International Affairs* 21, no. 2 (n.d.): 179–98, <https://doi.org/10.1111/j.1747-7093.2007.00069.x>.

⁴ Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008), <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-background-papers/Courting-Conflict.pdf>.

⁵ Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics & International Affairs* 21, no. 2 (n.d.): 179–98, <https://doi.org/10.1111/j.1747-7093.2007.00069.x>.

⁶ Mary T Reynolds, "Legitimizing the ICC: Supporting the Court's Prosecution of Those Responsible in Darfur," *Boston College Third World Law Journal* 30 (n.d.): 29.

⁷ William Brown, "A Question of Agency: Africa in International Politics," *Third World Quarterly* 33, no. 10

dependency with the global community reinforced by local practices: the idea of extraversion.⁸ It helps us understand the context of local practices, here illustrated in the way Ugandan and Sudanese politics interact with the ICC and other international actors, aiming at taking advantage of the court, by avoiding accountability or using criminal justice for their self-benefit. The consequence is that commitment to justice as pursued by the Rome Statute⁹ was put aside in favor of local politics in both countries. These processes will be highlighted in the following sections, first, in Darfur and, second, in Uganda. The paper concludes by briefly suggesting further research on how criminal justice in Africa depends on finding a solution to justice and peace that go beyond local political conspiracies that have done little for victims, but everything for their rulers.

Omar al-Bashir: using political agency to undermine the ICC

In 2003 in Sudan, President al-Bashir faced an uprising promoted by the Justice and Equality Movement (JEM) and the Sudan Liberation Army (SLA). The uprising targeted an increasing Arab representativeness over Africans in the government.¹⁰ Al-Bashir tried to contain the uprising with the use of force, leading to a deadly campaign against the militias and their African supporters.¹¹ He was backed up by the Arab militia Janjaweed, which promoted genocidal acts against non-Arab ethnicities among other forbidden attacks under international law.¹² Backed by a resolution by the United Nations Security Council (UNSC) in 2005, the ICC was entitled to investigate crimes under the Rome Statute in Sudan, although the country didn't sign up to the treaty.¹³ Investigations started in 2005, and in 2009 the court issued for the first time arrest warrants for the crime of genocide against a sitting president.¹⁴ The two warrants, however, have never been enforced because of the nature of the ICC, which has no enforcement body, leaving the court to rely on states' compliance with the Hague.¹⁵ Obviously,

(November 2012): 1889–1908, <https://doi.org/10.1080/01436597.2012.728322>.

⁸ Jean-François Bayart, and Stephen Ellis. "Africa in the World: A History of Extraversion." *African Affairs* 99, no. 395, (n.d.). <http://www.jstor.org/stable/723809>.

⁹ "Rome Statute of the International Criminal Court, 1998," accessed May 28, 2018, http://legal.un.org/icc/statute/99_corr/cstatute.htm.

¹⁰ Jamie A. Mathew, "The Darfur Debate: Whether the ICC Should Determine That the Atrocities in Darfur Constitute Genocide," *Florida Journal of International Law* 18 (2006): 517–48.

¹¹ Jamie A. Mathew, "The Darfur Debate: Whether the ICC Should Determine That the Atrocities in Darfur Constitute Genocide," *Florida Journal of International Law* 18 (2006): 517–48.

¹² *Ibid.*

¹³ "Darfur, Sudan." Accessed May 28, 2018. <https://www.icc-cpi.int/darfur>.

¹⁴ *Ibid.*

¹⁵ Mary T Reynolds, "Legitimizing the ICC: Supporting the Court's Prosecution of Those Responsible in Darfur," *Boston College Third World LawJournal* 30 (n.d.): 29.

al-Bashir didn't go to the Hague to face the charges against him, nor did he send over to the court government officials and Janjaweed members wanted by the ICC in 2007.¹⁶

The Sudanese case is an example in which the regime not only confronted the court's interests, but its ruler expanded its agency over the African Union and other international bodies in Sudan to manipulate and avoid prosecution. President al-Bashir and other government officials started a movement against the court through threats; first by trying to defer the proceedings under the Rome Statute by leaving the matter at the hands of the UNSC,¹⁷ and then by threatening to further intensifying their brutal campaign against revolutionary militias if the indictments proceeded.¹⁸ In 2008, President al-Bashir reported to the African Union on the situation in Darfur, claiming that there had been progress and that the Sudanese government would keep advancing against the rebels to pursue peace; yet, the violence on the ground continued.¹⁹

