

The ICC and Africa: Complementarity, Transitional Justice, and the Rule of Law

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Complementarity, Transitional Justice, and the Rule of Law: Cooperation between the International Criminal Court and African state institutions.

To date, the International Criminal Court (hereafter ICC or 'the Court') has opened cases solely in Africa. The establishment of the International Criminal Court in The Hague in 2003, following the ratification of the Rome Statute in 2002, was a large step towards establishing the rule of law in international affairs. Its creation coincided with the expansion and implementation of universal jurisdiction, following a decade of atrocities that had occurred in Africa and elsewhere. Two of its precursors, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, were international trials of war criminals that had involved the international judicial community working with state institutions in Rwanda and Sierra Leone in order to bring war criminals and human rights abusers to justice. In the same way, the ICC must work with state institutions in whichever country it is holding its investigations in order to conduct its work effectively.

Essentially, the ICC must work with state institutions in African states at all levels when conducting its enquiries. The ICC is the only permanent criminal court in existence which has the capability, under Article 17(1)(A) of the Rome Statute, to stand when national courts are incapable or unwilling to do so (Rome Statute 1998: 12). Its intention is not to supersede national judiciaries, but to complement them. To date, all of the ICC's 21 cases have involved situations in eight African countries. It is therefore important, naturally, that the Court should attempt to work well with the state institutions of Africa. Even more importantly, the international community has come to recognise that a strong domestic judiciary and national rule of law in African states is necessary, especially post-conflict, to rebuild political and economic infrastructure and to prevent future atrocities from occurring by deterring potential war criminals. The ICC therefore not only needs to work with state institutions when conducting its investigations and cases, but must also work with them in order to rebuild and strengthen domestic judicial institutions.

Problems the ICC faces and why it needs the co-operation of state institutions

The ICC operates on a global mandate with a small budget and very few staff. The Court, in reality, has very limited resources, especially since multiple cases often use the same personnel. The Court has jurisdiction to investigate alleged war crimes and human rights abuses in countries which are a party to the Rome Statute and have accepted its jurisdiction. The Court also has jurisdiction when the United Nations Security Council (UNSC) refers a case to the ICC's Chief Prosecutor, or the Prosecutor could act under his or her own volition, as long as there is authorisation from the Pre-Trial Chamber (UNSC 2005). The ICC only has a mandate to pursue cases and investigations in countries where the state institutions are not capable, or not willing, to pursue these cases themselves. It therefore greatly relies upon the judicial systems and institutions of sovereign states to prosecute crimes which occur within their own borders (Clark 2011). When a state is unwilling or unable to perform these prosecutions, providing that state is a party to the Rome Statute, the ICC has a mandate to step in. Much criticism has been propounded, especially by the African Union (AU), over the fact that the ICC specifically targets Africans, citing the fact that all of its cases so far have involved Africans as evidence of this. As mentioned, all of the ICC's current cases involve Africans (Hondora 2013). But this does not mean, as many have tried to claim, that the ICC is targeting the continent;

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quite the opposite, it means that the court is working closely with African state institutions. Four of the eight cases – Uganda, the Central African Republic, the Democratic Republic of the Congo and Mali – were referred to the Chief Prosecutor by the respective states' political institutions because they were unable to try the senior figures in their own countries. A further two of the eight cases – Darfur and Libya – were referred to the Chief Prosecutor by the UNSC, whilst only two cases were begun *proprio motu*, or 'on the own impulse' of the Prosecutor (Arieff *et al.* : 2011: 6-8).

The International Criminal Court will only intervene if domestic criminal judicial systems will not carry out their own prosecutions, whether through inability or unwillingness (Pichon 2008: 185). We can therefore see that the ICC already must work with the state institutions of the individual African states because, in some cases, the Court has been asked by these very institutions for help, and in all cases relies upon these institutions to detain suspects and help in investigations. It also means that the ICC works with state institutions to encourage or incentivise them to develop their own domestic judiciaries so that they would be able to conduct their own trials.

