

Complementarity: a working relationship between African states and the International Criminal Court

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The idea of an international criminal court has captured the legal imagination for well over a century. It became a reality on 18 July 1998 with the adoption of the Rome Statute. After attracting the necessary ratifications the statute entered force on 1 July 2002. And in just over a year of its existence, by November 2003, the International Criminal Court (ICC), through the Prosecutor, had received over 650 complaints.

It is important to consider these complaints. While in one sense they demonstrate the world's hopes and aspirations for justice through the ICC, they also reveal a disturbing lack of understanding of the Court and how it functions. Fifty of the complaints contained allegations of acts committed before 1 July 2002. This is problematic because the ICC's jurisdiction is forward-looking and it does not have retrospective jurisdiction over acts committed prior to 1 July 2002. A number of communications alleged acts that fall outside the subject matter of the Court's jurisdiction, and complained about environmental damage, drug trafficking, judicial corruption, tax evasion and less serious human rights violations.

Thirty-eight complaints alleged, no doubt correctly, that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the US is not a party to the statute and, in any event, the ICC cannot exercise jurisdiction over alleged crimes of aggression until the crime is properly defined – something the drafters of the statute expressly left until a future date. Two communications referred to the Israeli-Palestinian conflict. The problem here, too, is that Israel is not a party to the statute, and the Palestinian authority is not yet a

state and so cannot be a party. By early 2006 the Prosecutor's office recorded that it had received 1 732 communications from over 103 countries, and that a staggering 80 per cent of those communications were found to be 'manifestly outside [the Court's] jurisdiction after initial review' (International Criminal Court 2006).

The reality is that a range of organisations and individuals that submitted the first complaints to the Prosecutor seem to have fundamentally misunderstood the ICC, and have placed a false hope in the Court as a means to provide them with justice. The Court's jurisdiction is limited temporally – it can only exercise jurisdiction after 1 July 2002 – and its jurisdiction is limited substantively – it can only consider the most serious crimes of international concern, being genocide, crimes against humanity and war crimes, and, until a proper definition of aggression is agreed upon by States Parties, it cannot consider complaints about the crime of aggression.

Furthermore, the Court's jurisdiction is limited geographically. For States Parties, the Court can exercise jurisdiction over their nationals wherever they may be in the world. But for non-States Parties, like the US, the Court can only exercise jurisdiction if the guilty American commits his or her crime on the territory of a State Party.

The abuse at Abu Ghraib prison by US Private Lyndie England and her cohorts, which undoubtedly constitute war crimes and torture, is not something that Iraq or others can refer to the Court, since Iraq, on whose territory the crimes were committed, is not a party to the statute. In a similar vein, the crimes committed in Zimbabwe cannot fall within the purview of the Court as long as Zimbabwe remains a non-member of the ICC regime.

The only way in which the Court might exercise jurisdiction in relation to crimes committed on the territory of a state not party to the Court is if a case is referred to the ICC by the Security Council, as was done in respect of the atrocities in Sudan. The Court is then accorded the chance to exercise jurisdiction over the crimes committed in that country even though that country is not a party. That is because the referral bears the imprimatur of the UN Security Council, whose resolutions are binding on all member states of the UN, regardless of whether they are parties to the Rome Statute or not.

COMPLEMENTARITY AS A KEY FEATURE OF THE ICC

Perhaps the key feature of the ICC regime is the principle of complementarity. It is vitally important to appreciate its significance and, in so doing, to understand both

the promises and problems of international criminal justice as exemplified by the Court.

The ICC is expected to act in what is described as a 'complementary' relationship with domestic states that are party to the Rome Statute. The preamble to the Rome Statute says that the Court's jurisdiction will be complementary to that of national jurisdiction, and article 17 of the statute embodies the complementarity principle. At the heart of the principle is the ability to prosecute international criminals in one's national courts, on behalf of the international community, or to have in place mechanisms to arrest and surrender to the ICC persons that the Court seeks to prosecute and who happen to be in one's jurisdiction.

The general nature of national-implementation obligations assumed by states that elect to become party to the Rome Statute is wide-ranging (see, generally, Schabas 2004; see also Brandon and Du Plessis 2005). The Rome Statute notes that effective prosecution is ensured by taking measures at the national level and by international cooperation. Because of its special nature, States Parties to the Rome Statute are expected to assume a level of responsibility and capability, the realisation of which will entail taking a number of important legal and practical measures.

