

The International Criminal Court in Africa: challenges and opportunities

Makau Mutua

September 2010

Executive Summary

Norway's five-year experience as the lead nation of the Provincial Reconstruction Team This policy paper is a practically-oriented comparative analysis of the work of the International Criminal Court in Kenya, Uganda, Sudan, and the Central African Republic, and the policy implications for its work for Norway, States Parties, civil society, and key states. The paper argues that all actors, including Norway, should more seriously engage these African states – and key stakeholders within them – to facilitate the work of the ICC to stem impunity. Without such support, the paper concludes, the ICC's objectives in Africa will not be realised.

Each of the four countries under review here has its own unique internal political questions that drive its posture towards the ICC. Deference should be paid to these internal differences. But that should not trump the interests of justice and peace, and the larger international consensus on how to address the question of impunity. Elites in states with a large democratic deficit should be pressed and supported to respond to barbaric atrocities. That is why the ICC was established – to depoliticise the struggle against impunity where governments cannot (or lack the political will to) hold accountable those responsible for egregious atrocities.

In light of the review, the paper makes recommendations on how Norway and key stakeholders – States Parties, the United Nations, European Union, United States, and African Union – can more fully support the work of the ICC in Africa. They include encouraging domestic investigations and prosecutions; deepening regional partnerships; further empowering the Court; and cooperating

with the ICC to close the "impunity gap". There are also several recommendations for stakeholders with regard to the countries under consideration.

They include imposing sanctions and restrictions on Sudan's top officials as part of the efforts to bring the President Omar al-Bashir to justice; pursuing inquiries in the Central African Republic into the case of an ex-president arguably responsible for atrocities; working with Ugandan civil society; and issuing arrest-warrants for Kenyan officials implicated in the post-election violence of January 2008. All these initiatives will advance efforts to end impunity for horrendous crimes.

Makau Mutua

Makau Mutua is Dean, SUNY Distinguished Professor, and the Floyd H. & Hilda L. Hurst Faculty Scholar at Buffalo Law School, The State University of New York. He teaches international human rights, international business transactions, and international law. Professor Mutua holds a doctorate in law from Harvard Law School. He is a member of the Council on Foreign Relations and Chairman of the Kenya Human Rights Commission.

Professor Mutua is the author of several books including *Kenya's Quest for Democracy: Taming Leviathan* (2008). He has written dozens of scholarly articles on international law and human rights and numerous reports for the United Nations and leading NGOs. He has conducted numerous human-rights missions in Africa, Latin America, and Europe. He has lectured and spoken at public forums in many parts of the world, including Japan, Brazil, France, and Ethiopia.

Introduction

In 1998, the international community adopted the Rome Statute of the International Criminal Court¹ to establish the first permanent international tribunal to try perpetrators of the most heinous crimes. The ICC was given jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. In June 2010, the Review Conference of the Rome Statute in Uganda adopted a resolution to amend the Rome Statute to include the definition of the crime of aggression (the actual exercise of jurisdiction on the crime of aggression is subject to a decision of States Parties due on 1 January 2017). The ICC was inaugurated in 2003 shortly after the Rome Statute came into force in 2002. Today, the Rome Statute has been ratified by 111 states, among them Norway.

The ICC was given jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.

This policy paper is a practically-oriented comparative analysis of the ICC's involvement in Kenya, Uganda, Sudan, and the Central African Republic (CAR), and the policy implications for that involvement for Norway, States Parties, civil society,

and key states. Three of these countries (Kenya, Uganda, and the Central African Republic) are parties to the treaty, while Sudan is not. The paper concludes that all actors, including Norway, should more seriously engage these states – and key stakeholders within them – to facilitate the work of the ICC to stem impunity.

The countries under review – Kenya, Uganda, the CAR, and Sudan – are more similar than they are dissimilar. They are post-colonial states that have been wracked by civil conflict for years. In all of them, the writ of the central government does not effectively reach the provinces. Uganda and Sudan have raging conflicts in which crimes against humanity, war crimes, and genocide have been committed. Kenya, Uganda, and Sudan are rated “critical” – the most severe rating among the top twenty states in the 2010 Failed States Index.² Uganda is ranked at twenty-one and thus “in danger”, barely missing the infamous top twenty.

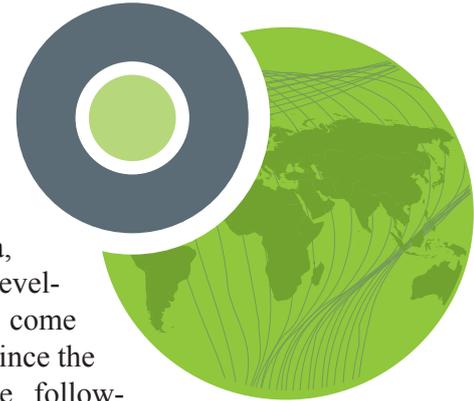
1 Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 - hereinafter “Rome Statute”, <http://untreaty.un.org/cod/icc/statute/romefra.htm>, accessed 23 September 2010.

