



African efforts to close the impunity gap

Lessons for complementarity from national and regional actions

INTRODUCTION

The aim of this paper is to highlight some of the successes and challenges of domestic and regional international criminal justice processes in Africa. That discussion might be framed as one about 'complementarity' in a broad sense – the idea that states act as a complement to the International Criminal Court (ICC) to make the world a smaller place for genocidaires and war criminals.

As will be seen, the idea of complementarity advanced in this paper and played out in the African examples covered below goes beyond the standard, technical understanding of complementarity as contained in the Rome Statute of the ICC. The idea of complementarity discussed here is less focused on how states work as a direct complement to the ICC (although that remains important), and is rather concerned with what they are doing to further the international criminal justice project more generally, which could (and has of late) include(d) domestic and regional cooperation efforts by states and civil society organisations.

Under the Rome Statute the traditional notion of complementarity is invoked as a vertical shield between states and the ICC, where the principle is meant to protect or maintain domestic jurisdiction by giving national justice systems primacy, and allowing the ICC subsidiary jurisdiction only if the state concerned is unwilling or unable to investigate the crimes itself. The notion of complementarity described through the African examples in this paper is arguably a richer one, suggestive of a horizontal complementary relationship between the ICC and national justice systems in the service of a common goal – reducing impunity gaps.

Of special significance will be those examples of African efforts to act as a complement to the ICC, and at times as

its substitute, in respect of crimes committed by nationals of states that are not party to the Rome Statute, or in the territory of such non-states parties. In those circumstances, either because the jurisdictional requisites for the ICC to become involved are not present (i.e. a legal gap), or because the UN Security Council has not referred the situation to the ICC (i.e. a political gap), there is an inability or unwillingness for the ICC to investigate the crimes concerned. It is in those circumstances that a credible and vital role arises for African states parties to the Rome Statute to take the lead in investigating such crimes, and thereby help close the consequent impunity gap.

For African stakeholders of international criminal justice (including states, regional bodies, civil society organisations, and victims of crimes), there is an important role to be played by domestic justice systems per se. That is most clearly because a large number of African states (33 in total) are Rome Statute members and the Statute's complementarity principle gives primacy to domestic courts. In this regard the ICC review conference in Kampala in May 2010 correctly raised the profile of domestic justice – a profiling that was widely supported by states parties and non-states parties.

But perhaps of more significance than the high-level commitments, affirmations, and resolutions, is that African states already have important experience with domestic efforts; experience which aligns with the African Union's (AU) Constitutive Act and its push for African solutions to African problems. Examples are growing of African states domestically choosing to utilise, or being challenged to utilise, their ICC implementation legislation to act against those responsible for international crimes. Even among those African states parties that have not passed ICC

implementing legislation (which are by far the majority), there is increasingly evidence of the practice of international criminal justice at the national level.

These positive developments are the focus of this paper. There have however also been less encouraging developments in the universe of complementarity on the African continent. The paper also discusses the AU's efforts to graft an international criminal chamber onto the body of the African Court of Justice and Human Rights. While such an initiative has the potential to create an overlapping and reinforcing regional mechanism to hold international criminals to account, it is possible that at least some within the AU are motivated by less noble ideals, thereby raising the spectre of what might be described as negative, or cynical complementarity. In this sense, negative complementarity can be understood as an attempt to undermine the existing work of the ICC through a commitment to an alternative mechanism for dispensing international criminal justice but which stands no realistic chance of providing such justice, at least not without significant changes in the funding available to the AU.

Apart from all this, another reason why the idea of domestic justice is relevant for Africa is the scale of the atrocities committed on the continent. Because of the extent of the problem, while the ICC might be a hope for symbolic justice for the victims of grave crimes through a limited number of highly publicised trials, for justice to be brought home in any meaningful way, domestic action is essential.

As the paper demonstrates, such domestic efforts are fraught with their own challenges. Not surprisingly, the politicised nature of international criminal justice resonates *also*, perhaps *more so*, at the domestic level than the international level. This resonance is most acutely witnessed in the examples of the challenges faced by African states in dealing with Sudanese President Omar al-Bashir, or in response to requests for arrests of alleged Israeli war criminals, or in pursuing domestically those accused of committing international crimes in neighbouring territories. These and other instances of the intersection between international and local politics are considered in this paper – and lessons are drawn.

Lastly, the paper makes a case for the vital role for civil society within this complex and rapidly developing field of human rights advocacy. That role is accentuated since current experience suggests that all too often states struggle to find the political appetite for tackling these difficult and contentious cases (especially when they involve universal jurisdiction). There then lies an important role for civil society to remind states of their legal obligations; to push for action in respect of those obligations; and where necessary, to challenge inaction by the legal means available. That is besides the importance of civil society

acting as an intermediary on behalf of the victims of grave crimes, and collaborating with governments to help build capacity, whether in the form of training, legal opinions, or expert legal assistance in preparing and prosecuting cases.

What can be said in sum is that a rich African understanding of complementarity – involving African states, regional organisations and civil society groups working in creative and contextual partnership to support the goals of the ICC – is a key ingredient for the success of the international criminal justice project on the continent. Furthermore, the lessons to be drawn from complementarity in action in Africa likely hold value for international criminal justice universally. The African examples are therefore worthy of closer study, hence the publication of this paper.

For a fuller understanding of the complexities, successes, and challenges of complementarity in Africa, it is necessary first to recall the present political context of the ICC and its relations with the AU.

POLITICS OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

International criminal law has sometimes been criticised for 'providing victors in a conflict with an opportunity to demonise their opponents, sanitise their crimes and perpetuate injustice'.¹ Similarly, since the ICC was established there have been concerns that the court has only concentrated on the 'usual suspects' with some arguing that it has illustrated a bias towards prosecuting cases in Africa while neglecting similar violations of the Rome Statute on other continents.² These concerns are captured in statements to the effect that the ICC is a 'hegemonic tool of western powers which is targeting or discriminating against Africans' as all of the situations to date have come from one continent.³ At the same time, there are concerns that this 'rhetoric of condemnation' (that the ICC is 'anti-African, and merely an agent of neocolonialism or neo-imperialism') may damage the institution to such an extent that it is simply abandoned.⁴

These concerns may prove to be overblown. Recall that none of the 33 African states parties have withdrawn from the treaty; that domestic legislation has been adopted and is being utilised on the continent (as discussed below); that half of the matters before the ICC from Africa were self-referrals, most recently from Mali;⁵ and that African states, including non-states parties, receive more than 50 per cent of the ICC's requests for cooperation, and over 70 per cent of these requests are met with a positive response.⁶

Nevertheless, the fact remains that there is a perception that the ICC is evidence of what Africans had suspected, even feared, all along – that the ICC would be used by the powerful in their own interests against the developing world. Notably, Archbishop Emeritus Desmond Tutu in

August 2012 declined to share a public platform with Tony Blair out of concern that some leaders evade justice for atrocities like the 2003 invasion of Iraq, while their African peers are 'made to answer for their actions in The Hague'.⁷ As a vocal supporter of the ICC, Tutu's comments are important because they highlight the depth of concerns in Africa about the perceived double standards that characterise international criminal justice.

Matters came to a head with the AU's response to the ICC's investigation of al-Bashir. While the ICC warrant of arrest for al-Bashir was welcomed by human rights organisations,⁸ the AU called on the UN Security Council to defer the ICC's investigation into al-Bashir by invoking article 16 of the Rome Statute, which allows for a suspension of prosecution or investigation for a period of up to 12 months.⁹ Notably, on 3 July 2009, at an AU meeting in Sirte, Libya the AU took a resolution calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir.¹⁰

This AU decision placed African states parties to the Rome Statute in the 'unenviable position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other.'¹¹ To date, even though al-Bashir is the subject of an arrest warrant by the ICC, there have been reports of several states parties failing to enforce the warrant after inviting al-Bashir to visit their territory – including Chad, Djibouti, Malawi and Kenya.

African concerns about an 'imperialist ICC', and the impact of competing legal obligations arising from the AU's resolution of non-cooperation with regard to al-Bashir, are perhaps best illustrated by decisions taken by the Kenyan government. Kenya, an ICC state party since 2005,¹² has come to the fore as the battleground for the ongoing 'struggle for the soul of international law'.¹³

The struggle is epitomised in three developments. The first, as indicated above, is the ongoing controversy over the ICC arrest warrant for al-Bashir and the AU's decision that its member states shall not cooperate in the execution thereof. For Kenya in particular, it is a decision that sits both legally and politically uncomfortably with that country's obligations under the Rome Statute and its domestic ICC implementing legislation. The Kenyan government's decision to invite al-Bashir to the launch of the country's new Constitution in August 2010 was the low watermark of this relationship. Many Western capitals were vocal in their condemnation of Kenya's actions, which the country attempted to justify on numerous grounds including regional stability and national interest. Further, Kenya pointed to its obligations as a member of the AU to comply with a decision by that body not to cooperate with the ICC in respect of al-Bashir. Nevertheless, the Kenyan government's action in hosting al-Bashir resulted in the first ever

decision of the ICC on non-cooperation in its history, against Kenya. This is a remarkable step back for a country that remains one of only eight of the 33 African ICC states parties to have adopted domestic legislation to implement (and expand) its obligations under the Rome Statute.¹⁴

The second, and potentially more ominous development, is the backlash from certain elements of Kenya's leadership against the ICC's investigation into the 2007-8 post-election violence in that country that left over 1 000 people dead and caused around 400 000 to flee their homes.¹⁵ The ignominy of being under investigation, and the profile of the suspects named by the ICC prosecutor, has drawn fire from many (including senior government members) for the investigation, resulting in the motion by Kenyan parliamentarians on 21 December 2010 to withdraw Kenya from the Rome Statute.¹⁶ (The motion did not ultimately result in the country withdrawing its ICC membership.)

At the practical level, many African states continue to cooperate with the ICC and several have publicly confirmed their support for the court

Third, political acumen has turned this domestic discontent into a regional African position in opposition to the ICC's investigation and fuelled a more general anti-ICC sentiment within Africa, further isolating those voices of support for the court on the continent, and in all likelihood adding urgency to the AU's project of expanding the jurisdiction of the African Court of Justice and Human Rights to cover the prosecution of international crimes – which in some quarters has been interpreted as a snub to the ICC.