The ICC does not exercise universal jurisdiction. As we have already noted, its jurisdiction is only triggered where the crime occurred on the territory of a state that accepts the Court's jurisdiction (territorial jurisdiction), or the accused is a national of such a state (the active-nationality principle), or the matter is referred to the Court by the UN Security Council exercising its chapter VII powers. By article 12, a state accepts jurisdiction by becoming a State Party, or can do so by declaration where it is a non-State Party. The consequence is that many states that become party to the Rome Statute may not have provided previously for criminal jurisdiction on the active-nationality principle; such states will normally require special legislation as the domestic legal basis enabling them to bring a prosecution at home of a national accused of international crimes committed elsewhere.

The role of the state under the complementarity principle

It is thus clear that the State Party assumes a significant role in the regime for the prosecution of international crimes, and certain features need to be present in the state's legal and justice system in order for this complementary system of justice to function effectively.

Incorporating the crimes into domestic law

The ICC has jurisdiction over those crimes regarded with the highest degree of concern by the international community: genocide, crimes against humanity and war crimes. These are thoroughly defined in articles 6, 7 and 8 of the Rome Statute, with further elaboration and definition given in the ‘Elements of Crimes’ guidelines agreed to by States Parties.

In addition to their duty to take steps to be able to surrender to the ICC persons for whom an arrest warrant is issued (see further below), States Parties to the Rome Statute may take steps to prohibit, as a matter of national or domestic law, the crimes or conduct described in the statute. This is to enable them to conduct a prosecution of such crimes domestically, should they elect to do so (and to remove any question of the crimes for which surrender is sought not being found in national law). Article 70(4), meanwhile, requires states to extend the operation and substance of their national criminal laws dealing with offences against the administration of justice, so as to criminalise in addition conduct that would constitute an offence against the ICC’s administration of justice.

Cooperating with the Court

Aside from enabling its own justice officials to prosecute international crimes before its domestic courts, a State Party is furthermore obliged to cooperate with the ICC in relation to an investigation and/or prosecution the Court might be seized with. The prosecution of a matter before the ICC (and the process leading to the decision to prosecute) will normally require very considerable investigation, information gathering, and inter-agency cooperation, often with high levels of confidentiality and information or witness protection required. Contact between the ICC (in particular the Office of the Prosecutor) and the national authorities will likely become extensive during the course of an investigation and any request for arrest and surrender or any prosecution. Indeed, in many cases there is likely to be a fairly complex and substantial process of information gathering, analysis and consideration that must be undertaken before the decision to formally investigate can even be taken.

Because the ICC lacks many of the institutional features necessary for a comprehensive handling of a criminal matter, for ordinary policing and other functions it will rely heavily on the assistance and cooperation of states’ national mechanisms, procedures and agencies.

In order to be able to cooperate with the Office of the Prosecutor during the investigation or prosecution period¹ (or otherwise with the Pre-trial Chamber or the Court once a matter is properly before these – for example, in relation to witnesses), a State Party is obliged to have a range of powers, facilities and procedures in place, including by promulgation of laws and regulations. The legal framework for requests for arrest and surrender, on the one hand, and all other forms of cooperation, on the other, is mostly set out in part 9 of the Rome Statute.

Article 86 describes the general duty on states to cooperate fully with the ICC in the investigation and prosecution of crimes. Article 87 sets out general provisions for requests for cooperation, giving the ICC authority (under article 87(1)(a)) to make requests of the state for cooperation. Failure to cooperate can, among other things, lead to a referral of the state to the Security Council (article 87(7)). Article 88 is a significant provision, obliging states to ensure that there are in place nationally the procedures and powers to enable all forms of cooperation contemplated in the statute. Unlike inter-state legal assistance and cooperation, the Rome Statute makes clear that by ratifying the statute states accept that there are no grounds for refusing ICC requests for arrest and surrender.² States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

Investigating and prosecuting international crimes domestically

While the Rome Statute envisages a duty to cooperate with the Court in relation to investigation and prosecution, the basic premise of the principle of complementarity is the expectation that states that are willing and able should be prosecuting ICC crimes themselves. The principle of complementarity ensures that the Court operates as a buttress in support of the criminal justice systems of States Parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a State Party is ‘unwilling or unable’ to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is seized with jurisdiction (International Criminal Court 2002: article 17(1)).