2 “The 2010 Failed States Index,” *Foreign Policy*, July/August 2010, http://www.foreignpolicy.com/articles/2010/06/21/the_failed_states_index_2010, accessed 23 September 2010.

Even though the Failed States Index uses a controversial methodology, there is little doubt that the four states under review here have high levels of dysfunction, if not outright failure.³ They have “imperial” or dictatorial executives. Their judiciaries are captive to the executive. Judges are corrupt and incompetent or lack capacity while the infrastructure of the legal system is threadbare. In a word, state structures are on life-support.

Only two of the states in this survey – Kenya and (to a lesser extent) Uganda – have any civil society to speak of. Kenya,

which is the most developed of the four, has come under serious strain since the catastrophic violence following the elections of December 2007 pushed the state to the brink of collapse.⁴ It is virtually impossible to hold the state accountable, and address civil conflict, without a vibrant civil society.⁵



The absence of strong civil societies (Kenya excepted) poses serious challenges to the work of the ICC and complicates strategies that Norway and other key players might consider in conflict resolution, peacebuilding, and the social reconstruction. What is required is a holistic understanding of the root causes of the culture of impunity and the seemingly intractable ethnic, social, and political problems. Such analysis would put Norway and other international actors in a better position to decide on the most effective and practical areas of “intervention” and partnership with local actors. The objective is to capacitate local actors and create an environment in which the ICC’s work can help reduce impunity and foster a culture of accountability and the rule of law.

3 Amnesty International, *The State of the World’s Human Rights: Amnesty International Annual Report 2010*, London, 2010, <http://thereport.amnesty.org/>, accessed 23 September 2010; Human Rights Watch, *World Report 2009*, New York, 2010, <http://www.hrw.org/world-report-2009>, accessed 23 September, 2010.

4 Makau Mutua, *Kenya’s Quest for Democracy: Taming Leviathan*, Boulder, Lynne Rienner Publishers, 2008.

5 John Harbeson, Donald Rothchild, Naomi Chazan, eds, *Civil Society and the State in Africa*, Boulder, Lynne Rienner Publishers, 1994.

The work of the ICC in Africa

The ICC is in its infancy. The Court has never concluded a single case since its inception. It is currently hearing its first cases, all from four African countries – Uganda, the CAR, Sudan, and the Democratic Republic of Congo (DRC). Additionally, the ICC has authorised its Prosecutor, Luis Moreno-Ocampo, to open an investigation on Kenya. Even with this modest beginning, the ICC is a historic achievement because it is the first global attempt to tackle impunity on a permanent basis.

● Is the ICC's pursuit of retributive justice an obstacle to peacemaking and reconciliation efforts?

The Court applies the principle of universality to exercise jurisdiction over the most egregious offences.

However, the ICC has faced numerous challenges in the four countries analysed here. The slow wheels of justice at the ICC have been a frustration to victims, and (while there is generally hope and optimism for the Court in most of the target states) there has also been resistance to and obstruction of its work. For example, a number of senior government officials in Kenya have sent mixed signals about their willingness to cooperate with the Court, and in Sudan the Court has faced outright hostility. But the ICC has made some progress in Uganda, the CAR, and Kenya. These states present different challenges for the ICC, including how it relates to their respective internal political processes, and raise questions about the role of external players and partners such as states and other stakeholders.

The role of the ICC is to help states combat impunity and help foster a culture for the respect of the rule of law. The hope is that the executive and judicial arms of the state will obey and apply the law equally, especially against powerful figures. The ICC should perform the role of the “gentle civiliser” of state power in weak states that are unable, or unwilling, to bring perpetrators to account. But the ICC cannot be – and is not – intended to replace domestic legal processes. It is meant to complement them and incubate accountability.

At this early stage in the work of the ICC, it is an open question whether the Court is successfully meeting these challenges. Does it have legitimacy with internal protagonists – senior officials, suspects, victims, and civil society – to accomplish its goals? Is the impact of the work of the ICC effective in building, and keeping, the peace? Is the ICC an inducement to rival factions to come to the table?

In Kenya, the ICC enjoys wide support among the general public, but many senior officials view it with trepidation. Its work could cause further ethnic polarisation. In Uganda, there was hope that the ICC would induce the perpetrators to seek a political settlement, although that has not yet happened. In the CAR, the government has cooperated with the ICC's investigations. In Sudan, the ICC has been rebuffed (especially after it issued a warrant of arrest against President Omar al-Bashir).