Although AU decisions on the ICC played a central role in Kenya's actions vis-à-vis the court, this should not create the impression that all African states share a common (negative) position towards the ICC. As noted above, at the practical (rather than political) level, many African states continue to cooperate with the ICC on various matters and requests for assistance, and several have publicly confirmed their support for the court. Nevertheless, it is of concern that the AU remains steadfast in (and has repeatedly reiterated) its calls for the UN Security Council to defer the ICC's work on the Darfur situation for a 12-month period, as well as its decision with regard to

non-cooperation on the al-Bashir arrest warrant. This is especially so considering that on 9 December 2010 the ICC prosecutor reported to the UN Security Council:

[T]he Government of the Sudan is not cooperating with the Court and is conducting no national proceedings against those responsible for the crimes committed. Since 2005, Sudanese authorities have consistently promised to do justice, creating mechanisms such as Special Courts and Prosecutors, while consistently and deliberately protecting those who commit the crimes. President Al Bashir, in accordance with the Chamber's findings, issued the criminal orders to attack civilians and destroy their communities. President Al Bashir does not want to investigate those who are following his orders.¹⁷

Despite the prosecutor informing the UN Security Council on more than one occasion of this non-cooperation, the serendipitous confluence of political factors that allowed for the referral of the situation in 2005, against the political grain, is not matched today by a willingness or ability on the part of the Council to take firm action to ensure that Sudan cooperates with the ICC in respect of the arrest of al-Bashir.¹⁸

At least for the foreseeable future then it seems that the presence of al-Bashir before the ICC can only be secured should he be surrendered by a state that he visits. In other words, domestic efforts will be required to ensure that international criminal justice is achieved. A discussion of such efforts leads to a consideration of the complementarity principle that is so central to the international criminal justice project.

BRINGING INTERNATIONAL JUSTICE HOME: UNDERSTANDING COMPLEMENTARITY

The standard notion

Complementarity is certainly posited as a driving feature of the ICC regime. 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 ICC's jurisdiction will be complementary to that of national jurisdictions, and article 17 of the Statute embodies the complementarity principle. At the heart of this 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 which join the Rome Statute system is wide-ranging.¹⁹ The Statute notes that effective prosecution is that which 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 that entails taking a number of important legal and practical measures.

The ICC does not exercise universal jurisdiction. Its jurisdiction is only triggered when the crime occurred on the territory of a state that has accepted the court's jurisdiction (territorial jurisdiction) or when the accused is a national of such a state (active nationality principle), or the matter is referred to the ICC by the UN Security Council exercising its Chapter VII powers. Through article 12, a state accepts jurisdiction by becoming a state party, or can do so by declaration if it is a non-state party. The consequence is that many states which become party to the Rome Statute will normally require special domestic legislation to enable them to prosecute, in their own courts, a person accused of international crimes committed elsewhere.

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

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 make sure they are able to arrest and surrender suspects to the ICC, states parties should also, in their national law, prohibit the crimes of genocide, crimes against humanity and war crimes that are described in the Rome Statute. This is to enable them to conduct a prosecution of such crimes domestically should they decide to do so (and to remove any question about the crimes for which the ICC may have issued an arrest warrant 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 conduct that would constitute an offence against the ICC's administration of justice.

Aside from enabling its own justice officials to prosecute international crimes in its domestic courts, a state party is furthermore obliged to cooperate with the ICC in relation to an investigation and/or prosecution which the ICC might be seized with. The prosecution of a matter before the ICC

(and the process leading to the decision to prosecute) will normally require considerable investigation, information-gathering, and inter-agency cooperation, often with high levels of confidentiality and 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, as well as 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. The ICC lacks several 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 (OTP) during the investigation or prosecution period²⁰ (or otherwise with the ICC's 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, amongst other things, lead to a referral of the state to the UN Security Council (article 87(7)).
- Article 88 is a significant provision, obliging states to ensure that national procedures are in place 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, states accept that there are no grounds for refusing ICC requests for arrest and surrender. States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws,²¹ to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

While the Rome Statute envisages a duty to cooperate with the ICC in relation to investigation and prosecution, it should be remembered that the principle of complementarity is premised on the expectation that states that are willing

and able should be prosecuting these crimes themselves. The principle of complementarity thus ensures that the ICC 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 within its jurisdiction that the ICC can then claim to have jurisdiction.²²

To enforce this principle of complementarity, article 18 of the Rome Statute requires that the ICC prosecutor 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 ICC.²³ In addition, the ICC prosecutor cannot begin an investigation on her own initiative without first receiving the approval of a chamber of three judges.²⁴ At this stage of the proceedings, both states parties and non-states parties can insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation.²⁵ If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.²⁶

From the above, three broad aspects of the standard notion of complementarity emerge:

- The thrust of the principle is a system that effectively creates a presumption in favour of action at the level of states.
- When the ICC is already seized with a matter, it will rely on states, through their domestic mechanisms of arrest, to achieve international justice.
- The system of complementarity is state-centric: the presumption in favour of domestic action is to favour state action, and when the ICC has already been seized with a matter, the expectations and obligations for cooperation with the ICC lie with states.

Complementarity in African action

Various developments in Africa suggest that a broader understanding of complementarity is unfolding in practice which is worthy of further exploration. This broader understanding in certain respects falls within the notion of 'positive complementarity' – a term meaning that the ICC and states should actively encourage genuine national proceedings where possible, and that national and international networks should be relied upon as part of a system of international cooperation.²⁷

The motivating force behind positive complementarity is the understanding that the ICC and domestic jurisdictions

share a common responsibility.²⁸ This common responsibility means that there is scope for domestic criminal justice institutions and the ICC to act as a complement to one another. As one commentator has explained, we might see ‘positive complementarity as the opposite of ‘passive’ complementarity’, namely as a concept, which ‘welcome[s] and encourage[s] efforts by States to investigate and prosecute international crimes and recognise[s] that such national proceedings may be an effective and efficient means of ending impunity’.²⁹

A state party to the Rome Statute which does have jurisdiction could and should close the impunity gap by complementing the ICC in situations where the court lacks jurisdiction

This idea of positive complementarity has, however, been confined to describing the partnering between the ICC and states parties in respect of situations or crimes over which the ICC or the state party both have potential jurisdiction under the Rome Statute. Thus, in the first place, the Rome Statute’s presumption of complementarity is predicated on a mutual relationship between the ICC and states parties, but ultimately in the service of cases over which the ICC has jurisdiction or potential jurisdiction. Under complementarity the exercise of that jurisdiction by the ICC would be prevented if a state party or a non-state party demonstrated a good faith willingness and ability to prosecute the offender before a domestic court. But the ICC would have to have potential jurisdiction in the first place for the complementarity principle to be operative under the Rome Statute – for the simple reason that the ICC cannot operate, and the standard principle of complementarity cannot operate, in respect of a case over which the ICC in any event does not have jurisdiction. Take crimes that might be committed in Zimbabwe, for example. Zimbabwe is not a state party and hence (failing a UN Security Council referral), the ICC does not have jurisdiction in relation to crimes committed by Zimbabwean nationals or on Zimbabwean territory. Accordingly, for the ICC the question of complementarity vis-à-vis Zimbabwe does not arise under the Rome Statute.

But what about a neighbour, like South Africa, which is a state party to the Rome Statute? Could South Africa, assuming jurisdiction under its ICC implementation

legislation, not play a vital complementary role to the otherwise jurisdiction-less ICC by investigating and prosecuting Zimbabwean offenders? Indeed, given its proximity to the offences, and precisely because the ICC does not have any jurisdiction in relation thereto, there is scope for contending that a state party (like South Africa) which *does* have jurisdiction *could* and *should* close the impunity gap by acting to complement the work of the ICC in situations where the ICC is unable to do so because it lacks jurisdiction under the Rome Statute, or because the international community has proved unwilling, through the UN Security Council, to refer the situation to the ICC.

While such action would occur through an assertion of universal jurisdiction (South Africa’s ICC implementation legislation, for instance, provides for this), that assertion of universal jurisdiction may also be described as a means of achieving a positive and buttressing complementarity between a state party and the ICC. As discussed below, this positive form of ‘gap-filling’ complementarity has occurred in South Africa in respect of crimes committed in Madagascar and has been prompted by civil society in requesting the investigation and prosecution of crimes committed in Zimbabwe and in Gaza.

In relation to Gaza, moreover, there would be every basis for the ICC to investigate the crimes committed by Israel during Operation Cast Lead,³⁰ but for the fact that the political unwillingness of the UN Security Council has ensured an impunity gap in respect of those crimes. Here too the question may be asked whether there is not a role for states parties to the Rome Statute to act in the place of the ICC where their domestic implementation legislation allows them to do so.

Furthermore, while the state-centric nature of complementarity is a key feature of the Rome Statute, the steps now underway by the AU to create a regional international criminal chamber within the African Court of Justice and Human Rights, raise interesting and troubling questions about the relationship between the regional court and the ICC, and the implications for complementarity. At the most obvious level, how is a state party to the Rome Statute, but who is also a party to the African Court’s international criminal chamber, meant to honour its obligations to both? And what if the African Court decides to take on a matter that is either already before the ICC, or proceeds to the ICC after the African Court has begun its work? Or vice versa?

On a more progressive note, there is potential for a regional court like the African Court to play a supportive role in the work of the ICC – as witnessed in the African Court’s issuing of a provisional order in relation to the recent Libyan crisis (discussed in detail below). There is scope, in other words, for a regional institution (as a

collective of states) to do important work in partnership with the ICC in the service of international criminal justice.

It is to these questions about complementarity in practice that the paper now turns. The answers to these questions suggest a potentially richer and more contextually responsive understanding of complementarity as a guiding principle of international criminal justice. The discussion also covers the potential for negative complementarity – that is, when steps are taken notionally in support of the international criminal justice ideals of the ICC, but which may in fact be intended to distract from or undermine those ideals.

POSITIVE AND NEGATIVE COMPLEMENTARITY? THE CASE OF THE AFRICAN COURT

In response to a 2009 AU decision on the matter, the AU Commission began a process in February 2010 to amend the protocol on the Statute of the African Court of Justice and Human Rights to expand the court's jurisdiction to include international and transnational crimes. The resultant draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several other crimes such as terrorism, piracy, and corruption.

By May 2012, African government legal experts and Ministers of Justice and Attorneys General had considered and adopted the draft protocol (except article 28E relating to the crime of unconstitutional change of government which presents definitional problems that require more attention). All that now remains is for the AU Assembly to formally adopt the draft protocol.

Given the continent's record of human rights atrocities, some have argued that vesting the African Court with international criminal jurisdiction is a worthy development to end impunity.³¹ In principle, that is indeed a laudable goal, but is it likely in practice, and at what cost?