Out of respect for the principle of complementarity, article 18 of the Rome Statute requires that the Prosecutor of the ICC must notify all States Parties and

states with jurisdiction over a particular case – in other words, non-States Parties – before beginning an investigation by the Court (International Criminal Court 2002: article 18(1)), and cannot begin an investigation on his own initiative without first receiving the approval of the Pre-trial Chamber (International Criminal Court 2002: article 15).

At this stage of the proceedings, it is open to both States Parties and non-States Parties to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation (International Criminal Court 2002: article 18(2)). If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the Court may only proceed if it concludes that the decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned (International Criminal Court 2002: article 17(2)(a)).

The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

THE NATIONAL INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

A presumption in favour of domestic action

As we have seen, complementarity is an essential component of the ICC's structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically.

The Court is one component of a regime – a network of states that have undertaken to do the ICC's work for it; to act as domestic international criminal courts in respect of ICC crimes. It was written in relation to the experience at Nuremberg that '[t]he purpose was not to punish all cases of criminal guilt... The exemplary punishments served the purpose of restoring the legal order; that is, of reassuring the whole community that what they had witnessed for so many years was criminal behaviour' (Röling 1979: 206). Because of the ICC's system of complementarity we can expect national criminal justice systems to play an important role of doing the ICC's work by providing 'exemplary punishments' that will serve to restore the international legal order. In this respect, Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, has pointed out that:

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice – either a nation tries its own or they will be tried in The Hague – it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle (Slaughter 2003).

The ICC Prosecutor put it as follows on taking up his post, explaining that:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of regular functioning of national institutions, would be a major success.³

This is the promise of international criminal justice as exemplified in the ICC's complementarity regime. One way in which we will come to regard the ICC as effective, as having achieved its promise, will be when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian and human rights law to investigate and prosecute.

The complementarity regime is furthermore a means by which African and other states are able to retain domestic jurisdiction over the offences that are committed by their nationals or on their territories. The ICC is not intended to be a court that imposes itself on states, or which arrogates to itself the right to investigate and prosecute offences that amount to international crimes. On the contrary, under the complementarity scheme States Parties have secured for themselves the right to act domestically in relation to these crimes. So long as the state is willing and able to conduct the investigation and subsequent prosecution itself, its decision will thereby deny the ICC jurisdiction over the offences and the perpetrators.

The task of ensuring that states are willing and able to prosecute ICC crimes

While the complementarity regime secures for states the right to act domestically in relation to ICC crimes, the first few years of the ICC's existence have demonstrated that states will not always be willing or able to investigate and

prosecute international crimes that are committed on their territory. Already the ICC Prosecutor has the crimes committed in three States Parties – Democratic Republic of the Congo, Uganda and Central African Republic – in his sights, and the Security Council referred the Sudan crisis to the ICC even though Sudan is not a party to the ICC.

As is obvious, each of these situations involves African states. It is thus important to reflect on some of the problems under the complementarity regime with a view to better understand how African nations might respond to their duties under the Rome Statute, and might better secure their rights under the complementarity system of international criminal justice through domestic prosecutions.

Arrest warrants without arrests: the problem of unwilling states

The small number of persons in custody hints at the difficulties that present themselves to the Prosecutor and the Court when investigating and prosecuting a case against the backdrop of complementarity.

We have seen that the Court has jurisdiction only when a State Party is unwilling or unable to do the job itself. Thus, if the Prosecutor has decided that state X is unwilling or unable to prosecute, the ICC may be seized with jurisdiction in terms of the complementarity scheme. In order for the Court to exercise jurisdiction – as with a criminal court in a domestic context – there needs to be an arrest. But unlike in a domestic context where the prosecution has a police force ready to assist in arresting accused who can then be brought to court, the ICC Prosecutor is a stateless actor, with no international police force to assist him in effecting arrests. He is forced to rely on the state that is implicated in the international crimes he wishes to investigate. To get his hands on an accused he needs state X to be his eyes and ears on the ground and to arrest when possible. Yet, state X is the very state that he decided was unable or unwilling to assist him in the first place.