The work of the ICC in Africa thus far raises a number of questions. What are the political implications of its work? What impact, if any, has it had on conflict resolution, peacebuilding, the rule of law, and the struggle to end impunity? Is the Court's pursuit of retributive and punitive justice an obstacle to peace making and reconciliation efforts, or should it adopt a more nuanced approach?⁶ Could the ICC's intervention exacerbate already deadly conflicts? Has the ICC suffered politically because of charges by some that it has “selectively” targeted poor, African, or “third world” states?⁷ What, practically, can states such as Norway, do to respond to these questions and challenges? How should Norway retool its foreign policy to respond to the challenges and opportunities raised by the work of the ICC?

To approach an answer to these questions, this paper now briefly examines the ICC's record in each of the respective countries under review.

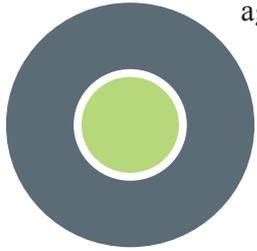


6 Issaka K. Souare, “The International Criminal Court and African Countries: the Case of Uganda”, *Review of African Political Economy*, vol. 36, no. 121, 2009, pp. 369-388, <http://www.roape.org/121/05.html>, accessed 23 September 2010.

7 Miriam Manak, “Proving Ground for International Criminal Court?” Inter Press News Service, <http://ipsnews.net/africa/nota.asp?idnews=43620>, accessed 23 September 2010; Stephanie Hanson, “Africa and the International Criminal Court,” Council on Foreign Relations, http://www.cfr.org/publication/12048/africa_and_the_international_criminal_court.html, accessed 23 September 2010.

Uganda

The ICC is involved in Uganda because of the atrocities committed by the Lord's Resistance Army (LRA) under the direction of Joseph Kony, its main leader. The LRA continues to commit the most abominable atrocities against civilians in northern Uganda and eastern DRC.⁸ Unable to contain or stop the LRA, Uganda self-referred the situation to the ICC which returned indictments and issued arrest-warrants for war crimes and crimes against humanity against five of the top LRA leaders – Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya.



Proceedings against Lukwiya were terminated after his death, but the case against the other four, who remain at large, is being heard by the Court. Kony and the LRA have refused to negotiate a peace deal with the government of President Yoweri Museveni unless the indictments are quashed and the case dropped. The ICC and human rights groups, such as Amnesty International, have opposed any offers of amnesty to Kony and the LRA even if they were to sign a peace accord with the government.

The tension between justice and peace has been brought into sharp relief by the LRA. Opinion is divided on what should be done. According to Richard Dicker of Human Rights Watch, Kony agreed to “take part in peace talks” because he was “prodded in part by arrest warrants issued by the ICC for him and his senior commanders.”⁹ However, it appears that Kony feigned good faith but never intended to sign the peace deal. He used the talks as bait to rearm. Still, the larger question remains unanswered – would it have served the dual purposes of justice and peace if Kony had signed the peace accord and silenced the guns?

Articles 16 and 53 of the Rome Statute seem to open the door to amnesty where either a “prosecution would not serve the interest of justice” or where the UN Security Council can request a deferral of an investigation or prosecution for a renewable twelve months

pursuant to a resolution adopted under Chapter VII of the UN Charter. This suggests that the Court can suspend action on a case on the grounds of international peace and security. There is a risk that both clauses can be used as a political subterfuge against the judicial process. That is why in 2007 the Prosecutor of the ICC adopted a strict and narrow interpretation of Article 53 of the Rome Statute.

There is support for either possible amnesty option in Uganda, and it is unclear whether the government is fully committed to any particular way forward. Equally unclear is whether the proceedings against Kony and his aides – in absentia, or even in person – would have any appreciable effect on impunity and the atrocities. A prosecution in absentia is likely to be no more than a public-relations exercise. A trial in person would arguably be more effective, but there is no guarantee that Kony would not simply be replaced by others who would continue the senseless conflict.

Sudan

Sudan, Africa's largest country by land mass, has been a troubled state since its creation by the British. A number of factors – a deep divide between the Arabised north and the black African south, religious and racial conflicts, competition over scarce resources, and dictatorship by a violent but weak state – has combined to create one of the most horrible humanitarian crises in the world today.