The first issue that bedevils support for the proposal is the drafting process. On paper this process has taken three years, but in reality government legal experts had just over one year to properly consider the draft protocol. It is also unfortunate that civil society and external legal experts were given little opportunity to comment; and that the draft protocol was never made available on the AU's website, or publicly posted for comment in other media.³² The AU would have benefitted from a broader process of consultation considering that questions around jurisdiction, the definition of crimes, immunities, institutional design and the practicalities of administration and enforcement, not to mention the impact on domestic laws and obligations, require careful examination. All these implications need to be considered.³³

The AU Commission explains that the expansion of the African Court is motivated by reasons other than anti-ICC sentiment. Specifically, the process originates in the AU's requirement to deal with three issues: the misuse of the principle of universal jurisdiction; the challenges brought about by the process of Senegal prosecuting the former President of Chad, Hissène Habré; and the need to give effect to article 25(5) of the African Charter on Democracy, Elections and Governance which requires that the AU formulate a new international crime to deal with unconstitutional changes of government.³⁴

It is, however, likely that the recent tension between the AU and the ICC did also influence the process, especially considering that the draft protocol is studiously silent on any relationship between the African Court with its expanded criminal jurisdiction, and the ICC.

The second concern is with the African Court's ambitious jurisdictional reach. Legitimate questions can be asked about the court's capacity to fulfil not only its newfound international criminal law obligations, but also about the effect that such stretching will have on the court's ability to deal with its existing general and human rights obligations. The subject-matter of the court's proposed ICL jurisdiction means the court is expected to try not only the established international crimes, but also a raft of other social ills that plague the continent. A related difficulty involves money: to ensure that justice can be done to the court's wide jurisdiction, a vast amount of money will be required to ensure proper staffing and capacity to run international criminal trials, not to mention perform the African Court's existing administrative tasks and to act as the continent's regional human rights court. Indeed, the fiscal implications of vesting the court with criminal jurisdiction raise serious questions about the effectiveness, independence and impartiality of such a court. By way of example, the ICC's budget – currently for investigating just three types of crimes, and not the range of offences the African Court is expected to tackle – is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.³⁵

Finally, given that the African Court will be occupying the same legal universe as the ICC, it is necessary to consider the relationship (if any) between these two courts. This is no small matter. It must be recalled that 33 African states are now party to the ICC, with at least eight of those states having adopted implementing legislation to give effect to their obligations to the ICC. It thus seems imperative that the relationship between the ICC and the African Court be addressed.³⁶ In the first place, which court will have primacy? Careful thought would also have to be given to the question of domestic legislation to enable a relationship with the expanded African Court (especially around the issues of mutual legal assistance and extradition). Given

these difficulties, it is surprising that the draft protocol nowhere mentions the ICC. A useful comparison here is the careful thinking that has gone into drafting of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, which similarly would envisage a new system for the prosecution of such crimes as a complement to the ICC's Rome Statute.³⁷

Given the many challenges with the creation of an international criminal chamber at the African Court, the question must be asked: what is the real motivation underpinning the draft protocol? All things considered, and returning to the complementarity theme, it is worth asking whether the draft protocol is an example of negative complementarity; an attempt to secure a regional exceptionalism in the face of the ICC's currently directed investigations on the continent. That is all the more so in light of reports that Kenya, *inter alia*, has been instrumental in driving the proposed expansion of the African Court's jurisdiction.³⁸

If there is potential to view this as a negative development, it must be noted that there is huge positive potential for the existing African Court – without an added international criminal chamber – to strengthen or complement the international criminal justice project.

That has most recently been witnessed in the work of the African Court (with the support of the African Commission). As the Libya crisis erupted in early 2011, and amidst a slow political and institutional response from the AU, many were surprised to learn of the unanimous Order for Provisional Measures by the African Court on Human and Peoples' Rights in respect of Libya. The Order, issued on 25 March 2011, demanded that Libya 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons' and report back to the African Court within 15 days on 'measures taken to implement this Order'. It was made *proprio motu* (of its own accord) by the court in the course of its consideration of an application brought urgently against Libya by the African Commission on Human and Peoples' Rights on 16 March 2011 alleging 'serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights' (the Banjul Charter). The court chose to take up the matter, having made a *prima facie* determination that it has jurisdiction to hear the case – and it ordered Libya to respond to the application within 60 days.³⁹

The African Court's Libya Provisional Measure Decision is remarkable in a number of respects. Following 'successive complaints against Libya' received by the Commission earlier in 2011, the Commission concluded that there was evidence of massive violations of the Banjul Charter. On this basis the Commission brought an application to the African Court against Libya, alleging

'serious and widespread' violations and 'excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment'.

The African Court responded to the Commission's application timeously and boldly. On 21 March the court's Registry demanded a response from Libya. In terms of the African Court's Rules, Libya was given 'thirty (30) days from receipt of the application, [to indicate] the names and addresses of its representatives'; and 'sixty days to respond to the application'. In addition, and on its own initiative, the African Court issued an Order for Provisional Measures that states:

The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of any other international human rights instruments to which it is party. The Great Socialist People's Libyan Arab Jamahiriya must report to the Court within a period of fifteen (15) days from the date of receipt of the Order, on the measures taken to implement this Order.

The African Court took these steps without eliciting the views of the parties to the matter, on the basis of the imminent risk to human life and the difficulty in scheduling an appropriate hearing involving Libya. In establishing the factual basis for the need for provisional measures, the court relied on the information contained in the Commission's application. In particular the court cited the statements of the AU, the Arab League and UN Security Council Resolution 1970 in support of its finding that the situation was of extreme gravity and urgency and that such measures were necessary to avoid irreparable harm to persons.

The significance of the African Court's Order for Provisional Measures, and the proceedings against Libya more broadly, should not be forgotten simply because events in Libya so quickly overtook the order. In the first place it must be recalled that the AU's response to the crisis in Libya had been slow, even by its own standards. The intervention of the Commission first, and then the African Court, could not have been more timely and signaled that it is wrong to think of a common African position that homogeneously defines the continent's position on human rights and impunity. The court's decision confirmed that Gaddafi's violent actions against his people continued in the face of both Western and African opposition.

But secondly, and for present purposes more importantly, the African Court's response fits within a deeper under-

standing of complementarity – that a regional court, alive to the role of the ICC in the Libyan context, could act as a complement to the ICC by insisting that Libya stop the atrocities which in the first place had been the basis for the UN Security Council's referral of the situation to the ICC. It is indeed unfortunate that such progressive and complementary conduct by the African Court is not receiving greater attention and encouragement from the AU, which instead has devoted time and resources to the task of rushing into existence the draft protocol for an international criminal chamber in the African Court.

DOMESTIC INITIATIVES: A VITAL ROLE FOR CIVIL SOCIETY

Having discussed these related African developments – the AU's opposition to the ICC's case against al-Bashir, the AU's efforts to create a regional court with jurisdiction over international crimes, and the African Court's provisional order in respect of Libya – and their meaning for a richer understanding of complementarity, it is now opportune to consider the future prospects for international criminal justice on the continent. That consideration highlights the vital role that domestic justice systems can play in serving as a complement to the ICC in cases involving atrocities committed not just in ICC states parties, but also in non-states parties.

Before considering these domestic cases, however, it needs to be recalled that for all the criticism of the ICC's African focus, this situation has arisen in large part at the behest of African states.⁴⁰ The fact that African governments (four in all) have self-referred cases to the ICC is evidence of African leadership, and the utilisation of the court by the continent. But these self-referred or 'bottom-up' cases and their impact on our understanding of complementarity must be distinguished from the al-Bashir and Kenya cases in which the perceptions and the politics are suggestive of a 'top-down' intervention by the ICC (whether through a UN Security Council resolution or the ICC prosecutor's own initiative) and a resulting domestic unwillingness to take action to arrest or prosecute the responsible actors.

For the purposes of this analysis, there is a related need to separate the African self-referral cases from situations where international crimes are committed in Africa or elsewhere by nationals from *non-states parties* (that have not been referred to the ICC by the UN Security Council), and African states parties find the individuals accused of such crimes planning visits to their territory.

In respect of both types of 'hard' cases outlined above (those that are not self-referred), the obvious risk is that the impunity gaps remain open. The question then is whether there is a place for African states to close that gap by, for instance, taking action to arrest the likes of al-Bashir. That is similarly true in respect of attempts, for instance, to arrest

Israeli officials implicated in Operation Cast Lead in Gaza, or to arrest Zimbabweans accused of international crimes, or other alleged international criminals from non-states parties, who happen to travel to a state party.

Given that governments are constrained by the international politics associated with attempts to close impunity gaps, there is a vital role for civil society to play

Given that governments are often constrained by the international politics associated with attempts to close such impunity gaps, there is a vital role for civil society to play. And it is especially in respect of this group of cases (the hard cases) that the African examples discussed below show that the international criminal justice project will require the work of domestic courts to complement the ICC's actions. Indeed, this section of the paper postulates that the success of international criminal justice (at least on the African continent) will depend in large part on domestic prosecutions and domestic initiatives to cooperate with the ICC where the court requires assistance, or to complement the ideals of the ICC by acting in place of the court when *the ICC* is unable or unwilling to do so. Here, the importance of civil society cannot be overstated. Five African examples suffice: four from South Africa, and one from Kenya.

Al-Bashir and Zuma's inauguration

The first example is the action taken by civil society in South Africa to seek a court order for the arrest of al-Bashir if he attended President Jacob Zuma's inauguration in Pretoria. After the press reported in April 2009 that the South African government had invited al-Bashir, as the Sudanese head of state, to Zuma's inauguration as South Africa's new president on 9 May 2009, civil society responded swiftly. A media release was issued by a number of influential civil society organisations on 7 May 2009 that read as follows:

The Southern Africa Litigation Centre (SALC), Institute for Democracy in South Africa (Idasa), and Open Society Institute (OSI) note with concern a report (Business Day, 'Sudan dilemma for Zuma's inauguration', 6 May 2009) that South Africa's government spokesman Themba Maseko

confirmed that Sudanese President al-Bashir has been invited, along with other heads of state, to president-elect Jacob Zuma's inauguration this coming Saturday. These organisations further note the statement by Director-General Ntsaluba at a media briefing on 7 May apparently confirming that President al-Bashir will not be attending, while not denying that he had been invited.

SALC, Idasa, and OSI recall that South Africa is a party to the Rome Statute of the International Criminal Court (ICC) and thus has an obligation to assist the ICC in effecting the arrest warrant issued for al-Bashir by the ICC in March of this year. In addition to its legal obligations in this matter, South Africa played an important leadership role in the development of the Rome Statute and thus the establishment of the ICC. South Africa is also one of only three states on the continent to have domesticated the Rome Statute's provisions into South African law: a significant step which demonstrates the country's commitment to taking action on matters of international criminal justice.

Specifically, South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (section 8 (2)) holds that were President al-Bashir to be present on the territory of South Africa, and the International Criminal Court were to request his arrest, the Director-General of the Department of Justice 'must immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who must endorse the warrant of arrest for execution in any part of the Republic'.