This is a hard reality that the Prosecutor is currently experiencing, as is well illustrated by the Sudan referral. The Darfur commission appointed by the UN to investigate the crimes committed in northern Sudan found that, as far as mechanisms for ensuring accountability for the atrocities committed in Sudan are concerned, the ‘Sudanese courts are unable and unwilling to prosecute and try the alleged offenders... Other mechanisms are needed to do justice.’ This is no small

finding. As will be appreciated, it is open to the Sudanese government (even as a non-State Party) to argue that it is willing and able to prosecute the offenders.

In terms of the complementarity principle, should Sudan in fact be willing and able, the ICC may have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to perform the prosecutions. It is apparently for this reason that the commission saw fit to stress that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders, thereby clearing the way for a ‘clean’ referral of the matter by the Security Council to the ICC.

However, the response by the Sudanese government to the Security Council resolution referring the matter to the ICC has made it clear that the Prosecutor would not be able to rely on Sudan’s government for cooperation in investigating and punishing persons responsible for gross human rights violations. Khartoum has called resolution 1593 a violation of its sovereignty (Agence France-Presse 3 April 2005), and President al-Bashir reportedly swore ‘thrice in the name of Almighty Allah that [he] shall never hand any Sudanese national to a foreign court’ (Agence France-Presse 5 April 2005).

Similarly, Sudan’s ambassador to the UN, Elfatih Mohammed Erwa, said: ‘Justice here is a great good used in the service of evil’ (British Broadcasting Corporation News 1 April 2005). The Sudanese government insisted it would not allow any Sudanese national to be tried before a foreign court (see further African Union 2005: paragraph 87, and Appiah-Mensah 2005: 10). Khartoum went so far as to instigate public demonstrations objecting to the referral, and the ICC was denounced as an ‘American court’ (Agence France-Presse 2 April 2005, and Reuters 5 April 2005).

As pointed out earlier, the Prosecutor has, through the Court, issued arrest warrants, on 27 April 2007, for Ahmad Muhammad Harun, former minister of state for the interior and currently minister of state for humanitarian affairs in the government of Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a leader of the militia/Janjaweed. But the Court’s website is telling when it records that in relation to these two individuals ‘[n]o hearings [are] scheduled at this time’.⁴

The Sudan scenario is thus an illustration of the difficulties the ICC faces to give effect to the Security Council referral. The Court has found itself faced with the very difficult task of trying to enforce its decisions against a recalcitrant state.⁵ This task is complicated and aggravated by the fact that Sudan is not a State Party to the ICC, and as such owes no treaty obligations to the Court. This is an inevitable problem with the referral of situations involving non-States Parties to the ICC as the referral extends the Court’s jurisdiction beyond the parameters of

the Rome Statute but does not concomitantly extend the Court's power to enforce that jurisdiction. This problem is one that was foreseen by the drafters of the Rome Statute, but which was never satisfactorily attended to.

One thing is abundantly clear: active Security Council involvement will prove vital for the effective functioning of the ICC. As one noted author points out:

[T]he Security Council could decide that compliance by all UN Member States with a particular ICC decision is a measure necessary for the maintenance of peace and security pursuant to Article 41 of the UN Charter, and, as such, bind all UN Member States under Article 25 of the Charter to comply with specific ICC decisions (Sarooshi 2004: 104).

Indeed, the Prosecutor of the Court has, in a report delivered to the Security Council in early December 2007, made it clear that without the Security Council's assistance the Court would not be able to prosecute the persons in respect of whom it has issued warrants of arrest. He put it bluntly when he told the Council that, although 'Sudan has known the nature of the case against Ahmad Harun and Ali Kushayb for 10 months, they have done nothing. They have taken no steps to prosecute them domestically, or to arrest and transfer them to The Hague.' The answer, in his view, lies with the Security Council, and he called on the Council to send 'a strong and unanimous message' to Khartoum to arrest and surrender the two men accused of committing war crimes during the conflict in Darfur (see Du Plessis and Ford 2008).

This is obviously correct, and demonstrates the precariousness of the Prosecutor's position. It is ultimately up to the members of the Council to live up to their responsibility and ensure that the government of Sudan respects its obligations under resolution 1593 and cooperates with the ICC, in particular through the arrest and surrender of Harun and Kushayb.