The ICC's onslaught on Sudanese forces developed into a broader continental complaint, by African elites, against the international court in 2007.²⁰ In February of that year, the African Union (AU) drafted a resolution, with a non-binding effect, to encourage African states to withdraw from the ICC. The union was concerned since most of the ICC's investigations were targeting leaders in the continent.²¹ The union's agency mirrored that of al-Bashir's; the organization called upon the United Nations (UN) to interfere, asking the body to suspend the court's proceedings against the Sudanese president, among claims of bias against African leaders.²² Currently, the court has opened 11 cases, with 10 of them in Africa.²³ The union's intentions to call for a massive withdrawal from the ICC among African states didn't impede the court from issuing another charge with war crimes and crimes against humanity against al-Bashir, in 2009.²⁴ Rather, it made the president more prone to continue

¹⁶ Ibid.

¹⁷ Avenue, Human Rights Watch | 350 Fifth, 34th Floor | New York, and NY 10118-3299 USA | t 1.212.290.4700. "UN Security Council: Don't Protect President Al-Bashir from Prosecution." Human Rights Watch, September 11, 2008. <https://www.hrw.org/news/2008/09/11/un-security-council-dont-protect-president-al-bashir-prosecution>.

¹⁸ Mary T Reynolds, "Legitimizing the ICC: Supporting the Court's Prosecution of Those Responsible in Darfur," *Boston College Third World Law Journal* 30 (n.d.): 29.

¹⁹ See report available at: "Sudan: Rhetoric Versus Reality in Darfur." Human Rights Watch, December 2, 2008. <https://www.hrw.org/news/2008/12/02/sudan-rhetoric-versus-reality-darfur>.

²⁰ Constance Johnson. "African Union: Resolution Urges States to Leave ICC | Global Legal Monitor." Web page, February 10, 2017. <http://www.loc.gov/law/foreign-news/article/african-union-resolution-urges-states-to-leave-icc/>.

²¹ "JURIST - AU Advisory Board Accuses ICC of Bias against African Nations." Accessed May 28, 2018. <http://www.jurist.org/paperchase/2016/07/au-advisory-board-accuses-icc-of-bias-against-african-nations.php>.

²² African Union. "Decision on the International Criminal Court," January 30, 2017. https://www.hrw.org/sites/default/files/supporting_resources/assembly_au_draft_dec._1_-_19_xxviii_e.pdf.

²³ "Home." Accessed May 28, 2018. <https://www.icc-cpi.int/pages/situation.aspx>.

²⁴ "Al Bashir Case." Accessed May 28, 2018. <https://www.icc-cpi.int/darfur/albashir>.

using political interests to obstruct the prosecution. Between March and June, al-Bashir expelled humanitarian organizations from the country,²⁵ responsible for most provisions of aid to Darfur.²⁶

African elites' backing of al-Bashir continued through his 2010 visit to Kenya—a party to Rome Statute—where local courts refused to enforce the arrest warrant.²⁷ Al-Bashir's visits to other African countries and beyond the continent's borders followed suit—all of them parties to the Rome Statute—²⁸without his ever being arrested.²⁹ In South Africa, al-Bashir would attend an African Union summit in 2015.³⁰ The ICC chief prosecutor, Fatou Bensouda, complained to the UNSC that the non-compliance of member states in arresting al-Bashir undermined not only the ICC, but also the UNSC.³¹ Despite this, al-Bashir arrived in Turkey twice, most recently in 2017 for a summit.³²

President al-Bashir seems to understand that the international community—including the African Union—may see his ruling the country as possibly the only way to reach a peace agreement in Sudan. The United States and the European Union backed war crimes perpetrators in Sudan by facilitating talks that led to peace agreements in Sudan (2005) and Darfur (2006).³³ Although charged with genocide and other crimes, the European Union supported al-Bashir so that he could prevent migrant flows to Europe, with a \$200 million package.³⁴ His charges also didn't prevent the UN secretary general from meeting al-Bashir.³⁵ President al-Bashir's

²⁵ “Darfur.” Save Darfur. Accessed May 28, 2018. <http://savedarfur.org/the-conflict/darfur/>.

²⁶ Mary T Reynolds, “Legitimizing the ICC: Supporting the Court’s Prosecution of Those Responsible in Darfur,” *Boston College Third World Law Journal* 30 (n.d.): 29.

²⁷ “Sudan Profile - Timeline,” *BBC News*, January 8, 2018, sec. Africa, <http://www.bbc.com/news/world-africa-14095300>.