SALC, Idasa, and OSI thus concur with the South African government's stance that if al-Bashir were to enter or be present in South Africa he would be subject to immediate arrest and welcome the Director-General's confirmation that he will not be attending.

In the event that President al-Bashir does for whatever reason choose to attend, SALC has requested Advocates Anton Katz and Max du Plessis to represent them in the event that al-Bashir arrives for President Zuma's inauguration and there is a failure by the relevant South African officials to take action in compliance with South Africa's international obligations. In particular SALC intends to approach the appropriate court for the necessary relief to assist South Africa in

complying with its obligations under the Rome Statute of the International Criminal Court.

SALC, Idasa, and OSI reiterate that States that have ratified the Rome Statute cannot be seen to be shielding persons who are alleged to be guilty of serious crimes against humanity and war crimes and who are sought for arrest and prosecution by the ICC.

As it turned out, al-Bashir did not attend, and the threatened court application was not necessary. But it is noteworthy that the civil society organisations concerned took the proactive step of briefing barristers to prepare court application papers in the event that al-Bashir did arrive and the South African government failed to act. Those court papers sought inter alia the following urgent relief:

1. Declaring the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir, to be inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
 2. Compelling the Respondents forthwith to take all reasonable steps to arrest the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir without a warrant in terms of section 40(1)(k) of the CPA and detain him, pending a formal request for his surrender from the International Criminal Court;
- alternatively*
3. Compelling the Respondents forthwith to take all reasonable steps to provisionally arrest President Bashir in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002;

One may surmise whether the public forewarning of this civil society-led litigation played a part in the South African government's decision to clarify its position regarding its legal obligations to arrest al-Bashir. The fact is that al-Bashir chose to change his plans to avoid a visit to South Africa – and he has never visited South Africa since.

Reaction to the SA government's support of the AU non-cooperation decision

The second development was the mobilisation by civil society to lobby for the South African government to reconsider its endorsement of the AU's decision not to

cooperate with the ICC in the arrest and surrender of al-Bashir. Because of its support for this AU decision, South Africa was quickly singled out for criticism both at home and abroad. One example of the criticism is a statement of 15 July 2009 signed by 17 South African civil society organisations and many concerned individuals calling upon Zuma to honour South Africa's treaty obligations by cooperating with the ICC in relation to the warrant of arrest issued for al-Bashir. The statement included signatures from high-profile South African personalities including Judge Richard Goldstone and Archbishop Emeritus Desmond Tutu. Virtually all of South Africa's leading human rights organisations, including the South African Human Rights Commission, united around the call for South Africa's government to respect its own law and Constitution and to disassociate itself from the AU decision to refuse cooperation with the ICC.⁴¹

The General Council of the Bar of South Africa issued its own strongly worded statement on the same day in which it summed up the legal position as follows:

The issue of whether or not President Al-Bashir will be subject to arrest and surrender in South Africa should he enter the country, is determined by reference to our laws, including the Implementation of the Rome Statute of the ICC Act and our Constitution.

The political considerations that underlie the AU's concern with the conduct of the ICC and the UN Security Council in relation to Africa should not impede our authorities from performing their express legal obligations under our law should President Al-Bashir enter South Africa.

Chapter 4 of our Implementation of the Rome Statute Act obliges our Central Authority, on receipt of a request from the ICC to enforce a warrant of arrest issued by that Court, with necessary accompanying documents, to approach a Magistrate who must endorse the ICC's warrant of arrest for execution where the accused is within our borders.⁴²

It is likely that the South African government was stung by this public condemnation of its conduct. Informal reports indicate that the subsequent clarification of government's position was in part as a result of the swift movement by local civil society organisations to remind government of its complementarity obligations as a matter of domestic and international law. It is also worth noting that this civil society process in South Africa provided the impetus for a similar Africa-wide initiative that resulted in 165 civil society

organisations from across the continent releasing a statement on 30 July 2009 urging all African states parties to reaffirm their commitment to the ICC, especially with regard to the arrest of al-Bashir.⁴³

Then, on 31 July 2009, the South African government publicly stated that it was committed to the Rome Statute and would arrest al-Bashir if he arrived in the country – and as if to dispel any further doubts, disclosed that an arrest warrant had been issued for him by a senior magistrate.⁴⁴ This conduct by civil society and government in South Africa – in support of the arrest warrant issued by the ICC for al-Bashir – is a meaningful example of domestic initiatives taken to complement the work of the ICC.

The Zimbabwe torture docket case

Another important initiative in Southern Africa is the use by civil society of South Africa's domestic legislation implementing the Rome Statute (The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 or 'the ICC Act') both to request the justice authorities to investigate ICC crimes, and if the authorities refuse to do so, to challenge that decision in court.

The first meaningful invocation of South Africa's ICC Act was on 18 March 2008, when the Southern African Litigation Centre (SALC) submitted a dossier to the Priority Crimes Litigation Unit in South Africa's National Prosecuting Authority (NPA). The dossier called on the NPA to investigate, with a view to prosecuting, senior Zimbabwean police officials who are alleged to have committed crimes against humanity by systematically torturing those who they believed were in opposition to the Zanu-PF-led government. The dossier dealt with events leading up to the Zimbabwe elections of March 2008. It contained a legal opinion and detailed evidence relating in particular to the torture of opposition activists that occurred subsequent to a police raid on 28 March 2007 on Harvest House in Harare – the headquarters of the Movement for Democratic Change (MDC). It also contained documentation relating to other separate clusters of the systematic use of torture on the part of Zimbabwean police.

But for South Africa's ICC Act, this initiative could not have been undertaken. The ICC Act gives effect to South Africa's complementarity obligations under the Rome Statute, but it arguably does more than that. In the Act's scope and ambition – for instance, it provides for a form of conditional universal jurisdiction – it goes beyond what was strictly required by the terms of the Rome Statute. As such, it demonstrates South Africa's commitment and leadership (at the time the Act was drafted and passed, at any rate) in respect of the larger international criminal justice project. In this way, the ICC Act facilitates the positive gap-filling complementarity role discussed above.

Prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in the country's courts. Under the ICC Act, a structure is created for national prosecution of the crimes contained in the Rome Statute.

Of importance in relation to offences committed in Zimbabwe is that the ICC Act allows for the prosecution of an individual who commits a core international crime and who does not have a close and substantial connection with South Africa at the time of offence. Put otherwise, it is possible under the ICC Act – provided that there is sufficient evidence – to initiate a prosecution against the persons (who are Zimbabwean nationals) responsible for torture and other crimes against humanity committed in Zimbabwe after 1 July 2002.

Following SALC's submission to the NPA, the South African authorities decided not to investigate. Their refusal has recently been challenged successfully in the Pretoria High Court through a case for judicial review brought by SALC and the Zimbabwe Exiles Forum.⁴⁵ In Judge Hans Fabricius's judgment delivered on 8 May 2012, the High Court confirmed that there is a duty on the South African authorities to investigate crimes against humanity. The judge ruled as follows:

- 1.1. The impugned decision was declared to be unlawful, inconsistent with the Constitution and therefore invalid;
- 1.2. The impugned decision was reviewed and set aside;
- 1.3. The NPA, Priority Crimes Litigation Unit (PCLU) and SAPS were ordered to investigate the contents of the dossier submitted by the first respondent to the applicants documenting the commission of crimes against humanity;
- 1.4. In that investigation the NPA and the SAPS were ordered to have regard for South Africa's international law obligations as recognised by the Constitution and contained in the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act); and
- 1.5. The NPA and SAPS were ordered to pay the costs of the application, including the costs of three counsel.

It is furthermore important to highlight that Judge Fabricius confirmed in his judgment South Africa's commitment – recorded in the preamble to its ICC Act – to act as a complement to the ICC. In this regard it is worth quoting the judge's findings in full:

I agree ... with the Applicants' contentions that the decisive factor in the present context is the ICC Act. In the present instance the quality of locus standi has to be decided, not by mere

reference to prior decisions of the Constitutional Court and the Supreme Court of Appeal, which both adopt a broad approach in constitutional litigation, but more importantly in the context of the Rome Statute and the domestic Act of 2002, the ICC Act. The former emphasises in its preamble that it is the duty of every state to exercise its jurisdiction over those responsible for intentional crimes. In the preamble to the ICC Act, Parliament committed South Africa, as a member of the international community, to bringing persons who commit such crimes to justice under South African law where possible. The Act, read in the context of its purpose and Rome Statute, seems to require a broad approach to traditional principles of standing. Section 3(d) read with s2 requires the High Courts of South Africa to adjudicate cases brought by persons accused of a crime committed in the Republic, and even beyond its borders in certain circumstances. The relevant international imperative must not be lost sight of, and the Constitutional imperative that obliges South Africa to comply with its relevant international obligations. The complementarity principle referred to in Article 1 of the statute must also not be lost sight of in this context. This states that the ICC has jurisdiction complementary to national criminal jurisdictions. Section 4(3) of the ICC Act is also relevant, as it goes beyond 'normal' jurisdictional requirements. In the context of the purpose of that Act, s3 requires that a prosecution be enabled as far as possible. Seen holistically therefore, all the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute, crimes against humanity within the ambit of the provisions of s4(3) of the ICC Act, and it is in the public interest that the State does so.⁴⁶

While the South African authorities are now attempting to appeal the decision to the Supreme Court of Appeal, it is worth noting the 'holistic' approach adopted by the High Court to the question of whether South Africa had a duty to prosecute the alleged Zimbabwean offenders. Added to this holistic mix is the fact, recorded by the judge, that there was little prospect of justice in Zimbabwe because the Zimbabwean authorities had shown little or no enthusiasm to investigate the offenders and there was a breakdown in the rule of law in that country.⁴⁷ Judge Fabricius may have added that there is also little or no prospect of justice through the ICC, since the ICC is unable to assert jurisdiction in respect of a non-state party like Zimbabwe so long as the UN Security Council fails to refer the Zimbabwean situation to the ICC.

Accordingly, through this decision the South African court has confirmed that there is an expectation – which is cast in the form of an obligation in the judgment – that South Africa ought to close the impunity gap in Zimbabwe. The case thus stands as a further example of a rich exercise of complementarity which embraces a ‘holistic’ approach to the work of a domestic court and which regards the ICC as a catalyst for the obligations that lie upon a state in furtherance of the international criminal justice project.

Furthermore, the fact remains that the court action is another example of African civil society pressure being brought to bear on government authorities to comply with their treaty obligations as states parties to the Rome Statute and, through domestic efforts, to complement the ICC where the ICC’s jurisdiction is otherwise lacking. The question of South Africa’s obligations – to act as a domestic conduit for international criminal justice in the place of the ICC – is now being firmly debated before the courts.