The Court has no police force of its own, and does not have a warrant, let alone the ability, to enter a country that denies it access. The Court relies upon individual states, and their police forces, to arrest or hand over the suspects it has indicted. Great difficulty arises, therefore, when these institutions refuse to cooperate with the ICC. The Sudanese government, for example, has for a number of years been refusing to co-operate with the Court since the passing of United Nations Security Council resolution 1593, which charged Sudanese president Omar al-Bashir with the responsibility for the war crimes, acts of genocide and crimes against humanity committed in Darfur by Sudanese armed forces and their allies, the Janjaweed militia (Amnesty International 2013). The AU even called on its member states not to co-operate with the Court in enforcing the indictment of the president in 2011 (Annan 2012: 151). ICC investigators were unable to obtain visas from the Sudanese government, leading to the Court being forced to rely upon distant and secondary sources, for example Sudanese refugees in Chad, when conducting its investigations into al-Bashir. It is not known whether this evidence will even be able to withstand scrutiny in any future trial which might occur (Gegout 2013: 807). This is illustrative of the difficulty the Court faces when state institutions in African states refuse to co-operate or work with it. The relative weakness of the ICC means that co-operation with domestic institutions, especially in African states currently, is critical to its success. When the ICC is forced to work with state institutions that are not willing to work with the court themselves, its work is hampered.

How the court works with African state institutions when conducting its investigations, and how it works with state institutions unhappy with ICC judicial intervention, will now be assessed.

Explanation of case studies

For the purpose of this essay, two case studies, the Democratic Republic of the Congo (DRC) and Sudan, will be assessed. These two countries have been selected because their cases represent polar opposites in terms of the way the ICC opened and conducted investigations. The ICC's Chief Prosecutor may formally open an investigation with or without the consent of the country under investigation. In the case of the DRC, the situation was referred by the state in question to the Chief Prosecutor of the ICC. In the case of Sudan, the situation was referred by the UNSC to the Chief Prosecutor through a resolution (Trendafilova *et al.*, 2010: 10). The cases studies are the first examples of each of these two scenarios and therefore will provide a more long-term analysis to answer the question. Comparisons will be made between these two case studies in three different aspects of ICC work with state institutions: transitional justice, the complementarity principle, and co-operation during investigations.

The Congolese government formally referred the situation in the country to the Chief Prosecutor in April 2004. There is little controversy here because the principle of state sovereignty was not breached. The DRC was not able to prosecute those accountable for the atrocities committed during the Second Congo War and its aftermath, and had therefore asked for the situation to be referred to the ICC for investigation, thus working with the Court by accepting its jurisdiction. The investigation into Sudan is more controversial. Sudan, following the war in Darfur, was the first case to be referred to the Chief Prosecutor by the UNSC. Following the passage of Resolution 1593, the ICC was granted authority to open a formal investigation, which began in June 2006 (UNSC 2005). This was the first time that Article 15 of the Rome Statute had been evoked to allow the Prosecutor to open an inquiry in this manner, all prior

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cases having been referred by the nation state itself or the United Nations (International Peace Institute (IPI) 2013: 54). The government of Sudan therefore had no input into whether or not the ICC would open investigations into its citizens' alleged international crimes. So, whilst the DRC's government could work with the ICC because it accepted the court's jurisdiction, the ICC would find it harder to work with the governments and state institutions of Sudan because they had not accepted the authority of the ICC.

This juxtaposition of these case studies therefore facilitates a comparison between a state whose domestic institutions are willing to work with the ICC, the DRC, with one whose domestic institutions are not, Sudan.

Transitional justice, the rule of law, and the strengthening of the domestic judiciary in post-conflict states