It is also apparent, however, that Africa and its states should do more to support the work of the Court. In relation to the Sudan referral, for instance, it remains open to the AU and other regional bodies to demand that Sudan comply with its obligations under resolution 1593.

The problem of capacity and priority

But it is not only outright unwillingness by states to cooperate in the cause of international criminal justice that is of concern. As a recent study by the Institute for Security Studies (ISS) demonstrates (Du Plessis and Ford 2008), there is a

myriad of issues that undermine the promise of international criminal justice through the ICC's complementarity regime.

It will be remembered, as the preamble of the Rome Statute puts it, that '[i]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. The most serious international crimes – genocide, war crimes and crimes against humanity – are shocking cruelties attracting universal condemnation.

The creation, through widespread adoption of the Rome Statute, of a permanent international criminal court has been of enormous practical and symbolic significance. The ideals underlying the ICC require practical instrumentalities and processes. The ISS monograph, 'Five-country study on domestic implementation of the ICC Statute', was concerned with the significance of national-level measures for the effectiveness of the scheme of international criminal justice. It consists of a compilation of reports by independent experts on the extent of legislative and other measures taken by five selected African states (Botswana, Ghana, Kenya, Tanzania and Uganda – all party to the Rome Statute), to implement the statute's obligations into their national laws and procedures. It comprises, too, a comparative overview of the themes emerging from the various country reports. As such, it is an assessment of the degree of capacity of these states (and similarly situated states) to respond to international crimes by workable, acceptable and lawful processes and within the parameters set by international law, in particular international human rights law. As the preamble to the Rome Statute emphasises, 'effective prosecution must be ensured by taking measures at the national level and by international cooperation'.

We have already seen that at the heart of the complementarity regime are the measures that must be taken by individual states in their own legal systems to ensure no safe harbour exists for the worst international criminals; to ensure that there are no barriers to smooth cooperation and assistance between states and with the ICC; and to ensure that national procedures and mechanisms are of sufficient quality, from a rule of law perspective, and adequately accommodate human rights safeguards, so that principles are upheld and prosecutions are not jeopardised by deficient investigations.

The monograph is concerned with answering questions such as: How relevant to Africa is the priority of implementing measures consistent with the Rome Statute that enable the effective prosecution of international crimes? How does it sit relative to the other priorities of government and government departments, human rights defenders and civil society?

The findings of the monograph illustrate the remaining and apparently enduring problems of giving effect to complementarity in Africa. The reports indicate that one perception is that having in place national ICC response measures is not particularly relevant or urgent from an African perspective. As the country reports reveal quite clearly, all five countries sampled ratified the Rome Statute but thereafter failed to put in place national-level measures to implement Rome Statute obligations.

The reasons for the delay in implementation are in large measure shared among the five states studied. Not only does the study reveal the status and peculiarities of individual countries' responses to ratification of the Rome Statute, it also allows us to draw certain comparative insights.⁶

The consultations reveal the following features, misconceptions, misgivings or concerns as common barriers to implementation or common reasons for delay in the process of implementing the Rome Statute in some African countries. (As will be readily appreciated, these factors and difficulties can operate so as to compound one another.)

First, there is a genuine **lack of awareness** about the need for and significance of implementation at the highest level, among many officials, civil society, the legal profession and judiciary, and the wider community. This manifests either as a lack of awareness altogether (so that there is no local pressure on government for implementation), or awareness in the sense that the issue simply has not come up in official or other circles.

Second, there is a discernible **capacity shortfall** in some of the countries studied: an overstretched and thinly staffed justice system, and a lack of sufficient numbers of officials with expertise in drafting or in international criminal cooperation. How this can manifest is that concept papers and other initiatives moving the issue up to a political level are unlikely to be undertaken, or approved, where capacity is thin. Parliaments also appear to lack some capacity to review these issues at a committee level in an informed way. This, of course, means that only a few issues can have priority. At present, if any capacity is devoted to international criminal issues it is to terrorism and international organised crime.