The long-running conflict between the north and the south has abated for now, but the government of President Omar al-Bashir has been credibly accused of war crimes, crimes against humanity, and genocide in Darfur, the western region that is home to black African Muslims.¹⁰ The UN estimates that 300,000 Darfurians have been killed and about 3 million displaced in the last five years alone.¹¹ Government security forces working with the Janjaweed, an Arab militia, are responsible for the atrocities.¹²

10 Gérard Prunier, *Darfur: A 21st Century Genocide*, Ithaca, Cornell University Press, 2008.

11 Marlise Simons, “Sudan's Leader May be accused of Genocide”, *New York Times*, 3 February 2010, <http://www.nytimes.com/2010/02/04/world/africa/04bashir.html>, accessed 23 September 2010.

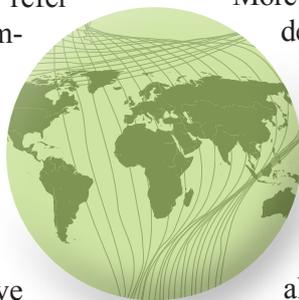
12 Ann McFerran, “The Curse of the Janjaweed”, *Sunday Times* [London], 23 September 2007, <http://www.timesonline.co.uk/tol/news/world/africa/article2489206.ece>, accessed 23 September 2010.

8 Human Rights Watch, *Trail of Death*, New York, 28 March 2010, <http://www.hrw.org/node/89324>, accessed 23 September 2010.

9 Richard Dicker, “When Peace Talks undermine Justice”, <http://www.hrw.org/en/news/2008/07/03/when-peace-talks-undermine-justice>, accessed 23 September 2010.

The Darfur conflict pits the fundamentalist Islamic regime against fellow Muslims. The conflict seems to be highly racialised – Darfurians are black – and driven by a struggle over resources.¹³

In 2005, the UN Security Council voted to refer the issue of Darfur to the ICC, which commenced pre-trial investigations. In 2009, the ICC issued a warrant of arrest for al-Bashir for war crimes and crimes against humanity.¹⁴ On 12 July 2010, the ICC issued a second warrant of arrest for al-Bashir on three counts of genocide in Darfur. In addition to al-Bashir, five other Sudanese officials have been charged with war crimes and crimes against humanity.



One of the accused, Bahr Abu Garda, has appeared voluntarily before the ICC. The others, including al-Bashir, are still at large. Their cases are currently being heard by the ICC. Since the warrants of arrest, al-Bashir's movements have been restricted. He has been denied invitations to several international meetings and several states, including South Africa, have vowed to arrest and turn him over to the ICC should he set foot on their soil.¹⁵ President al-Bashir responded to these indictments by expelling humanitarian agencies and escalating atrocities in Darfur.¹⁶

The restrictions on the president's movements are not absolute. In a shocking development, al-Bashir was on 27 August 2010 in Nairobi at the invitation of the Kenya government to attend the promulgation of the new constitution. Kenya was sharply criticised at home and by the European Union for inviting al-Bashir and

failing to arrest him pursuant to its obligations under the Rome Statute. The ICC reported Kenya to the UN Security Council, but the African Union and the Commonwealth came to Kenya's defence.

More generally, and regrettably, the Sudanese president has also received strong vocal public support from the Arab League.¹⁷ In 2009, the African Union even passed a resolution – despite Botswana's strong objections – to reject the ICC's arrest-warrants against al-Bashir¹⁸. Nigeria, the continent's most populous state, openly supported the AU resolution.¹⁹ In April 2010, al-Bashir was easily re-elected in a vote boycotted by the opposition and marred by widespread fraud and intimidation.²⁰

Central African Republic

The CAR is one of the poorest countries in the world with a history of instability and dictatorship. In 2003, President Ange-Félix Patasse was overthrown by French-backed General Francois Bozizé who won a democratic election in 2005. In 2002, Patasse invited Jean-Pierre Bemba, the Congolese warlord and head of the Movement for the Liberation of Congo, to help put down a coup attempt. Bemba, a former DRC vice-president, was indicted and arrested by Belgian police while there and turned over to the ICC on charges of war crimes and crimes against humanity in the CAR. Bozize had self-referred Bemba's case to the ICC; Bemba is now on trial at The Hague.²¹

Although the CAR state and judiciary have been cooperative with the ICC, the case has political overtones. Some analysts suspect that the CAR and the DRC are

13 Makau Mutua, "Racism at the Root of Darfur's Crisis",

Christian Science Monitor, 14 July 2004, <http://www.csmonitor.com/2004/0714/p09s02-coop.html>, accessed 23 September 2010.

14 Marlise Simons and Neil MacFarquhar, "Court Issues Arrest Warrant for Sudan's Leader", *New York Times*, 4 March 2009, <http://www.nytimes.com/2009/03/05/world/africa/05court.html>, accessed 23 September 2010.