In recent years, international forums have stressed the role that state judicial institutions must play in bringing an end to civil conflicts and restoring order in states which have experienced such problems. The ICC works with states in Africa by providing a credible assurance to hold war criminals and human rights abusers to account. The threat of an indictment can arguably be a powerful deterrent against abhorrent behaviour, and can hopefully impel a leader to change his behaviour before one is issued or crimes are committed. It would seem common sense to say that the most successful interventions in Africa have involved operations on all levels, not just military, for example civil affairs teams to help rebuild the police force, state judiciaries and the civilians' trust in state institutions. Resolving disputes between communities hostile to one another can be a first step on the road towards rebuilding divided societies. However, as has been seen in the DRC and Sudan, as well as many other post-conflict African states, deep divisions can render state judicial institutions ineffective. After conflict or severe civil discourse, many may not be willing to accept the authority of domestic courts who wish to punish men who had been welcomed by large sections of society, or who do not treat wartime circumstances as extenuating, for instance (Widner 2001: 65). The courts are usually weak and do not have the correct resources, abused communities may not tolerate the bail of detainees still on suspicion, and the courts may have limited access to documents and evidence, which may have been destroyed or lost in the conflict. Furthermore, the post-conflict domestic courts might not have the capacity to deliver the resources necessary to restore civil order. This is when the state may need to look to international forums for help.

The concept of transitional justice is important when considering the ICC's work in Africa. In such cases as the DRC and Sudan, there have been efforts to form a justice system for the transitional period from conflict to stable nationhood. For many, such as the framers of the Rome Statute, transitional justice is vital for stability and peace. The ICC believes that by providing support for justice where forms of justice might already appear, or providing a framework for justice where there are no such mechanisms, the rule of law will begin to be recognised, and domestic judicial institutions will be strengthened or established, depending on the nature of the country's domestic institutions after a conflict (Mobekk 2005: 261). Efforts by the ICC to strengthen the domestic rule of law, such as outreach and education efforts within the population, will lead to an increased public understanding of justice, and confidence amongst the wider population that the law can be fair (Stromesth 2009: 88). Local ownership of these processes of justice, therefore, is incredibly important (Mobekk 2005: 261).

The DRC, working with the ICC, has taken a number of steps to ensure a period of transitional justice, including the amendment of military criminal rules and allowing independent military courts sole jurisdiction when international laws are broken (Adjami & Mushiata 2010: 3). However, these revisions to national law failed to accept the same definition of genocide, war crimes or crimes against humanity as the Rome Statute. Nonetheless, the Congolese *Haute Cour Militaire* has accepted that Congolese judges can use international legal definitions of international crimes, as opposed to the more obscure definitions used by Congolese military tribunals (Burke-White 2005: 570). Furthermore, the state courts have prosecuted a number of cases of crimes against humanity, with a particular focus on mass rape and sexual violence (Adjami & Mushiata 2010: 54). This is an indication of genuine willingness from the Congolese government and state institutions to legislate and factor in international law, as well as the Congolese courts to apply it. It could be argued that this demonstrates that ICC investigations can encourage the reform of African domestic legal systems. But on the other hand, this also demonstrates that the ICC could have worked more closely with a government that was willing to attain the required standards of international law, but chose not to.

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Sudan, as might be expected from its unwillingness to accept ICC jurisdiction, did not work so readily with the Court to ensure transitional justice. The Sudanese government, in order to hinder the Court's progress, founded the Special Criminal Court for Events in Darfur (SCCED), a Special Prosecutions Commission, and a Judicial Investigations Committee (Peskin 2009: 661), which will be discussed further later. Although the ICC doubts these investigations are genuine, there remains a potential for transitional justice, which could be seen as hopeful. However, it could be argued, that far from working with Sudanese institutions, the ICC investigation into the situation in Darfur has negatively impacted the transitional period in the country and weakened hopes for justice. As a consequence of the arrest warrant for President Omar al-Bashir, the Sudanese government initiated a series of arrests and incarcerations of human rights workers, suspended the work of humanitarian organisations and shut down three domestic institutions with humanitarian links (Joensen 2011: 67). Such institutions are essential for providing education on legality and human rights, and are therefore necessary for transitional justice. The removal of these professionals and institutions, as an indirect result of the work of the ICC, has negatively affected transitional justice in Sudan.