Third, the clear indication in most of the reports is that these countries have entertained **other priorities**, and having national laws to implement the statute is simply not considered relevant enough to be accorded any or sufficient priority. This came through strongly in most of the reports. Many of the countries have had significant elections, or constitutional-reform processes, that appear to have absorbed a good deal of political energy. This need not have prevented implementation, but has certainly not aided it.

Fourth is the fact that these states held a number of **political misgivings** about implementation, and a sense that the local political risk of implementation (or the regional criticism that may come from some future surrendering of a leading figure to an international court) outweighs the risk of any international criticism for lack of implementation. Some of the sense of political misgiving can only be inferred from the fact that implementation has not received political momentum (in Uganda, the reasons for political uncertainty about proceeding are more obvious, given the peace process ongoing there). But there is also in the reports a trace of a sentiment that having national laws in place will cause more problems and embarrassments than it will solve, or that it would be preferable for these issues to be dealt with in some other way, or that international prosecutions are seen as a 'Western preoccupation'.

Fifth, the commonly expressed reason for delay in implementation is **political or constitutional concerns** with the immunity regime of the Rome Statute (that article 27 brooks no immunity even for serving heads of state). This has typically arisen at a late stage in the drafting process. It is rather a significant barrier, particularly where there has been political violence in the country, and given the reportedly high degree of sensitivity resulting from what could be described as the 'Charles Taylor phenomenon' (the perception that immunities are never watertight and that prosecution may follow at some point in the future).

Sixth, there is some concern in these countries about the perceived **cost** of implementation measures. Some of these perceptions are based on misunderstandings – for example, the mistaken belief in one country that cooperation with the ICC meant undertaking the cost of building new, high-quality prison cells without which criminal suspects would be able to claim that their trial was unfair or their rights abused. Some of the concerns are perhaps more understandable, such as the cost of training prosecutors and judges. This factor is not as significant as others, and seems not to underlie the principle reasons for delay in implementation.

A seventh and final reason is what appears to be the **absence of domestic pressure groups**, either within or outside of government, in any of the five countries studied, to give the issue of ICC implementation a profile or publicity or forward momentum. There have been some non-governmental organisation-organised seminars and programmes, but not on the scale that took place during the campaign for ratification. The issue lacks the international-partner backing, political convenience and perceived relevance that sees counterterrorism and organised-crime measures move forward. Unlike the Geneva Conventions, the statute lacks the support of a single institution, such as the military.

These findings are dealt with comprehensively in the monograph. What does appear from them is that the primary barrier to implementation in the countries studied appears to be that the issue (cooperation in preventing impunity for international crimes) is not considered, at the higher political levels in these countries, as having sufficient importance, relevance and priority. Viewed in this way, capacity or expertise and cost are in a sense ‘secondary’ factors that can be addressed once the sense of priority is accorded to them, by direction from the executive or by political leadership or consensus – for example, acquiring the services of local or international legal-drafting experts, or asking the ICC itself for assistance.

Thus, while real capacity constraints do hamper the justice systems of these countries, the real explanation would appear to be that once the international credit has been obtained by ratification, actual implementation of the Rome Statute is simply not considered politically significant enough to be accorded priority.

The lack of appeal to the political decision-makers appears to be both relative and absolute. Relative to other priorities for these countries, it is evident from the studies that ICC implementation legislation simply does not feature highly; any post-ratification momentum has been lost. Moreover, there is no discernible constituency at home or abroad calling for action to be taken, and indeed some voices suggest it would be a distraction towards a Western preoccupation. Added to this ‘relative irrelevance’ issue are factors that, even if the issue gets to the political decision-maker and so receive attention, would tend to positively militate against implementation: these are perceptions or concerns about constitutional immunities, or the misunderstandings about the reach of ICC crimes that may preclude discussing ‘international crimes’ for reasons of local politics (for example, Kenya), or real concerns about the impact on local peace processes of taking forward legislation (for example, Uganda).⁷

COMPLEMENTARITY IN AFRICA: SOME SUGGESTIONS AND RECOMMENDATIONS

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC. More than half of all African states (30) have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. These efforts must continue. The lesson we learn from the Sudan

referral is that complementarity must work if the international criminal justice project is to succeed on the whole.