²⁸ “The States Parties to the Rome Statute,” accessed May 28, 2018, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

²⁹ “Sudan (Darfur) Chronology of Events : Security Council Report,” accessed May 28, 2018, <http://www.securitycouncilreport.org/chronology/sudan-darfur.php?page=all&print=true>.

³⁰ Barry Bateman, “ICC: SA Violated ICC Agreement When It Failed to Arrest Al-Bashir,” accessed May 28, 2018, <http://ewn.co.za/2017/07/06/icc-sa-violated-icc-agreement-when-it-failed-to-arrest-al-bashir>.

³¹ “Reports of the Secretary-General on the Sudan and South Sudan,” twenty-sixth report on the situation in Darfur pursuant to resolution 1593 (2005) (United Nations Security Council: United Nations, December 12, 2017), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8132.pdf.

³² “Despite ICC Warrant, Sudan’s Al-Bashir Arrives Turkey for Jerusalem Meeting.” Accessed May 28, 2018. <https://www.dailytrust.com.ng/despite-icc-warrant-sudan-s-al-bashir-arrives-turkey-for-jerusalem-meeting-251304.html>.

³³ Nick Grono and Adam O’Brien, “Justice in Conflict? The ICC and Peace Processes,” in *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008), <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csdc-background-papers/Courting-Conflict.pdf>.

³⁴ Jina Moore, “Germany Will Help A Leader Wanted For Genocide Build Detention Camps For Refugees,” BuzzFeed, accessed May 28, 2018, <https://www.buzzfeed.com/jinamoore/germany-will-help-a-wanted-genocide-criminal-set-up-detentio>; “Inside the EU’s Flawed \$200 Million Migration Deal with Sudan,” IRIN, January 30, 2018, <https://www.irinnews.org/special-report/2018/01/30/inside-eu-s-flawed-200-million-migration-deal-sudan>.

³⁵ “As Sudan Hinders UNAMID in Darfur, ICP Asks and UN Makes Excuses, Ruedas Took Award,” accessed

manipulation of African allies using the court's political selectivity, oppression, and neocolonialist discourse, and his subjection to European interests against migration helped thwart the court's efforts in Sudan and in the continent. The result is that he avoided prosecution while the conflict continues to make victims.³⁶

Museveni: using the ICC for self-benefit

Despite accusations of war crimes and other atrocities, no one has benefited more from an ICC intervention than Museveni, although the Ugandan government has been accused of war crimes.³⁷ Museveni worked to make the ICC hostage of his political interests. After he referred the case of his LRA's enemies to the court in 2013, the ICC never targeted members of the government in Uganda.³⁸ The paradox of self-referral is that, by exerting its agency under the premises of seeking criminal justice, Museveni established a convenient relationship that goes against the principles of neutrality in justice. What followed was justice for one side: the LRA opposing Museveni.³⁹ It becomes clear that Ugandan cooperation would become a threat for the ICC if the court targeted government officials. The ICC would go further and say that this is not the perfect scenario but, rather, a legitimate one to avoid paralysis of prosecutorial procedures.⁴⁰

The Ugandan case is a clear example of the extraversion strategy as proposed by Bayart. In this case, through playing with the ICC, African leaders have intensified their dependency on the global community by seeking legitimacy, which came in Uganda at the cost of true justice for victims of the civil war and impunity to Museveni's forces. Interestingly enough, Museveni is one of the most heated critics of the ICC's efforts in Africa, having called its members "a bunch of useless people" after being sworn, in Kampala, for his fifth mandate as

May 28, 2018, <http://www.innerecitypress.com/sudan1guterresruedas051018.html>; "UN: 'Procedures Followed' for Al Bashir – Guterres Meeting at Addis Summit," Radio Dabanga, accessed May 28, 2018, <https://www.dabangasudan.org/en/all-news/article/un-procedures-followed-for-al-bashir-guterres-meeting-at-addis-summit>.

³⁶ "Sudan Is in Danger with Al-Bashir in Power - Sudan Tribune: Plural News and Views on Sudan," accessed May 28, 2018, <http://sudantribune.com/spip.php?article65495>.

³⁷ Kersten, Mark. "Between Disdain and Dependency — Uganda's Controversial Place in the ICC-Africa Relationship." *Justice in Conflict* (blog), March 29, 2017. <https://justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/>.