Acting where the UN Security Council won’t

A further example arises from requests by the Palestinian Solidarity Alliance and the Media Review Network to the South African authorities to investigate crimes committed by Israel during Operation Cast Lead in Gaza. In that regard a team of lawyers led by Professor John Dugard was briefed to compile a dossier that was presented to the NPA’s Priority Crimes Litigation Unit and the police’s Directorate for Priority Crimes Investigation on 3 August 2009. The dossier – submitted in terms of the ICC Act – requests the South African government to investigate and, if appropriate prosecute, foreign nationals and South Africans allegedly involved in war crimes and crimes against humanity during Operation Cast Lead. In parallel with this request, the complainants handed the dossier over to the ICC prosecutor in early September 2009.

At the time, *Newsweek* magazine reported an interview with the ICC prosecutor who expressed the view that one of the individuals cited in the docket – Lieutenant Colonel David Benjamin, a reserve officer in the Israeli military – may be a basis for the ICC to launch an enquiry. According to *Newsweek*, the ICC prosecutor ‘believes he has all the authority he needs to launch an inquiry: Benjamin holds dual citizenship in both Israel and South Africa, and the latter has signed the ICC’s charter, bringing Benjamin into the court’s orbit.’⁴⁸

It is not known what became of the ICC prosecutor’s reported belief that Benjamin was within the court’s orbit, but the example illustrates again an interesting complementary role that might be played by a state party in relation to crimes committed by nationals of, or on the

territory of, a non-state party. What can be said is that Benjamin, who visited South Africa in August 2009, cut short his trip due to a perceived risk that he might be arrested for his alleged involvement in Operation Cast Lead.⁴⁹

Another request was made in early 2011 by the Media Review Network and a UK-based lawyers firm, requesting that an arrest warrant be issued for Tzipi Livni, the former Israeli government minister implicated in Operation Cast Lead. Livni had indicated an intention to visit South Africa at the invitation of the South African Jewish Board of Deputies. While the authorities were still considering the request, Livni announced that her visit to South Africa would not proceed.

While no doubt some would argue that justice would only be served if Livni had in fact arrived and been arrested and investigated in South Africa, at the very least there is a basis to contend that the threat of arrest itself has made the world a smaller place for individuals suspected of war crimes. Indeed, this is a positive by-product of domestic initiatives to act as a complement to (or substitute for) the ICC particularly in cases where the ICC would otherwise be unwilling or unable to act against the offenders.

A first: South Africa investigates crimes against humanity in Madagascar

South Africa has recently opened its first ever investigation into crimes against humanity. What is more, it is doing so on the basis of universal jurisdiction in respect of a former head of state. The NPA announced in August 2012 that it has opened the investigation in respect of abuses committed in Madagascar in 2009, with a view to prosecuting the country’s ousted former President Marc Ravalomanana for his role in their commission. According to an NPA spokesperson, ‘evidence has been brought to the attention of the Priority Crimes Litigation Unit ... and there’s reasonable suspicion that crimes against humanity may have been committed’.⁵⁰

The investigation was initiated under South Africa’s ICC Act. It will be ‘managed and directed’ by the NPA’s Priority Crimes Litigation Unit but carried out by the police’s Directorate for Priority Crimes Investigation. As with the Zimbabwe torture docket, this case was instigated by civil society who submitted a docket to the NPA earlier this year. According to media reports at the time, in the Madagascar case, a group called the Association of the Martyrs of Antananarivo Merrina Square and Citizens of the State of Madagascar asked the NPA to investigate Ravalomanana – who lives in exile in SA – for allegedly ordering the shooting of protesters at the presidential palace in the Malagasy capital, Antananarivo, on 7 February 2009. The group alleges that the shooting was a crime against humanity as defined in the ICC Act and so SA authorities may, and should, prosecute Ravalomanana.

The victims and relatives of victims shot in the demonstration say 71 people were killed and 698 injured during the shooting. They presented the NPA with several sworn affidavits, urging the prosecutors to ensure that justice is done.

The investigation is in its early stages and more work needs to be done, particularly in terms of proving the contextual elements of the crimes and (perhaps most difficult) establishing whether Ravalomanana is liable for the crimes under the doctrine of command responsibility. However, it is significant that this is the first investigation into international crimes by South African authorities (recalling that in the Zimbabwe torture docket case the South African authorities declined to exercise jurisdiction).

Kenya's High Court issues an arrest warrant for al-Bashir

The last example is from Kenya, and again al-Bashir is the source of controversy. Despite intense criticism locally and abroad of the Kenyan government's decision to host al-Bashir for the celebrations of the country's new Constitution in August 2010,⁵¹ al-Bashir was again set to visit Kenya just two months later for the Intergovernmental Authority on Development (IGAD) special summit on Sudan. In response to this extraordinary news, the ICC took decisive action: on 25 October 2010, the judges of Pre-Trial Chamber I requested the Kenyan government to explain, by 29 October, 'about any problem which would impede or prevent the arrest and surrender of Omar Al Bashir in the event that he visits the country on 30 October, 2010.'⁵² On 28 October the ICC president reported Kenya's actions to the UN Security Council.⁵³

In Kenya and South Africa it has taken the work of civil society for international crime cases to be brought to the authorities

In addition to this speedy intervention by the ICC, 22 civil society organisations from Kenya and other African countries sent a public letter to Kenyan president and prime minister expressing concern over the news and pointing out that the decision to host al-Bashir was '... contrary to Kenya's obligations as a state party to the ICC. Moreover, Kenya's own domestic law – the International Crimes Act and the Kenyan Constitution (under section 2(6)) – requires that the Kenyan government uphold its commitment to cooperate with the ICC'.⁵⁴ The IGAD meeting was

subsequently moved to Addis Ababa and convened on 30 October 2010. Although the Kenyan government was reluctant to attribute the change in venue to the presence of an ICC indictee, officials eventually admitted that the location was changed to avoid the controversy over al-Bashir's attendance.⁵⁵ This example presents important evidence of civil society complementing the work of the ICC with regard to one of the court's most difficult current cases.

The fact that the Kenyan government had intended to host al-Bashir again so soon after the widely condemned visit by the Sudanese president in August 2010, prompted a leading civil society organisation in Kenya – the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) – to seek court action to force the government to apprehend al-Bashir should he travel to the country in future. ICJ-Kenya's decision was supported by the growing African network of civil society organisations working in support of international justice on the continent. The network, drawing on South Africa's experience with al-Bashir's planned attendance of Zuma's inauguration (discussed above), shared lessons with Kenyan colleagues about options for civil society action and public interest litigation.

On 28 November 2011, High Court Judge Nicholas Ombija ruled in favour of ICJ-Kenya's application and issued a provisional arrest warrant for al-Bashir should he visit Kenya, and ordered Kenyan authorities to arrest al-Bashir as provided for in section 32 of Kenya's International Crimes Act of 2008. The Attorney General of Kenya has since appealed the High Court decision.⁵⁶

This decision represents a major achievement for civil society in the international criminal justice field and most importantly, for the victims of the atrocities committed in Darfur. It is also another example of how the threat of arrest does 'make the world a smaller place' for those accused of grave crimes. And notably also, this case shows that without civil society intervention, it is unlikely that the Kenyan government would have issued an arrest warrant for al-Bashir, despite the fact that the country is obliged to do so under both treaty and domestic law.

Drawing lessons

Various lessons might be drawn from the selected examples presented above. The first is that in many cases it is unlikely that the domestic legislation in question (the ICC Act in South Africa, or the International Crimes Act in Kenya) would have been invoked by either of the governments or their prosecution agencies without the intervention of civil society. It has taken the work of civil society for cases to be brought to the relevant authorities; and the South African and Kenyan governments have not 'self-initiated' cases in accordance with their statutory and

treaty obligations. (This may have as much to do with a lack of capacity in the respective police and prosecution agencies as with a lack of political will or priority given to international criminal justice in either government.) These examples for present purposes demonstrate the willingness and ability of African civil society actors to utilise domestic incorporation legislation to request and if necessary compel their governments to act in conformity with their international treaty obligations.

The second lesson is that it is vital to push for domestic implementation legislation. The drive to ratify the Rome Statute must be backed up by tactful lobbying for implementation laws to be put in place. The problem too often is that international criminal justice – and the obligations of the Rome Statute – may be seen by parliamentarians and justice officials as exotic and unrelated to their national and departmental priorities. Domestication of the Rome Statute is the first step in bringing these obligations home; and the sense of disconnect or at least distance between the goals of international criminal justice and that of the state can begin to be removed. Domestication also makes it more difficult for governments to sidestep their treaty obligations, not least of all because a government's failure to act under its own domestic law may more easily (than treaty law obligations) be framed as a 'rule of law' issue. This has been demonstrated in both the High Court decision in South Africa around the Zimbabwe torture docket, and the decision of the Kenyan High Court confirming an arrest warrant for al-Bashir. Accordingly, renewed energy should be directed at convincing all states parties to adopt legislation incorporating the obligations and ideals of the Rome Statute directly into domestic law. In many cases, especially in Africa where specialised legislative drafting capacity is in short supply, and economic and developmental priorities overshadow international justice ones, lobbying for domestication must be accompanied by offers of sustainable technical assistance to ensure the job gets done.

The third lesson is that domestic legislation may more easily and less controversially allow for universal jurisdiction as a complement to the work of international criminal tribunals and the ICC. That exercise of jurisdiction may be vitally important to close the impunity gap, particularly in respect of states that are not party to the Rome Statute and crimes that are committed by their nationals or on their territory. As noted above with respect to legislative drafting, this requires the capacitation of domestic investigators and prosecutors to enable them to handle the complexities and withstand the political controversies of pursuing cases against individuals accused of the world's worst crimes. South Africa is a case in point, at least on the African continent. It is only because of South Africa's ICC Act that a specialised prosecutorial unit now exists in the form of

the Priority Crimes Litigation Unit in the NPA. As the next section of the paper illustrates, units such as these will typically be small and have responsibility over a range of the most serious crimes facing the state and its citizens. Nevertheless, there is little doubt that such domestic units are an important future component of international criminal justice both under the principle of complementarity in terms of the Rome Statute, but also as units that may exercise universal jurisdiction where empowered to do so (and be challenged, by way of judicial review, if they fail to do so lawfully).