Perhaps the greatest problem that faces the ICC in future cases is an unwillingness or inability on the part of States Parties to properly investigate and prosecute international crimes, a problem obviously compounded where, as in the case of Sudan, the state is not party to the Court’s statute. While such scenarios will entitle the ICC to then assume jurisdiction over the case under the complementarity scheme, the Sudan referral demonstrates that the Court will struggle to ensure assistance and cooperation from states that are unwilling or unable to do the job themselves.

The existence of these problems points us back to the promise of complementarity. The more states are able faithfully to fulfil the promise of the ICC regime – of ensuring that there is meaningful domestic prosecution of the world’s most serious crimes – the more the ICC can avoid these problems altogether, or at least diminish their impact.

It is thus important that African states develop national capacity for responding, lawfully and within the context of international law and human rights, to international crimes and criminals. A key element of long-term post-conflict peace building is strengthening the rule of law and access to justice. Equally important is developing mechanisms to manage and prevent conflict, and creating accountability in government.

In Africa, post-conflict peace building is threatened by the widespread lack of accountability among those responsible for the continent’s many violent conflicts that are characterised by torture, rape, murder and other atrocities. The pervasive culture of impunity threatens newly established peace processes, not only because those responsible for atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge that can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing meaningful forms of accountable governance.

However, in most African countries national judicial systems are often too weak to cope with the burden of rendering justice for these crimes. ‘International crimes’, including war crimes, crimes against humanity and genocide, are characterised by large numbers of victims and perpetrators, and are often committed with the complicity if not the active participation of state structures or political leaders. This means that the political pressure may be too great for national justice systems to cope with. Successful domestic prosecutions are further

limited by resource and skills shortages, together with the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law.

In circumstances such as these, when the national justice system is unable or unwilling to investigate or prosecute those responsible, the international community can and should assist with these processes. This the international community has already begun to do in Africa, through the creation of, first, the International Criminal Tribunal for Rwanda and, thereafter, with its assistance in creating the hybrid Special Court for Sierra Leone. Most recently, the EU has sent a delegation to assist Senegal in preparing the trial of Hissène Habré, the former Chadian dictator. Habré, who ruled Chad from 1982 to 1990, when he fled to Senegal, is accused of thousands of political killings, systematic torture and waves of 'ethnic cleansing' during his rule. In July 2006 Senegal agreed to an AU request to prosecute Habré 'on behalf of Africa.' The EU delegation, headed by Bruno Cathala, the Registrar of the ICC, is in response to a request by Senegalese President Abdoulaye Wade for international assistance in preparing the trial. The EU experts will evaluate Senegal's needs and propose technical and financial help.⁸

Of significance is that the AU has named Robert Dossou, Benin's former foreign minister and justice minister, as an envoy to the trial. This is a promising development, and one that hopefully signals broader AU support for initiatives aimed at combating impunity for international crimes. Naturally, one of the most important initiatives in this regard is the creation of the ICC. One can hardly overestimate the importance of Africa to the Court: the ICC's first 'situations' are all on the continent (Democratic Republic of the Congo, Uganda, Sudan and Central African Republic). Africa is thus currently a high priority for the ICC, and will remain so for the foreseeable future. It is the most represented region in the ICC's Assembly of States Parties, with 30 countries having ratified the Rome Statute, and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peace-building efforts on the continent. However, the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC. In reality, the Court will be able to tackle a selection of only the most serious cases. And even if it did have the capacity to handle higher volumes of cases, this would be limited in Africa by the fact that the ICC is, by design, a 'court of last resort', with the main responsibility for dealing with alleged offenders resting with domestic justice systems. Governed by the principle of complementarity, this means that the ICC can only act in support of domestic criminal justice systems.

National courts should be the first to act, and only when they are 'unwilling or unable' to do so can the ICC take up the matter.

This implies a certain level of technical competency among domestic criminal justice officials. But technical competency is only part of the problem. A related (and often prior) issue is political support for the idea of international criminal justice and for the ICC's complementarity scheme. In that regard, it is vital that African states ratify the Rome Statute. The ICC cannot, of its own accord, initiate investigations into crimes committed in a state, or by a national of a state that has not ratified or acceded to the statute establishing the ICC. Considering that 30 of Africa's 53 states have ratified the statute, a large portion of the continent still falls outside the ICC's mandate. And even for those that have ratified it, there is the further and essential requirement of implementing effectively and comprehensively the obligations contained in the ICC Statute.