³⁸ "Defendants in Uganda," accessed May 28, 2018, <https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%2C%22r%22%3A%5B%7B%22n%22%3A%22MngSituationNameColloquialEN%22%2C%22t%22%3A%5B%22%5C%22%2C%22%27%82%27%825567616e6461%5C%22%22%5D%2C%22o%22%3A%22and%22%2C%22k%22%3Afalse%2C%22m%22%3Anull%7D%5D%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D>.

³⁹ Ibid.

⁴⁰ Ibid.

the President of Uganda in 2016.⁴¹ At that same ceremony sat Omar al-Bashir, not arrested by Ugandan forces despite Uganda being a party to the Rome Statute.⁴²

Museveni's relationship with the ICC is a doubled-edged sword. On one hand, he safeguards himself from being targeted by the court: he takes advantage of the court's dependency on him to prosecute his enemies in the Hague and not at local courts, where such beneficial dependency would make no sense.⁴³ On the other, Museveni openly criticizes the ICC behind a Pan-Africanist approach, in which the ICC represents a neocolonial court, aiming at gaining political capital with his now ally al-Bahir of Sudan, which had been his historic enemy for decades.⁴⁴ Museveni's attitude reflects what Bayart said about Africa's extroversion, in which coercion translates into manipulation of powerful forces that can help the manipulators secure a safe haven.⁴⁵

Conclusion

This research paper sought to address how African elites proved themselves to be skilled manipulators of the international system, here expressed by the ICC, using cases from Sudan and Uganda. Al-Bashir's campaign against the court in Sudan included threats of further increasing violence against his enemies. He also pursued African political sympathy against an apparent biased ICC. Further, he subjected himself to European interests against migration flows to Europe, leaving the ICC weak to obtain the international support to prosecute him and his allies. With Uganda, Museveni self-referred cases against his enemies to the ICC instead of prosecuting them at local courts. By facilitating the process of prosecuting war criminals on the opposition side, Museveni protected himself against prosecutions. His open critics against the court attract political sympathy from African leaders—such as al-Bashir—and represents his understanding that if the court charges him or his forces for crimes committed in the local civil war, further collaboration would be at stake. The consequence is that justice remains

⁴¹ Conor Gaffey On 5/13/16 at 7:33 AM, "Western Leaders Walk out and Mugabe Gets a Cheer at Ugandan Presidential Ceremony," *Newsweek*, May 13, 2016, <http://www.newsweek.com/uganda-museveni-prompts-western-leaders-walkout-icc-useless-459605>.

⁴² *Ibid.*

⁴³ Mark Kersten, "Between Disdain and Dependency — Uganda's Controversial Place in the ICC-Africa Relationship," *Justice in Conflict* (blog), March 29, 2017, <https://justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/>.

⁴⁴ Mark Kersten, "Sudan's President Was Indicted. Why Isn't He Paying Any Price?," *Washington Post*, May 26, 2016, sec. Monkey Cage, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/26/sudans-president-omar-hassan-al-bashir-is-making-allies-and-flouting-the-icc/>.

⁴⁵ Jean-François Bayart and Stephen Ellis, "Africa in the World: A History of Extraversion," *African Affairs* 99, no. 395, (n.d.), <http://www.jstor.org/stable/723809>.

unsought in both countries, with an ICC unable to achieve criminal justice that it set out to pursue.

Both presidents' practices reflect a strategy of extortion and dependency between African elites and the international community, exemplified here in both their skilled ability to shift local and global political support to their self-benefit. Further research should explore ways in which justice can be achieved regardless of peace processes under such circumstances; for example, beyond the ICC recognizing, and needing to overcome, some legitimate African concerns on political selectivity in their cases—with the majority in Africa, as noted earlier.⁴⁶ Accounts have hinted upon the role of the ICC relationship with the UNSC as triggering African discontent, since powers holding a permanent seat vote against African leaders but protect themselves.⁴⁷ Further ways in which the UN system and the international community can help bridge a political divide between political agencies—African, western, or global—under the need for pursuing global criminal justice may be necessary. For peace or for justice processes, the international community is a vital part of these mechanisms. The same may be true if political manipulations are to be avoided.

⁴⁶ “ICC: Situation.” Accessed May 28, 2018. <https://www.icc-cpi.int/pages/situation.aspx>.

⁴⁷ Mark Kersten, “Between Disdain and Dependency — Uganda’s Controversial Place in the ICC-Africa Relationship,” *Justice in Conflict* (blog), March 29, 2017, <https://justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/>; Alex de Waal, “Darfur, the Court and Khartoum: The Politics of State Non-Cooperation,” in *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008), <http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-background-papers/Courting-Conflict.pdf>.

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