15 "SA to Arrest Bashir if he Attends World Cup", *Daily Nation*, 30 May 2010, <http://www.nation.co.ke/News/africa/SA%20to%20arrest%20Bashir%20if%20he%20attends%20World%20Cup/-/1066/929010/-/4vta28z/-/index.html>, accessed 23 September 2010.

16 "Sudan: 2 Foreign Workers Expelled" *New York Times*, 15 July 2010, <http://www.nytimes.com/2010/07/16/world/africa/16briefs-Sudan.html>, accessed 23 September 2010; Nicholas Kristof, "Has Obama Forgotten Darfur?", *New York Times*, 11 June 2010.

17 BBC, "Arab Leaders Back 'Wanted' Bashir", http://news.bbc.co.uk/2/hi/middle_east/7971624.stm, accessed on 23 September 2010.

18 BBC, "Botswana Rejects AU ICC Resolution", http://www.bbc.co.uk/worldservice/africa/2009/07/090705_botswana_au_icc.shtml, accessed on 23 September 2010.

19 AllAfrica.Com, "Sudan: Nigeria Supports AU's Position on Al-Bashir's Arrest Warrant", <http://allafrica.com/stories/200903130408.html>, accessed on 23 September 2010.

20 Marlise Simons, "International Court Genocide to Charges Against Sudan Leader", *New York Times*, 12 July 2010, <http://www.nytimes.com/2010/07/13/world/africa/13hague.html>, 23 September 2010.

21 Marlise Simons, "Congolese Politician Goes before the ICC" *New York Times*, 5 July 2008, http://www.nytimes.com/2008/07/05/world/africa/05hague.html?_r=1&ref=thomas_lubanga, 23 September 2010.

in cahoots to remove Bemba from the scene. It is curious that the CAR has not referred the case of Patasse himself to the ICC. Bemba's supporters in the DRC and Belgium, where he has a large following, have organised demonstrations to denounce the ICC.

Kenya

Kenya is the most disappointing of the four countries under review because it was for long touted as a beacon of hope in a sea of chaos. But the enduring problems of its own history – an overbearing state, deep-seated ethnic animosities, corruption, and the failure of democratic reform – exploded in genocidal violence in January 2008 after contested polls towards the end of the previous month.²² Over 1,000 people were killed and many more injured while thousands were displaced. Security forces and ethnic militias supported by senior figures were responsible for most of the carnage. The violence ended after the international community led by former UN secretary-general Kofi Annan brokered a power-sharing arrangement in which the two protagonists, Mwai Kibaki and Raila Odinga, became (respectively) president and prime minister.

Attempts to establish a local tribunal to try suspects of the violence were blocked by an elite that thrives on impunity. Since Kenya would not refer the situation to the ICC, the Prosecutor proceeded in *proprio motu* (on his own volition) and the ICC authorised him to open an investigation into Kenya. He expects to present several cases for crimes against humanity before the Court by the end of 2010. There is every indication that high-ranking officials – some of them senior cabinet ministers – will be charged at The Hague. Ordinary Kenyans have generally applauded the ICC's actions, although powerful ethnic barons have attacked it bitterly.²³

22 Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan*, Boulder, Lynne Rienner Publishers, 2008; Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower*, London/New York, HarperCollins, 2010.

23 Former MP Pleads Innocence Against War Crimes", *Daily Nation*, 4 December 2009, <http://www.nation.co.ke/News/politics/-/1064/817672/-/wu6ptcz/-/index.html>, accessed 23 September 2010; "Mau Evictions and Trial for Chaos Suspects Tests for Raila", *Daily Nation*, 17 July 2009, <http://www.nation.co.ke/News/-/1056/625492/-/ukyndw/-/index.html>, accessed 23 September 2010.

In this respect, Kenya's aforementioned invitation to Omar al-Bashir to attend the promulgation of its new constitution on 27 August 2010 could signal a reluctance to cooperate with the ICC on its investigations in the country.

Kenya's judiciary is notoriously corrupt and has never successfully prosecuted a single top official for human-rights violations or economic crimes. Most Kenyans view the ICC as a chance to deal a blow to the culture of impunity. But there is some possibility that warrants of arrest could polarise Kenya – and lead to civil unrest – ahead of the 2012 elections.

Kenya is the most disappointing of the countries under review because it was long touted as a beacon of hope.

Towards a consensus

Each of the four countries under review has its own unique internal political questions that drive its stance towards the ICC. While deference should be paid to these internal differences, they alone cannot trump the interests of justice or peace, and the larger international consensus on how to address the question of impunity. Country-specific elites – especially in states which have a large democratic deficit – should not be left alone by the international community to craft responses to barbaric atrocities. Too often, the pressure to appease warlords and "protect" fellow elites has left victims without recourse. Indeed, that is why the ICC was established – to depoliticise the struggle against impunity in states where governments cannot – or lack the political will – to hold accountable those responsible for egregious atrocities.