It must be stressed that the role of national courts is of the utmost importance when considering how the ICC can work with African institutions to strengthen transitional justice. We must remember, after all, that the ICC has a number of inherent limitations, mentioned above, which prevent it from providing truly universal justice and means that referral to the ICC will not prevent the ability to pursue other avenues of transitional justice (Derbal 2008: 15). The ICC only has authority to investigate crimes against humanity, war crimes and genocide perpetrated after the Court began proceedings in July 2002, meaning the ICC needs to work with national courts to provide additional mechanisms to prosecute acts committed prior to the Court's existence, on top of crimes less grave which do not fall under the Court's jurisdiction (Henman *et al.* 2007: 53; Rome Statute 1998: 3). The ICC, because of these limitations, is only able to focus on a narrow group of important individuals at any one time. The African state institutions therefore bear the brunt of the role of responding to the vast amounts of human rights violations that the ICC is not able to respond to itself. This can be beneficial because by increasing the amount that victims and perpetrators can experience justice being applied,

'reconciliation in a post-crisis Darfur (and Congolese) society will be better promoted and achieved, and victims and survivors will, in turn, be better able to transition into their new society' (Totten & Tyler 2008: 1099).

Secondly, the number of cases undertaken by the ICC is limited by the discretion of the Prosecutor, who has claimed that he will only prosecute the 'big fish' implemented in an atrocity (Henman *et al.* 2007: 54). The ICC's prosecution will not handle low-level cases, which would also need to be handled by state judicial institutions. Finally, it is in the ICC's, as well as the individual African states', interest to work together to strengthen their judiciaries and domestic institutions to the point where they would be able to handle cases themselves (ICID 2005: 111-115). The ICC, after all, only has jurisdiction over countries whose judiciaries are not able or willing to investigate cases themselves. This is called the principle of complementarity, and renders the court supplementary to domestic courts.

The complementarity principle

As has been briefly touched on above, due to both obligations of state sovereignty and the ICC's limited resources, the domestic judiciary has the responsibility to effectively investigate and bring to justice people against whom allegations of the 'most serious crimes of international concern' have been made (EJIL 2011). It is only when the state is unwilling or unable to perform this duty that the ICC can step in to take jurisdiction away from that country. This is known as the principle of complementarity and is provided for by the Rome Statute. It marks a step away from the precedent of previous international criminal tribunals. For example, previous tribunals, such as Nuremberg, the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Tribunal for Yugoslavia had seen themselves as having primacy above the jurisdiction of national courts (ICTY 1993: Note 11, Article 9(2); ICTR 1994: Note 11, Article 8(2)).

The ICC on the other hand does not necessarily see itself as above national courts in terms of jurisdiction. It merely wishes to work with national courts in order to 'complement' their work. It is therefore of vital importance for the ICC to work with African national judicial institutions, especially since most of the court's work involves Africa. According

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to the principle of complementarity, if domestic courts, such as those of Sudan and the DRC, are able and willing to prosecute someone who has allegedly committed crimes outlined in the Rome Statute, then the ICC cannot intervene in the judicial processes of that nation and must refrain from initiating its own proceedings (Rome Statute 1998: 12-13). The principle would be violated if the ICC initiated the prosecution of such an individual in this scenario. On the other hand, the principle would not be violated if the ability or willingness of domestic courts to prosecute were absent because of undue government pressure or a biased judicial system. In this scenario, the Court can legally continue the prosecution of the individual.

The complementarity principle could not have been breached in the case of the DRC because, as previously explained, the government had referred the situation to the court in the first place. Because the government was not able to prosecute alleged criminals fully, the case was handed to the ICC to 'complement' work already underway. The complementarity principle posed problems, however, in the case of Sudan. Because the Sudanese government had already set up courts and criminal processes to investigate what happened in Darfur, which will be explained further in the following section, the government argued that, under the complementarity principle, complementary work from the ICC was not needed. The SCCED, for example, was 'a substitute to an international criminal court aimed at divesting the ICC of jurisdiction under the complementarity principle' (Derbal 2008: 10). Nonetheless, Article 17 of the Rome Statute (1998: 13) allows the ICC's Pre-Trial Chamber to use the complementarity principle to determine whether a case is permissible, and to determine whether domestic proceedings were instigated with the 'purposes of shielding the person from criminal responsibility' or 'were not conducted independently or impartially' (ICC 2007A: 2). Therefore, despite the efforts of the Sudanese government to prove that the complementarity principle was being broken, the ICC still has a legal justification to investigate the events of Darfur. Even so, the ICC and Sudanese state institutions are not working together at all in this respect.