Due to a need in Africa for greater public and official awareness about the work of the ICC, and a need for enhanced political support for the work of the Court and for international criminal justice more generally, the fulfilment of the aims and objectives of the ICC on the African continent are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession and civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC.

It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. Other structures, such as the African Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights and other pan-African institutions, can play a meaningful role in this regard that should be encouraged. An example in this respect is the work of the African Commission on Human and Peoples' Rights in its 2005 resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, in which the commission called on civil-society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

That these African structures and organisations should be at the forefront of awareness raising is important, not least of all because of the perception present within certain African states that international criminal justice and the ICC is an 'outside' or 'Western' priority and relatively less important than other political, social and developmental goals. The leading regional organisation, the AU, should thus play a more significant role in building understanding and support among its

member states about the importance of practical measures aimed at ending impunity for serious international crimes. In doing so it should make explicit the principled and practical reasons for building capacity to respond to international crimes, including viewing this capacity as inherent to a developed notion of 'security' and as a key component of peace building, conflict prevention and stability. This will enhance the role and work of the ICC in Africa and encourage states to comply with their complementarity obligations under the Rome Statute.

Ultimately, there is both scope and need for African states and their regional organisations to draw on African experience to ensure an African-based and African-focused initiative for contributing towards peace building and stamping out impunity. After all, it should not be forgotten that it is not the UN, the ICC, or Western states that drafted the aims of the AU. Under articles 4(m), 3(h) and 4(o) of the AU's Constitutive Act it is African states that reiterate that the AU is committed to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

NOTES

- 1 The extent of cooperation required of States Party is evident from the fact that the Office of the Prosecutor has a very wide mandate to 'extend the investigation to cover all facts' and investigate circumstances generally 'in order to discover the truth' (International Criminal Court 2002: article 54(1)(a)).
- 2 See International Criminal Court (2002), article 89, although article 97 provides for consultation where there are certain practical difficulties.
- 3 Sarooshi (2004: 477), quoted in McGoldrick et al.
- 4 See <http://www.icc-cpi.int/cases/Darfur.html>, accessed on 12 February 2008.
- 5 The most recent (symbolic) example of this recalcitrance is the Sudanese government's decision to appoint Musa Hilal, a leader of the Janjaweed, to a central government position. See the human rights outcry occasioned thereby and the full story by Reuters (2008).
- 6 In deciding whether the results of the study are relevant to an Africa-wide assessment of attitudes and responses to the ICC and the Rome Statute, it is worth bearing in mind that all of the countries studied can be considered, at least in their respective regions, to be relatively advanced at least in a number of respects relevant to this topic. So, Botswana is (with South Africa) seen as a leading example of good governance in Southern Africa and continentally; Ghana, whose leader has the status of an elder statesman in at least West Africa, has come to be considered the most stable and well-governed of the major West African countries; although it has suffered recent instability; Kenya is a leading African state with a complex and evolving democracy, and some strong institutions (although instability has set in following the contested election results in late 2007 and current reports of violent

demonstrations are of obvious concern); Tanzania, while poor, is stable, growing and respected for its pedigree of pan-Africanism and its regional peacemaking; Uganda recently hosted the Commonwealth summit and some of the processes it has followed towards multiparty democracy, economic growth, women's empowerment, HIV prevention, etc., have been described as a model for other African countries. In considering the problems and possibilities of implementation in *other* African countries, then, it is worth remembering that the sample is of countries that could reasonably be expected to have made progress or be capable of making progress on implementation.

- 7 It is worth noting that many of the problems with implementation noted by the consultants can be seen as generic problems with treaty implementation, ones that have been encountered in many countries in terms of following up the ratification of human rights instruments, for example. It is not necessary to explore the literature on this issue, except to note, firstly, that the Rome Statute is not the only instrument of great aspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon; and, secondly, that many of the reasons for lack of implementation of human rights instruments apply equally to the statute: political misgivings, capacity, and so on.
- 8 Senegal has said that the investigation and trial will cost 28 million euro, and recently said it would spend over 1,5 million euro (1 billion francs CFA) on the trial. In addition to the EU, a number of individual countries, including France and Switzerland, have publicly committed to helping Senegal. See further Human Rights First (2008).

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