To address these complexities, this paper concludes with a set of general thematic and country-specific recommendations. The work of the ICC should not be the labour of any one state. For the Court to be successful, and to meet its objectives, it must of necessity receive the support and cooperation of all States Parties and other key stakeholders, such as the UN, EU, and the AU. Norway should work in concert with all these actors to maximise the potential of its impact on the work of the ICC in Africa.

Recommendations: thematic

Closing the impunity gap: beyond justice v peace

States Parties to the Rome Statute are obligated, as a matter of law, to fully cooperate with the investigations and prosecutions of the ICC. Specifically, States Parties must arrest the individuals wanted by the Court, locate and provide evidence needed for use by the Court, relocate and protect witnesses, and enforce the Court's decisions, including sentences.

Justice and peace must be seen to complement each other, and not be seen in opposition.

These obligatory requirements are applicable even if the target is a sitting head of state such as Omar al-Bashir of Sudan. States Parties, including Norway, members of

the European Union, and African states are bound by law to carry out these obligations, no matter the diplomatic headaches and protocols involved.

States Parties must recognise that the ICC is not the primary locus for combating impunity. Domestic national tribunals and processes constitute the primary and lasting solutions to impunity. States must work with the ICC and with each other through bilateral and multilateral forums and processes to address egregious violations. Otherwise, the “impunity gap” will never be closed. Thus states have the primary duty to investigate and prosecute all offenders, including those who bear the greatest responsibility.

Where a state is unable, or unwilling, to bear this burden, the principle of complementarity – where the ICC addresses those bearing the greatest responsibility while domestic tribunals deal with the bulk of the offenders – is invoked. But States Parties must realise that the ICC will fail if national proceedings are abandoned in favour of ICC prosecutions. Norway and other stakeholders must work to encourage domestic investigations and prosecutions in the first instance.

States Parties must abandon the charade of pitting justice against peace. Justice and peace must be seen to complement each other, not be seen in opposition. That is why the AU's argument on Sudan – that the al-Bashir warrants hinder peace efforts – is spurious and should be opposed by Norway and all ICC stakeholders.

Using partnerships: the UN and Europe

The United Nations, with its significance in Africa, should become a more active partner in the work of the ICC. In 2004, the United Nations and the ICC signed a cooperation agreement. With this agreement as a hook, the UN can use its considerable leverage in Africa to mobilise states to support the objectives of the ICC. This could be an entry point for canvassing the cooperation of UN member-states outside Africa to assist the ICC in its work on the continent. The political pressure that UN support would bring cannot be underestimated. Because of its credibility and historical involvement with the UN and in Africa, Norway could be a catalyst for encouraging more direct UN involvement.

The European Union has not done enough to support the work of the ICC in Africa. While the cooperation-and-assistance agreement of 2006 between the EU and the UN was a step in the right direction, the letter of its law has not been backed up by concrete action. The United Kingdom and Austria have entered into agreements with the ICC on the enforcement of sentences. Even though the EU has struck the right political tone, both it and individual EU states have not been practically supportive of the ICC's work in Africa. The EU has significant economic, diplomatic, political, security, and other interests in Africa. The EU's “partnerships” with African countries are deep and abiding. Yet they have not been exploited for the ICC's benefit. The EU, and its individual members, needs to activate these levers.

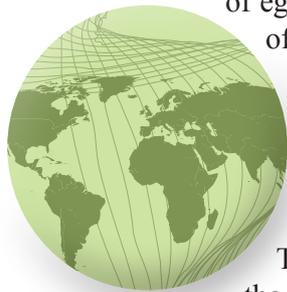
Achieving clarity: the AU and the US

The AU has vowed to shed the negative legacy of its predecessor, the Organisation of African Unity (OAU), which was loath to “interfere” in the internal affairs of sister states. On paper, the AU has committed itself to a democratic, rule-of-law culture. Even so, the AU has been an apologist for Omar al-Bashir of Sudan. In July 2010, the AU at its annual summit in Kampala, Uganda, attacked Luis Moreno-Ocampo for securing a warrant of arrest against al-Bashir for genocide. The AU then made its reprehensible request to the UN to suspend the arrest-warrants against al-Bashir,²⁴ reflecting the AU's ostensible belief that the warrants will interfere with peace efforts in Sudan.

24 Fred Ojambo, “African Union Asks United Nations to Suspend Warrants for al-Bashir”, Bloomberg News, 27 July 2010 at <http://www.bloomberg.com/news/2010-07-27/african-union-asks-united-nations-to-suspend-arrest-warrants-for-al-bashir.html>, accessed on 23 September 2010.