During the ICC Review conference in Kampala in 2010, the ICC introduced the concept of 'positive complementarity', which involves states working with one another, with additional support from the Court and civil society, to reach the standards required by the Rome Statute (Gegout 2013: 813). Where local and domestic judicial systems are in operation, the ICC should avoid interfering, whilst the Court should encourage these systems nationally to deal with criminal justice affairs (Fiss 2009: 59-69). Positive complementarity has already been put into practice in Libya where, in 2011, the ICC promised to defer cases to Libya on condition that ICC judges would be involved. However, in 2013, the Libyan government was ordered to hand over Gaddafi's intelligence chief, Abdullah al-Sanussi (Gegout 2013: 813), which violates the concept of 'positive complementarity'.

How the ICC cooperates with state institutions when conducting investigations

One of the main problems that the ICC can face when conducting investigations into possible war crimes and human rights abuses occurs when a state is not willing to work with the Court. As we have seen recently, the work of the ICC has become hindered by a number of actions taken by the AU. In response to what the AU sees as the unfair targeting of Africans by the ICC, it drafted a resolution claiming that 'no sitting head of state should appear before a court of law' (BBC 2013). This would lead the ICC to be unable to prosecute potential human rights abusers simply because they are running a state, which goes against the principle of international justice. There are therefore two scenarios within which to assess how the ICC works with African state institutions. Firstly, when the state in question is willing to work with the ICC, in this case the DRC, and secondly, when the state in question is not willing to work with the ICC, with the example of Sudan.

The DRC arguably represents the best example of the co-operation of a state's institutions with the ICC out of all the Court's African cases. Two of the five suspects indicted by the ICC, Thomas Lubanga and Germain Katanga, already had ongoing judicial proceedings issued against them by the state prior to ICC intervention. Whilst this represents a willingness to prosecute that has not necessarily been shown in previous African post-conflict states, the ICC did not believe that the principle of complementarity applied, because the state judicial institutions lacked the ability to sufficiently prosecute these alleged criminals for the serious charges which the Court levied against them (Adjami & Mushiata 2010: 11). They were extradited to custody in The Hague by the Congolese authorities, working under an ICC arrest warrant, in March 2006 and October 2007 respectively. A third person that the ICC had indicted, Mathieu Ngudjolo Chui, was detained by DRC police on behalf of the Court and was surrendered to The Hague in

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February 2008 (ICC 2007B). These cases represent the strongest examples of the ICC working with state institutions of African states in order to arrest, prosecute, and charge those accused of the most serious crimes of international concern.

However, Phil Clark has argued that the reason the Congolese government has worked so readily with the ICC might be down to ulterior motives. In this particular investigation, over a year's negotiations took place between the Chief Prosecutor's office and the government of the DRC before an agreement for referral was made (ICC 2004). Although this could be seen as evidence of the ICC actively and thoroughly working with an African state institution in order to achieve international justice, Clark has claimed that it was not until the Congolese government was sure an ICC intervention would serve their interests that they agreed upon a referral (Clark 2011). Evidence of this suspicion comes from the fact that, despite the widespread abuses the government allegedly committed against its own people, the ICC is yet to pursue any criminal cases against members of the government, instead pursuing members of the political opposition who also committed atrocities during the Second Congo War, such as Thomas Dyilo, founder of the Union of Congolese Patriots, and Bosco Ntaganda, former Deputy Chief of the Patriotic Forces for the Liberation of the Congo (Mills 2012: 406). This leads to concern that if the ICC works too closely with state governments, it could lead to African leaders using the Court as a means of targeting their political opponents whilst shielding themselves from persecution. This will be discussed further in the conclusion.