DOMESTIC RESPONSIBILITIES: GOVERNMENTS RISE TO THE CHALLENGE

As has been argued earlier in this paper, many individual African states are committed to ending impunity for grave crimes despite the impression to the contrary created by the AU's negative position towards the ICC. This is most obviously illustrated by the fact that a majority of African governments have ratified the Rome Statute, eight have adopted domestic implementing legislation and a further 16 have some form of draft legislation,⁵⁷ four have referred situations to the ICC, and most comply with the court's requests for cooperation. Across the continent, there are many examples of international criminal justice in practice. In some cases this takes the form of 'standard' ICC complementarity. Increasingly, however, it also includes a wider array of justice processes driven by government officials as well as civil society actors, as the discussion above illustrates, that are aimed at closing the impunity gap. In this regard, it should be noted that while civil society groups have often taken the initiative with regard to the practice of international justice, these actions would not have been possible without the governments concerned having passed domestic implementation legislation in the first place.

Examples from three countries – South Africa, Uganda and the Democratic Republic of the Congo (DRC) – point to the commitment of African states to international criminal justice, and provide practical illustrations of justice processes at the domestic level that contribute to closing the impunity gap. As such, the discussion below is not intended as an in-depth analysis of the activities undertaken by the respective governments.

South Africa

South Africa incorporated the Rome Statute into its domestic law by means of The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('ICC Act').⁵⁸ Prior to the ICC Act, the core international crimes of war crimes, crimes against humanity and genocide had not been criminalised in South African law.

The ICC Act, like the Rome Statute, has limited temporal jurisdiction in that no action may be brought against a person for crimes committed before 1 July 2002.⁵⁹

Of importance is the provision in the ICC Act for a structure for national investigation and prosecution of crimes in the Rome Statute in line with the principle of complementarity. One of the objectives of the ICC Act is to enable 'as far as possible and in accordance with the principle of complementarity ... the National Prosecuting Authority to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.'⁶⁰ This provision clearly provides South Africa with extra-territorial jurisdiction. In addition to having jurisdiction over people who are South African and/or commit crimes against South Africans, section 4(3) of the ICC Act provides for the prosecution of individuals who are not South African (nor ordinarily resident in South Africa), who after the commission of the crime are present in the territory of South Africa.⁶¹

In order to allow for the proper fulfillment of South Africa's obligations contained in the ICC Act, a Priority Crimes Litigation Unit (PCLU) was established within the NPA through a Presidential Proclamation issued on 23 March 2003.⁶² The PCLU is headed by a Special Director of Public Prosecutions who, in addition to heading the PCLU, must 'manage and direct the prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act' amongst other serious offences. With regard to the other serious offences, it is important to note that the PCLU's mandate is extensive, with the unit being responsible for directing investigations and prosecutions relating to Rome Statute crimes, national and international terrorism, weapons of mass destruction, mercenaries, matters emanating from the post-apartheid Truth and Reconciliation Commission process, and any other priorities as determined by the National Director of Public Prosecutions. To carry out this broad mandate, the PCLU has just five advocates and one administrator.

When it comes to the investigation of crimes within its mandate, the PCLU depends on the cooperation of the South African Police Service (SAPS). In 2009, a Directorate for Priority Crimes Investigation (DPCI) was established with a mandate to investigate, inter alia, Rome Statute crimes. Within DPCI, a 26-member unit – the Crimes Against the State (CATS) unit⁶³ – is responsible for the actual investigation of international crimes. Like the PCLU, which has a much broader mandate than just international crimes, the CATS unit is tasked with investigating a range of other serious offences such as acts of terror, offences related to the unlawful use or transfer of firearms and other deadly

weapons, organised crime, and acts which may pose a serious threat to the security of the state such as treason and sedition.

The broad mandates of the PCLU and CATS units have important implications for their ability to devote specific attention to Rome Statute crimes. Nevertheless, the PCLU and CATS units have dealt with a number of cases, most of which were brought to their attention by civil society or advocacy groups. Most notably, the PCLU was approached to open a case in respect of alleged acts of torture committed by Zimbabwean police against anti-government activists in the run-up to the 2008 presidential election (this case, known colloquially as the Zimbabwe torture docket, is covered in detail above).⁶⁴ In 2011, as indicated previously, two civil society organisations, the Media Review Network and the Palestinian Solidarity Alliance, compiled and submitted a lengthy dossier (over 3 000 pages long) to the PCLU in which they detailed international crimes allegedly committed in Gaza by Israeli authorities. The dossier implicated, amongst others, the then Israeli Foreign Minister Tzipi Livni, and sought arrest warrants. The DPCI decided not to investigate further, contending that there was insufficient evidence to proceed.

In 2012, the PCLU was called upon to seek a warrant for the arrest of the late Prime Minister of Ethiopia, Meles Zenawi, ahead of his visit to South Africa for alleged crimes against humanity and genocide against the Ogadeni people. A similar request was made by civil society for former British Prime Minister Tony Blair in August 2012 in respect of crimes committed by British soldiers in Iraq and Afghanistan. Both requests were declined.

As outlined in the section above, the first international crime case that the NPA has decided to proceed with is that in respect of abuses committed in Madagascar in 2009, with a view to prosecuting the country's ousted former President Marc Ravalomanana for his role in their commission.

Through the domestication of the Rome Statute and the establishment of specialised units tasked with the investigation and prosecution of international crimes, South Africa is clearly taking steps to meet its complementarity obligations. Moreover – to the extent that the ICC Act provides for universal jurisdiction – South African authorities can help close the impunity gap by investigating and prosecuting crimes that fall outside the Rome Statute system's net: those occurring in states that are not ICC members, or by nationals of such states, as in the Zimbabwe, Israel-Gaza and Madagascar cases mentioned above.

Although it is true that none of the South African examples covered here were initiated by the NPA or the

police, this is not necessarily an indication of a lack of commitment to international justice on the part of the authorities. The relatively small size of the units tasked with handling these crimes limits practical action, as does their wide mandate which includes many other complex and serious offences. One sign that the South African authorities – at least at the level of senior officials – are committed to the principles of the Rome Statute, is the ongoing efforts to build capacity among the prosecutors and investigators who work on international crimes. Since 2008, the Institute for Security Studies has provided training to the NPA (and more recently also the CATS unit in the police) on international criminal justice, the Rome Statute and the ICC Act. This training has been provided within the context of broader programmes that cover other crimes falling within the mandates of these units as well as technical aspects of international cooperation in criminal matters such as mutual legal assistance and extradition.

Uganda

Uganda is one of the eight African countries that have enacted domestic implementing legislation for the Rome Statute. In terms of Uganda's International Criminal Court Act of 2010, Uganda can investigate and prosecute the core international crimes. As in the case of South Africa's ICC Act, Uganda's legislation also allows for limited universal jurisdiction,⁶⁵ which is indicative of Uganda's commitment to dealing with international crimes beyond its borders. It is also worth noting, as a measure of its support for the international criminal justice project broadly, that Uganda was the first country to refer crimes committed within its borders to the ICC.⁶⁶ The government referred the situation in northern Uganda and investigations were initiated in July 2004.⁶⁷ The ICC has established a field office in Kampala to support its operation in Uganda.

In 2008, further to the Juba Peace Agreement between the Government of Uganda and the Lord's Resistance Army (LRA), the government established a War Crimes Division.⁶⁸ The division, later rebranded as the International Crimes Division (ICD), is a specialised division of the High Court with jurisdiction to try not only cases relating to war crimes, genocide and crimes against humanity, but also other serious transnational crimes including terrorism, human trafficking, piracy and any other international and transnational crime as provided by the Uganda Penal Code Act, the Geneva Conventions Act and any other applicable laws. In this sense, the mandate of the ICD, like that of the specialised units in South Africa, is much broader than just the Rome Statute crimes.

Also like the specialised units in South Africa, the ICD does not have a large staff complement: the division has five judges and a registrar, along with a team of six prosecutors and five police investigators attached to it.

The designation of officers from the judiciary, prosecution and police has nevertheless led to the development of competence and specialty to handle complex international and transnational crime cases while applying international standards. The ICD has also benefited from tailored capacity building offered by various stakeholders.⁶⁹ For example, since March 2011, the Institute for Security Studies has provided the ICD with intensive training workshops on international criminal justice, counter-terrorism and mechanisms for international cooperation. The judges and the registrar of the ICD have also benefitted from exchange programmes or study tours to the ICC and the International Criminal Tribunal for Rwanda (ICTR). The judiciary and various local and international non-governmental organisations have facilitated these different projects aimed at building the capacity of the ICD. Similar training has been provided for prosecutors and selected investigators and magistrates through the office of the Director of Public Prosecutions.

The mandate of Uganda's International Crimes Division is much broader than just the Rome Statute crimes

The ICD began its operations in 2011 with the war crimes case of *Uganda v Thomas Kwoyelo* who is charged under Uganda's Geneva Conventions Act for committing grave breaches against civilians. Thomas Kwoyelo, a former commander of the LRA, faces 65 counts against him of war crimes. However, the matter was referred to the Constitutional Court by Kwoyelo's defence team. The referral relates to the refusal by the Office of the Director of Public Prosecution to pave the way for the Amnesty Commission to grant amnesty to Kwoyelo. Kwoyelo's trial came to an abrupt end on 22 September 2011 when the Constitutional Court ruled that he qualified for amnesty under the country's Amnesty Act of 2000.⁷⁰ In addition to the Kwoyelo case, the ICD has been involved in investigations into crimes committed in northern Uganda and is currently dealing with a matter against a top commander of the Allied Defence Force whose group burnt 80 students to death in 1998.

While Uganda is attempting to address international crimes at the domestic level, the Amnesty Act has proved a great hindrance to prosecution efforts. Part 11 of the Amnesty Act gave a blanket amnesty to all those who renounced the LRA rebellion. According to the head of prosecution at the ICD, Joan Kagezi, many cases were

investigated and presented in court only for the accused persons to seek amnesty and subsequently evade justice.⁷¹ It is worth noting, however, that Part 11 of the Amnesty Act lapsed in 2011 and amnesty certificates can no longer be issued. This then presents important opportunities for Uganda in terms of its future complementarity obligations.

Military courts in South and North Kivu in the DRC have undertaken domestic prosecutions of international crimes and continue to pursue additional cases

As the ICD pursues these opportunities, the challenges encountered thus far in investigating, prosecuting and adjudicating international crimes will need to be confronted.⁷² These include, first, that because the LRA has since migrated out of Uganda, gathering evidence outside the country has proved difficult especially when cooperation from neighbouring states is not forthcoming. Second, the ICD is under-staffed and under-resourced, which makes its work difficult. Third, similar to South Africa's specialised investigation and prosecution units, the ICD has an expansive mandate that is not limited to international crimes and this requires that all staff develop specialised expertise on a wide range of crimes.