The position of the AU reflects too the complex relationships between African and Arab states, as well as the culture of impunity in most African states. It is important to note, however, that the AU is divided over how to address al-Bashir's indictment. Several countries (notably South Africa, Uganda, and Botswana) advocate cooperation with the ICC, while several others (led by Libya) would like to see the body shun the ICC. The actual situation is, however, more complex because a number of African states have been cooperating with the ICC. There is even a memorandum of understanding (MOU), agreed in 2008, between the ICC and the Asian-African Consultative Organisation.

It is possible to interpret the AU's position as "political" and without any "legal" effect on the obligations of African States Parties to the Rome Statute. In an encouraging sign, the AU's African Commission on Human and Peoples' Rights ruled in a landmark decision in July 2010 that Sudan has committed a wide range of egregious violations against the people of Darfur.²⁵ The UN can do more to remind the AU and African states of their obligations to the Rome Statute and to victims of unspeakable abuses.



The Barack Obama administration in the United States should rethink its policy towards the ICC and speak unequivocally on Sudan. After the ICC issued its second arrest-warrant for al-Bashir in July 2010, Obama said he was "fully supportive" of the Court. But General J. Scott Gration, his special envoy to Sudan, said that the Court's decision "will make my mission more difficult and challenging, especially if we realize that resolving the crisis in Darfur and [the] south, issues of oil, and combating terrorism 100%, we need Bashir."²⁶

Playing by the rules

UN member-states and all States Parties, including Norway, must practice an unwavering commitment – rhetorically and practically – to the principle of universal jurisdiction for war crimes, crimes against human-

ity, genocide, and the crime of aggression. There must be no equivocation on the Rome Statute. Any other position is bound to weaken the ICC at a critical juncture in its development and retard the fight against impunity.

● The use of the UN
● Security Council
● mechanism to
● suspend investigations
● must be vigorously
● opposed.

States Parties, including Norway, need to follow the lead of the Prosecutor of the ICC. Otherwise, target states will play the ICC against them – a "divide-and-conquer" strategy by target states could paralyse the ICC and render it ineffective.

The use of the UN Security Council mechanism to suspend investigations must be opposed in all cases unless there are extraordinarily extenuating circumstances. Security Council member-states must resist the pressure to politicise the work of the ICC. Norway and EU states should use diplomacy to dissuade Security Council members from having a negative impact on the work of the ICC.

Empowering the Court: suspects and witnesses

The EU, Norway, and other democratic states should offer their diplomatic, security, and other assets to capacitate investigations by the ICC and to facilitate the capture of suspects who have been indicted

Norway, the EU, and other donor states should work to build the capacity of human-rights NGOs and other local actors that have the proclivity and interest in helping the ICC to fulfil its mandate.

One of the key challenges facing the ICC is the protection of witnesses without whom it is virtually impossible to successfully prosecute perpetrators. Norway should work with local actors and other external players to create safe havens and mechanisms for securing witnesses who are at risk of death or disappearance.

Creating leverage: action, aid, support

The EU, the US, Canada (which has strong relationships with states and civil societies in Africa) and Norway should shun – not directly engage – indicted officials even when they command senior positions. They should use their power to arrest suspects. Where arrests are not possible, the EU, US, and Norway must impose visa-bans, freeze assets, and prevent the free movement of suspects.

25 "African Commission issues Scathing Decision against Government for atrocities in Darfur", allAfrica.com, <http://allafrica.com/stories/201007291003.html>, accessed on 23 September 2010.

26 "US Envoy to Sudan says Bashir indictment will make his job Harder," Washington Post, 21 July 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072105664.html>, accessed 23 September 2010.

Although aid conditionality is a contested issue, the EU and Norway should consider how to use their leverage as donors to encourage target states to cooperate more fully with the ICC.

The ICC has entered into a cooperation agreement with the International Committee of the Red Cross regarding detainee visits. Other international non-governmental organisations and multilateral entities should enter into agreements to support the work of the ICC.

Recommendations: country-specific

Uganda

Uganda is playing a pivotal role for the ICC in Africa. Its hosting of the recent Review Conference of the Rome Statute showed commitment to the values of the treaty. As Wangari Maathai, the Nobel peace laureate of 2004 has written, the ICC is Africa's "only shield from crimes against humanity."²⁷ The EU and Norway should work more directly with Uganda to strengthen Uganda's positive outlook and encourage it to isolate Omar al-Bashir.

The EU, the US, and Norway need to work more closely with Ugandan civil society organisations that have an interest in the ICC process.