The government of Sudan failed to oblige the ICC in the fashion of self-referred countries, for example the DRC, Central African Republic, Mali, and Uganda, had done. The UNSC referral of the Sudan to the ICC was opposed to the will of the Sudanese government, which, predictably, led to the failure of state institutions and the ICC to co-operate (Pichon 2008: 185; Gehrig 2012). At first, the Sudanese government co-operated with the ICC to an extent, arresting one of the individuals who the Court had issued an arrest warrant for, Ali Kushayb, the Janjaweed militia leader (BBC 2011). The Sudanese government arrested Kushayb on the charge of war crimes in 2009, two years after the arrest warrants had been issued, and promised to prosecute him domestically, rather than handing him to the ICC (IPI 2013: 55). At the time of writing, Kushayb has not been tried domestically or handed to the ICC, and the other individual for whom the court issued an arrest warrant, Ahmed Haroun, remains at large.

The arrest of Ali Kushayb has proven to be the extent of Sudan's direct co-operation with the ICC. What little work that was being done with the ICC ended in 2007, when Khartoum challenged the indictments of the ICC on grounds of sovereignty (IPI 2013: 55). Sudan never ratified the Rome Statute, so the ICC does not have direct authority over the state's criminal courts. The government further argued that its state judicial institutions were capable of handling the prosecution of crimes committed in Darfur. Once it realised an ICC investigation into the crimes committed in Darfur was inevitable and with the president of the country, Omar al-Bashir, under investigation, the government of Sudan commenced a number of judicial, political, and diplomatic tactics aimed at discrediting the Court and hindering its proceedings (Baldo 2010: 3).

As briefly mentioned earlier, the Sudanese government established investigative commissions of inquiry, judicial bodies, and special courts to uncover crimes that had occurred in Darfur, most prominently the SCCED, initiated the day of the announcement of the ICC investigation, presumably to counter the Court's work (Baldo 2010: 3). Furthermore, in August 2008, the Sudanese government appointed a Prosecutor General for Darfur who committed himself to cases which had previously been blocked (IPI 2013: 55). It could be argued that this measure taken by the Sudanese government can be seen as an indirect consequence of the work of the ICC. Had the Court not announced its investigation into the alleged crimes in Darfur, the Sudanese government might not have acted to investigate these crimes at all. This would lead to the conclusion that whilst the ICC is not able to work directly with hostile governments, the Court's work, and the threat of an investigation, can still indirectly lead to measures being taken by state institutions to enact judicial measures and enforce the rule of law.

However, the efforts of Sudan's state institutions to end impunity in Darfur have proven to be insincere. The numerous impunity provisions, the fact that they have only considered low-ranking individuals on very minor charges, and the limited independence of the SCCED proves that it is an initiative with the intention of shielding important individuals from ICC jurisdiction (Human Rights Watch 2006: 10). Furthermore, the arrest warrant for President Bashir has proven, and will surely continue to prove, pointless. As has been stated, with no enforcement or arresting

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powers of its own, the ICC merely relies upon the co-operation of other countries, especially those countries party to the Rome Statute. Because Sudan is not such a party, the Court can only hope to work with African states that are party to the statute to arrest Bashir when he visits their countries. Kenya and Chad, both a party to the statute, have already received Bashir without taking action (IPP 2013: 57).