Democratic Republic of the Congo (DRC)

Unlike South Africa and Uganda that require a domestic implementation law to criminalise international crimes, the DRC is a monist state. This means that in the DRC, international treaties carry the same weight as constitutional law and can be directly applied.⁷³ The DRC ratified the Rome Statute in March 2002, and theoretically the Rome Statute has been applicable domestically since then. In 2004, the government referred the situation in the eastern DRC to the ICC.⁷⁴ The ICC's Office of the Prosecutor launched investigations and as of October 2012, these have resulted in five arrest warrants being issued related to the conflicts in Ituri⁷⁵ and the provinces of North and South Kivu.⁷⁶ Thus far, the ICC has conducted trials against three of the accused. The first conviction was secured against Thomas Lubanga Dyilo in March 2012 for the recruitment of child soldiers in Ituri.

Regarding efforts by the DRC to investigate and prosecute international crimes domestically, in November 2002, the DRC adopted a new military code – the Military

Penal Code Law 024/2602 – that criminalises war crimes, crimes against humanity and genocide, and provides for their investigation and prosecution. Pursuant to this law, military authorities in the eastern provinces of South and North Kivu have undertaken domestic prosecutions of international crimes and continue to pursue additional cases. Further, in 2006 the government of the DRC passed a national law on sexual violence, which clearly defines rape and other forms of sexual and gender-based violence and provides expedited judicial proceedings and greater protection for victims.

In addition to the military tribunals, mobile gender courts in South Kivu have also conducted prosecutions of international crimes. Set up to prosecute rape and other serious crimes, these courts 'have prosecuted hundreds of mostly direct physical perpetrators of sexual violence'.⁷⁷ Then, on 21 February 2011, Lieutenant Colonel Mutuare Kibibi became the most senior commander in the Congolese army to be found guilty of crimes against humanity, for ordering the mass rape of at least 49 women in the town of Fizi on New Year's Day in 2011. Eight soldiers under his command were also convicted. While other international crimes are committed in the DRC, trials conducted to date have focused primarily on sexual and gender-based violence by armed groups and to a lesser extent by civilians. It is thus important that the prosecutions of other international crimes – where the current law allows – be conducted. Nevertheless, the mobile gender court's work has been described as 'a promising indication of what can be achieved with targeted national support when domestic courts are both able and willing to prosecute very grave crimes'.⁷⁸

The DRC government has demonstrated its commitment to international criminal justice through both cooperation with the ICC and instituting proceedings in its domestic courts. This has not been an easy task, however, and the Open Society Foundation has identified some challenges impeding the DRC from fully realising its complementarity obligations.⁷⁹ First, the DRC has been embroiled in conflict for over a decade and the areas in which international crimes are being committed are largely out of government control. Second, while there have been attempts to prosecute international crimes, these have been done in the absence of a domestic implementing legislation which provides a procedure to enable domestic prosecutions within the civilian justice system. Third, amongst other challenges facing the criminal justice system, there is a lack of qualified investigators, lawyers and judges with the requisite knowledge of international criminal law.

Despite these challenges, the fact remains that the DRC's efforts manifest a working example of complementarity on the continent through the various domestic prosecutions completed or underway.⁸⁰

Drawing lessons

The following lessons, many of which cover similar ground to the lessons from civil society initiatives, can be drawn from the three examples of government action outlined here.

- As noted above, having the necessary domestic laws in place is central to ICC complementarity efforts, domestic prosecutions and broader justice processes aimed at closing the impunity gap. In addition, domestic legislation can usefully assist investigators, prosecutors and other senior officials to counter negative positions taken by their political principals on international justice. For example, when difficult choices have to be made between a state's domestic legal obligations on the one hand and its foreign policy imperatives on the other, the former often wins out (as illustrated in the al-Bashir–Zuma inauguration case covered above).
- In order for ICC complementarity as well as action in respect of non-states parties to have the best chance of success, efforts must be made to bridge the gap between civil society organisations (CSOs) working in the field, and the investigators and prosecutors who tackle these crimes. In South Africa, prosecutors and investigators on the one hand and civil society actors on the other working on cases such as those pertaining to Operation Cast Lead and the Zimbabwe torture docket, have over time developed respect and tolerance for one another. The nature of these cases means that civil society organisations can often provide a much-needed bridge between victims and the state in the search for justice. Given the capacity limitations facing many police and justice departments, the role that CSOs can play as intermediaries should be seen as a potential asset rather than an obstacle. For their part, CSOs that become involved in these cases need to be aware of both the applicable domestic and international legislation and the mandates and capacity of the government agencies they approach with information.
- As noted in the lessons from civil society action, training and the development of specialist capacity among the government officials tasked with responding to international crimes is key. Such specialisation need not, however, be an expensive and complicated institution-building exercise aimed at creating a large unit to deal with international crimes and ICC complementarity only. The reality is that few African states have the capacity and budgets for this approach. Instead a more flexible approach could be considered (the Ugandan example is worth noting in this regard) that allows for a group of investigators, prosecutors and judges with experience in complex cases including organised and transnational crime, as well as mutual legal assistance (MLA) and extradition, to be selected and trained in

order to initiate international crime cases or respond to requests for cooperation should they come their way (from the ICC, other states or civil society organisations).

- The case of the military tribunals in the DRC highlights the challenges and opportunities for home-grown initiatives aimed at responding to international crimes. Whether it is a DRC military court or traditional justice remedies like Rwanda's Gacaca courts which tried thousands of suspects compared to the limited number tried by the International Criminal Tribunal for Rwanda, further thinking is needed about how to accommodate domestic justice initiatives within the broader complementarity universe. This raises real questions about norms and standards. It is necessary to recognise that in certain (or perhaps even many) cases, an unrealistic insistence that domestic justice systems must meet the highest international standards risks making perfection the enemy of the good. At the same time, certain basic principles need always to be maintained if fairness and justice in such trials are to be maintained. While getting this balance right is a delicate exercise, the reality is that in Africa at least, most states do not have the facilities or budgets to run international criminal trials along the lines of the special UN tribunals or the ICC. Just one example to consider is that only one African country has an established witness protection programme (South Africa), with a second (Kenya) well on the way to setting one up. Witness protection, outreach, reparations and victim assistance are beyond the scope of many African justice systems' capacity and resources. If complementarity is about promoting domestic action, then this limitation must be confronted. Development partners that are serious about complementarity ought to appreciate the need for significant funding, training and capacitation to be directed in support of such domestic efforts.
- It may perhaps be a function of complementarity's youth (the ICC statute has only been operative for 10 years) that to date few international criminal cases have been pursued in national courts in Africa. In the examples above, while Uganda and DRC have tried suspects for international crimes, only the DRC has completed any cases. From informal discussions with prosecutors and investigators, one reason for the limited number of cases is that they are perceived to be highly complicated and technically quite different from other cases that officials work on. As a result, it takes time and effort to sensitise officials about the relevance of these cases before positive action is taken. Moreover, particularly where universal jurisdiction is involved in asserting a case against a foreign national for crimes committed abroad, sensitivities about foreign relations

and a perceived lack of resources and expertise to collect evidence and meaningfully investigate the offences concerned in the foreign state, are cited as reasons for a reluctance to open investigations. This reticence is not entirely unexpected, and in any event not out of kilter with experience within the international tribunals or comparative jurisdictions. The fact is: international criminal justice cases are invariably novel and complex, often implicate political considerations, and take time. As a result, it would be unrealistic to expect many such cases to be dealt with in national courts. Nevertheless, it is clear that a failure on the part of government to open investigations is not itself beyond scrutiny. As the Zimbabwe torture docket case illustrates, and the example of Kenyan civil society action in respect of al-Bashir confirms, domestic courts are being approached to challenge government inaction. This itself is a new level of complementarity – of civil society requesting, and one branch of government (the judiciary) ordering, that domestic action be taken to close the impunity gap.

CONCLUSION

If there is one thing that can confidently be predicted it is that the larger concerns expressed by African states around the work of the ICC will define the court's relationship with the AU in the years to come. What is increasingly clear is that the ICC has been placed at the heart of a long-standing debate about the skewed power dynamics and uneven landscape of international justice. The Kenya scenario combined with the AU's defensive position on al-Bashir are illustrative of the charged political nature of this debate. The push by powerful African states to expand the jurisdiction of the African Court to cover international crimes symbolises the attempts on the continent to think about ways of leveling the unevenness of the international criminal justice landscape.

Ultimately therefore, a vital ingredient (in Africa and elsewhere) for the success of international criminal justice will be the ability of governments to incorporate and operationalise their commitment to international criminal justice. It is here that exciting work is likely to be done by civil society organisations and local lawyers (relying on international and comparative precedent) in moving international criminal justice forward. With a more progressive understanding of complementarity, both civil society and domestic criminal justice systems have a vital role to play in these efforts.

Of course, one of the most obvious contributions that may be made by civil society is to remind governments and regional bodies (including the AU) that the ICC is not the preserve of states or powerful political leaders – to be

used or ignored as befits political will (or the lack thereof). But civil society's message would find more traction if it also pointed out that communities and individuals have an important stake both in the ICC and in closing the impunity gap in those cases when the ICC cannot or will not act – and that these communities and individuals are ultimately the most important stakeholders in a project aimed at ensuring that impunity does not follow the commission of serious international crimes.

There is good reason to be skeptical of the AU's decision to expand the jurisdiction of the African Court of Justice and Human Rights. Moreover, some of the domestic steps taken by African states to cooperate with the ICC (in respect of Sudan, for instance) or to domestically investigate ICC crimes committed in proximate states (like Zimbabwe) have had to be cajoled out of the authorities by pressure from local civil society groups. Nevertheless, the fact remains that international criminal justice is taking shape on the continent and many governments are devoting resources and attention to its implementation.

In this regard a number of heartening African developments have been discussed in this paper that flow from a proactive form of complementarity. Aside from the examples in Uganda and the DRC to initiate prosecutions of those involved in the commission of international crimes within the states' territories, some African states have chosen to act in support of the ICC by complementing its attempts to arrest al-Bashir for crimes he has allegedly committed in Sudan. It will ultimately fall to African states to ensure a positive outcome in relation to the UN Security Council's decision to refer the Sudan situation to the ICC. With the example set by South Africa, Botswana, and most recently Malawi, at the very least the continent has been made a slightly smaller place for al-Bashir.

Moreover, African states – with reliance on their ICC domestic legislation – have acted, or have been asked to act by victims and civil society groups, to investigate crimes committed by nationals of, or in the territory of, non-states parties. Through such interventions the potential exists for a 'gap-closing' form of complementary domestic action. This refers to processes in which African states parties pursue the common goal of reducing impunity for grave crimes in circumstances where the ICC has been unable to do so because it lacks jurisdiction, or because the international politics within the UN Security Council have resulted in cases not being sent to the ICC.