Sudan

No democratic state, including Norway, should directly engage Sudan, even though the referendum to decide the fate of South Sudan scheduled for January 2011 may turn on how al-Bashir responds to his warrants of arrest. Thus far al-Bashir has lashed out at aid agencies and peacekeepers in order to bargain his way out of the pariah status in which the arrest-warrant has cast him. He has been largely isolated, the visit to Kenya notwithstanding, but more pressure needs to be applied. Norway and other stakeholders should call his bluff. Engaging him simply emboldens him to continue the atrocities in Darfur. As the only sitting head of state ever indicted by the ICC, he must

face justice to send a clear signal that the international community will not stand for genocide, war crimes, and crimes against humanity.

Norway, the EU, the UN, and the US should freeze al-Bashir's assets and those of his top aides, impose trade sanctions on Sudan, and issue visas for all senior Sudanese officials.

General Graton gave the wrong message to Sudan and to the international community when he publicly declared that the United States needs al-Bashir in order to pursue strategic objectives such as its war on terror. President Obama should repudiate the general and immediately replace him with someone who believes that genocide cannot be traded for geopolitical interests.

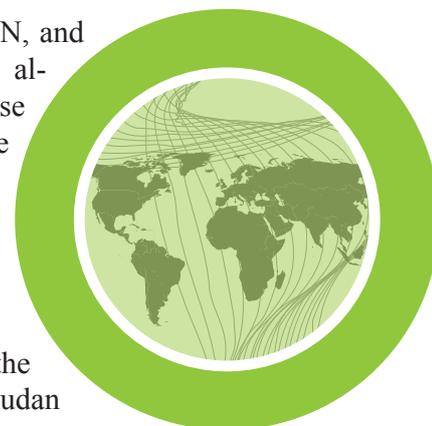
The EU, the US, and Norway should press the People's Republic of China to end its support for the al-Bashir regime.

Central African Republic

On the Central African Republic, Norway and all States Parties should follow the lead of the Prosecutor, but seek information on why former President Ange-Félix Patasse has not been referred to the ICC for an investigation. He and Jean-Pierre Bemba appear to be equally culpable for the atrocities that were committed in response to the coup. Otherwise, the prosecution of Bemba seems "political".

Kenya

The investigation on Kenya has reached a critical stage. There is little doubt that the ICC will issue arrest-warrants for a number of senior officials. The Court's action will dramatically alter the political landscape ahead of the elections due in 2012 because several of the targets are plausible presidential candidates. Their removal from the scene will be a major victory for the struggle against impunity. The EU, the US, Canada, and Norway should work with President Mwai Kibaki and Prime Minister Raila Odinga to encourage them to arrest and hand over their colleagues once they are indicted.



27 Wangari Maathai, "ICC Our Only Shield from Crimes Against Humanity," *Daily Nation*, 17 June 2010, <http://www.nation.co.ke/oped/Opinion/ICC%20our%20only%20shield%20from%20crimes%20against%20humanity/-/440808/941116/-/es55s6z/-/>, accessed 23 September 2010.

Donor states and Norway should work with the vibrant Kenyan civil society to help protect witnesses and capacitate them in evidence-gathering. They should sponsor public forums where the ICC can be publicised to Kenyans to create “buy-in” by the public.

- Donor states and Norway should work with the vibrant Kenyan civil society to help protect witnesses.

Once indictments are issued by the ICC, there could be an outbreak of violence in the Rift Valley, the epicentre of the 2008 atrocities. There are already indicators that militias are rearming. Norway, Canada, the US, and the EU should support civil society in monitoring and peacebuilding to prepare for and alleviate or stop the possibility of violence.



Further reading

1. **Issaka K. Souare**, “The International Criminal Court and African Countries: the Case of Uganda,” *Review of African Political Economy*, vol. 36, no. 121, 2009, pp. 369-388
2. **Gerald Prunier**, *Darfur: A 21st Century Genocide*, Ithaca, Cornell University Press, 2008
3. **Mark Ellis, Richard Goldstone**, eds, *International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, Idebate Press, 2010
4. **Tim Allen**, *Trial Justice: the International Criminal Court and the Lord’s Resistance Army*, Zed Books, 2006
5. **William Schabas**, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford Commentaries on International law, 2010

Author: Makau Mutua

Editors: David Hayes and Fionnuala Ní Éigearthaigh

Design: Juan Pelegrín

Copyright: Noref

The Norwegian Peacebuilding Centre

Norsk ressurscenter for fredsbygging (Noref)

P.O. Box 2947 Tøyen, N-0608 Oslo, Norway

Website: www.peacebuilding.no

E-mail: info@peacebuilding.no