Conclusion and recommendations

The International Criminal Court's work with state institutions, especially governments, is something which should, in most circumstances, be applauded. The weakness of African judicial systems means that African nations need to work well with the ICC. And, as has been explored, those countries which choose to work with the ICC, produce outcomes far more beneficial to international justice than those who choose not to. As these domestic judicial institutions strengthen, with the help of the ICC and myriad other factors, there will be less of a need for the Court in international affairs. Further progress requires states, especially those who have made the promise 'set out under the Rome Statute, to investigate, prosecute, and punish those responsible for grave crimes themselves' to adhere to this promise (Annan 2012: 153). Until that time comes, the Court provides a useful alternative to flawed domestic criminal investigations in unstable post-conflict states, as we saw in the role the Court played in Libya in 2011. However, working too closely with state institutions can sometimes lead to questions of concern. As was briefly touched upon earlier, the ICC has so far avoided prosecuting members of the government in the DRC, and this is also true of Ugandan state officials. The Ugandan government did not seem to understand that it could not only refer its political opposition to the Court (Mills 2012: 406). This has led to accusations that state institutions have been all too willing to work with the ICC if it means shielding their officials from war crimes and hindering their political opposition. In the DRC, the ICC's investigation into Jean-Pierre Bamba, the main opposition at the previous Congolese presidential elections, has been of great help to President Kabila, whilst the pursuit by the ICC of the Lord's Resistance Army in Uganda has benefited President Museveni, who has been engaged in civil war with the force for over 26 years. The ICC could be accused of not working impartially with state institutions but playing a political role, because it took sides in a conflict (Gegout 2013: 807). On the other hand, the ICC is increasingly acting against state officials. In the ICC investigation in Kenya, four out of the six suspects currently being investigated were, or still are, members of the Kenyan government (Escritt and Macharia: 2013). Questions here are raised about 'how closely the ICC should work with state institutions and national governments before, during and after conflict situations are referred' (Clark 2011). It is interesting to note that Kenyan state institutions were less willing to work with the ICC than in the DRC or Uganda. In these situations, it might benefit the international criminal justice process for the ICC to work less closely with state governments and political institutions, and more closely with state judicial institutions. This, however, might be hard to do in situations where the state is not willing to work with the ICC unless it has an input into investigations, or where state political and judicial institutions are constitutionally interlinked.

The International Criminal Court should be open to holding discussions with states and judicial institutions, as well as with those people who live in conflict and post-conflict societies. People need to have confidence in their own legal and political systems. In the case of the DRC, where the Court was right to doubt the competence of Congolese state judicial institutions, the Congolese government should have been helped to remedy them, through the influence of the ICC, because this might have led to better understanding and confidence in the state judiciary. Whilst if opportunities for the victims of Darfur to experience the workings of impartial justice were increased, it would be easier to achieve reconciliation in the post-crisis Sudanese society, and victims would more easily be able to transition into their new society. The absence of preemptive and positive complementarity in the ICC's proceedings is the largest obstacle to creating a lasting benefit for African state judicial systems. Working with, and relying upon, state institutions to investigate and prosecute their most serious criminals is the best way for post-conflict African societies to establish a rule of law, the first step on the path to reconciliation and justice.

Bibliography

Adjami, Mirna and Mushiata, Guy (2010) *Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court* New York: International Center for Transitional Justice.

Amnesty International (2013) 'UN: Demand al-Bashir's surrender to the International Criminal Court (20/09/2013)',

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<http://www.amnesty.org/en/news/un-demand-al-bashir-s-surrender-international-criminal-court-2013-09-20>, date accessed 29/10/2013.

Annan, Kofi (2012) *Interventions* London: Allen Lane.

Arieff, Alexis; Browne, Marjorie Ann; Rhoda, Margesson and Weed, Matthew C. (2011) *International Criminal Court Cases in Africa: Status and Policy Issues* Washington DC: Congressional Research Service.

Baldo, Suliman (2010) *Sudan: Impact of the Rome Statute and the International Criminal Court* New York: International Center for Transitional Justice.

BBC News (2011) 'Sudan: SPLM rejects South Kordofan win for Ahmed Haroun (16/05/2011)', <http://www.bbc.co.uk/news/world-africa-13408877>, date accessed 20/10/2013.

BBC News (2013) 'African Union urges ICC to defer Uhuru Kenyatta case (12/10/2013)', <http://www.bbc.co.uk/news/world-africa-24506006>, date accessed 21/10/2013.

Burke-White, William W. (2005) 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo', *Leiden Journal of International Law*, 570/6: 557-590.

Clark, Phil (2011) 'The Limits and Pitfalls of the International Criminal Court in Africa (28/04/2011)', <http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/>, date accessed 29/10/2013.

Derbal, Ayad (2008) *The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace* Indiana: Center for Civil and Human Rights.

Escritt, Thomas and Macharia, James (2013) 'Kenyan deputy president must attend his trial: ICC judges (25/10/2013)', http://www.reuters.com/article/2013/10/25/us-kenya-icc-idUSBRE99O07L_20131025, date accessed 25/10/2013.

European Journal of International Law (EJIL) (2011) 'Clarifying the Principle of Complementarity: the ICC confirms the admissibility of case despite investigation in Kenya (14/09/2011)', <http://www.ejiltalk.org/clarifying-the-principle-of-complementarity-the-icc-confirms-admissibility-of-case-despite-investigation-by-kenya/>, date accessed 15/10/2013.

Fiss, Owen (2009) 'Within reach of the state: prosecuting atrocities in Africa', *Human Rights Quarterly*, 31/1: 59-69. in Gegout, Catharine (2013) 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace', *Third World Quarterly*, 34/5: 813.

Gegout, Catharine (2013) 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace', *Third World Quarterly*, 34/5: 800-818.

Gehrig, Michelle (2012) 'International Courts and the domestic judiciary in Africa (19/01/2012)', <http://www.e-ir.info/2012/01/19/international-courts-and-the-domestic-judiciary-in-africa/>, date accessed 20/10/2013.

Henman, Ralph; Chalfont, Paul and Behrens, Paul (2007) *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* Farnham: Ashgate.

Hondora, Tawanda (2013) 'The African Union and the ICC: Standing for Human Rights or Against? (09/10/2013)', <http://www.theafricareport.com/North-Africa/african-union-and-the-icc-standing-for-human-rights-or-against.html>, date accessed 11/10/2013.

The ICC and Africa: Complementarity, Transitional Justice, and the Rule of Law

Written by Thomas M. Dunn

Human Rights Watch (2006) *Lack of Conviction: The Special Criminal Court on the Events in Darfur* New York: Human Rights Watch.

International Commission of Inquiry on Darfur (ICID) (2005) *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* Geneva: International Commission of Inquiry on Darfur.

International Criminal Court (2004) 'The Office of the Prosecutor of the ICC opens its first investigation (23/06/2004)', <http://goo.gl/dLueqA>, date accessed 02/11/2013.

International Criminal Court (2007A) *Fifth Report of the Office of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 2005* The Hague: Office of the Prosecutor of the ICC.

International Criminal Court (2007B) *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* The Hague: International Criminal Court.

International Criminal Tribunal for Rwanda (1994) *Statute of the International Criminal Tribunal for Rwanda* New York: United Nations.

International Peace Institute (IPP) (2013) *Peace Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity* New York: International Peace Institute.

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) (1993) *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* New York: United Nations.

Joensen, Vagn (2011) *Letter Dated 12 May 2011 from the President of the International Criminal Tribunal for Rwanda Addressed to the President of the Security Council* New York: United Nations Security Council.

Mills, Kurt (2012) 'Bashir is Dividing Us: Africa and the International Criminal Court', *Human Rights Quarterly*, 34/2: 404-447.

Mobekk, Eirin (2005) 'Transitional Justice in Post-Conflict Societies: Approaches to Reconciliation', in A. Ebnother and P. Fluri (eds.) *After Intervention: Public Security Management in Post-Conflict Societies*, Geneva: Geneva Centre for the Democratic Control of the Armed Forces: 261-292.

Peskin, Victor (2009) 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', *Human Rights Quarterly*, 31/3: 655-691.

Pichon, Jakob (2008) 'The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court', *International Criminal Law Review*, 8/1: 185-228.

Rome Statute (1998) *Rome Statute of the International Criminal Court* The Hague: Rome Statute.

Stromesth, Jane (2009) 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies', *Hague Journal on the Rule of Law*, 1: 87-97.

Totten, Christopher and Tyler, Nicholas (2008) 'Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court', *Journal of Criminal Law and Criminology*, 98/3: 1069-1118.

Trendafilova, Ekaterina; Kaul, Hans-Peter and Tarfusser, Cuno (2010) *Situation in the Republic of Kenya* The Hague: International Criminal Court.

The ICC and Africa: Complementarity, Transitional Justice, and the Rule of Law

Written by Thomas M. Dunn

United Nations Security Council (2005) *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court* New York: United Nations Security Council.

Widner, Jennifer (2001) 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case', *The American Journal of International Law*, 95/1: 64-75.

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