The ICC is one component of a regime – a network of states that have undertaken to advance international criminal justice alongside or as a complement to the ICC, acting, if you will, as domestic international criminal courts in respect of ICC crimes. In this respect, Anne-Marie Slaughter 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.⁸¹

This paper has explored the unfolding story of a proactive, contextual and positive complementarity in Africa – and the risks of an undermining form of negative complementarity. The examples demonstrate both the promises and difficulties of international criminal justice as exemplified in the ICC's complementarity regime. Paragraph 6 of the preamble to the Rome Statute declares that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

The very principle of complementarity makes it clear that by domestic investigators and prosecutors acting against international criminals, national courts ensure the international rule of law through a mutually reinforcing and complementary international system of justice.⁸² As Professor Antonio Cassese pointed out in 2003, there was a practical basis at Rome for this principle:

It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused.⁸³

Thus, rather than perceiving the ICC as an instrument of global or universal (in)justice disrespectful of particularly African states' sovereignty, the very premise of complementarity ensures appropriate respect for states by demanding that the ICC defers to their competence and right to investigate international crimes. As Slaughter says, the choice is for a nation to try its own or they will be tried in The Hague. Instead of weakening states and undermining sovereignty, properly understood the ICC regime does quite the opposite: it 'strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle'.⁸⁴

What is more, there is an essential supporting role for states to play in pursuing justice in respect of non-states parties. That role, as demonstrated in this paper, is acutely relevant where the ICC is unable to exercise jurisdiction. It is at those moments that national justice systems become the courts of last resort – the means by which to close the gaps left by the UN Security Council or the ICC to deliver international criminal justice in pursuit of a common goal.

NOTES

1. W Schabas, *An Introduction to the International Criminal Court*, 2004, 1; see also CS Igwe, The ICC's favourite customer: Africa and international criminal law, *CILSA* 40, 2008, 295.
2. See CS Igwe (above, n 1) at 294. However, other situations were under preliminary examination by the Office of Prosecutor in Afghanistan, Colombia, Chad, Georgia, Guinea; in this regard see M Ssenyonjo, The International Criminal Court arrest warrant decision for President Al Bashir of Sudan, *International & Comparative Law Quarterly* 59, 2010, 205.
3. M du Plessis, Recent cases and developments: South Africa and the International Criminal Court, *SACJ* 3, 2009, 442.
4. N Fritz, Black-white debate does no justice to a nuanced case, *Business Day*, 13 August 2008.
5. See Ottilia Maunganidze and Antoinette Louw, Mali: Implications of Another African Case As Mali Self-Refers to the ICC, *AllAfrica.com*, 24 July 2012.
6. Fatou Bensouda, ISS Seminar: Setting the record straight: the ICC's new Prosecutor responds to African concerns, Pretoria, 10 October 2012. See <http://www.issafrica.org/eventitem.php?EID=864>.
7. See <http://www.guardian.co.uk/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq?newsfeed=true>.
8. See Human Rights Watch, ICC: Bashir Warrant Is Warning to Abusive Leaders, 4 March 2009, available at <http://www.hrw.org/en/news/2009/03/04/icc-bashir-warrant-warning-abusive-leaders>; also see Amnesty International, ICC Issues Arrest Warrant for Sudanese President Al Bashir, 4 March 2009, available at: <http://www.amnesty.org/es/node/9632>.
9. M du Plessis (above, n 3) at 443. Article 16 empowers the UN Security Council to defer an investigation or prosecution for one year if it is necessary for the maintenance of international peace and security under Chapter VII of the UN Charter. The UN Security Council would need to make a determination that the continued involvement of the ICC is a greater threat to international peace and security than suspending the ICC's work.
10. *Ibid* at 443.
11. D Tladi, The African Union and the International Criminal Court: The battle for the soul of international law, *SAYIL* 34, 2009, 57.
12. Kenya ratified the Rome Statute on 15 March 2005 becoming a State Party on 1 June 2005.
13. With apologies to Dire Tladi. See Tladi, The African Union and the International Criminal Court: The battle for the soul of international law, *SAYIL* 34, 2009, 57.
14. See Kenya's *International Crimes Act*, 2008 which came into operation on 1 January 2009. The others are: South Africa, Uganda, Senegal, Burkina Faso, Comoros, Mauritius and Central African Republic.
15. See M Du Plessis, The International Criminal Court goes to Kenya (but keeps its head down on Gaza), in *South African Journal of Criminal Justice* 2, 2010, 256.
16. See <http://www.bbc.co.uk/news/world-africa-12066667>.
17. ICC, Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), Office of the Prosecutor, 9 December 2010.
18. See M du Plessis & C Gevers, Darfur Goes to the International Criminal Court, *African Security Review* 14(2), 2005.

19. See generally William Schabas, *An Introduction to the International Criminal Court*, 2001; see also Ben Brandon & Max du Plessis, (eds), *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States*, 2005.
20. The extent of cooperation required of states parties 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': article 54(1)(a) of the Rome Statute.
21. See article 89 – although article 97 provides for consultation where there are certain practical difficulties.
22. Article 17(1) of the Rome Statute.
23. Article 18(1) of the Rome Statute.
24. Article 15 of the Rome Statute.
25. Article 18(2) of the Rome Statute.
26. Article 17(2)(a) of the Rome Statute.
27. See Office of the Prosecutor, Report on Prosecutorial Strategy, para 2. See also Office of the Prosecutor, Report on the activities performed during the first three years (June 2003–June 2006), para 58. See Carsten Stahn, Complementarity: a Tale of Two Notions, *Criminal Law Forum* 19, 2008, 87–113.
28. See Carsten Stahn, *supra*, at 101.
29. See William Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice, University of Pennsylvania Law School, Public Law and Legal Theory Research Paper No. 07-08, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=964201#PaperDownload at 19; and see also William Burke-White, Implementing a Policy of Positive Complementarity in the Rome System of Justice, *Criminal Law Forum* 18, 2007.
30. This is made clear by the findings of the Independent Fact Finding Committee on Gaza to the League of Arab States, Report of the Independent Fact Finding Committee on Gaza: No Safe Place, 30 April 2009, as well as the Goldstone Report of 15 September 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>.
31. See D Deya, Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes, *International Criminal Justice*, *Openspace*, February 2012, available at <http://www.osisa.org/openspace/regional/african-court-worth-wait>.
32. See further Institute for Security Studies, African Court Roundtable Report, 24 April 2012, on file with author, hereafter 'ISS Roundtable Report'.
33. See more fully, M du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, ISS Paper 235 available at <http://www.iss.co.za/pgcontent.php?UID=31600>, hereafter Du Plessis, 'Implications'.
34. See D Deya, Worth the Wait (above n 31).
35. See Du Plessis, 'Implications', 9 (above n 33).
36. See <http://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties-internat>.
37. See Leila Sadat, A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity, 9, available at <http://law.wustl.edu/harris/CAH/docs/CompHistoryFinal01-06-11.pdf>.
38. According to Opiyo: 'Kenya has been using the AU as a platform to have the trials against four of its citizens postponed or referred to an African court. So far African leaders are trying to make sure that the African Court of Justice and Human Rights has the capacity to try international crimes, which hitherto have been the domain of International Criminal Court'. See Peter Opiyo, Why Kenya-AU plot against ICC may stall, 16 July 2012, available at <http://www.standardmedia.co.ke/?articleID=2000062030&pageNo=1>.
39. Something which never happened – probably on account of the worsening crisis and its apogee in the killing of Gaddafi.
40. See in greater detail Max du Plessis, *The International Criminal Court and its Work in Africa: Confronting the Myths*, ISS Paper No 173, 2008 available at <http://www.issafrica.org/pgcontent.php?UID=2780>.
41. Prominent South Africans who endorsed the statement include: The Most Reverend Desmond Mpilo Tutu, former Chairperson of the TRC, Richard Goldstone, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia and Rwanda; former judge of the Constitutional Court of South Africa, Advocate Dumisa Buhle Ntsebeza SC, former Commissioner on the International Commission of Inquiry on Darfur appointed pursuant to UN Resolution 1564, Professor Kader Asmal, Former Minister and Honorary Professor UCT and UWC, Professor Hugh Corder, Professor of Public law, UCT, Yasmin Sooka, former TRC Commissioner, Professor John Dugard, Centre for Human Rights, Pretoria University, Jody Kollapen, Chairperson of the South African Human Rights Commission, and Professor Karthy Govender, Commissioner of the South African Human Rights Commission and Professor of Law, University of KwaZulu Natal. For the statement see <http://www.issafrica.org/pgcontent.php?UID=18893>.
42. General Council of the Bar Circular No 111/09, 15 July 2009.
43. For the statement, released on 30 July 2009, see <http://www.issafrica.org/pgcontent.php?UID=18893>. Both these initiatives subsequently contributed to the formation of an African network of civil society organisations concerned with ending impunity that works actively across the continent on international justice issues.
44. See <http://www.dfa.gov.za/docs/speeches/2009/ntsa0731.html>.
45. See a discussion of the judgment in *South African Litigation Centre and Others v The National Director of Public Prosecutions and Others* (as yet unreported) by Chris Gevers available at: <http://warandlaw.blogspot.com/2012/05/landmark-zimbabwe-torture-docket.html>.
46. Page 56 of the judgment.
47. Page 87 of the judgment.
48. See Dan Ephron, ICC prosecutor may charge Israeli with War Crimes, *Newsweek*, 21 September 2009, <http://www.newsweek.com/blogs/wealth-of-nations/2009/09/21/icc-prosecutor-may-charge-israeli-with-war-crimes.html>.
49. See Haaretz, Israeli soldiers from South Africa feel heat of prosecution drive in old country, 29 November 2009, available at <http://www.haaretz.com/israeli-soldiers-from-south-africa-feel-heat-of-prosecution-drive-in-old-country-1.374>.
50. See <http://www.google.com/hostednews/afp/article/ALeqM5jLJpwtSeHn3QmYv-6aZsZ6aVW-HQ?docId=CN.G.446243936066d013c9a0d21b85a9f64b.3a1>.
51. BBC news, Court worry at Omar al-Bashir's Kenya trip, 28 August 2010, available at <http://www.bbc.co.uk/news/world-africa-11117662>.
52. For the press release and Pre-Trial Chamber I letter, see <http://www.icc-cpi.int/menus/icc/press%20and%20media>.

- 20media/press%20releases/press%20releases%20%282010%29/pre_trial%20chamber%20i%20requests%20observations%20from%20kenya%20on%20the%20enforcement%20of%20warrants%20of%20arrest%20agains.
53. See ICC press statement at: <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20%282010%29/pr591>.
 54. For copies of the letters and a related press release on the issue, see <http://www.issafrica.org/pgcontent.php?UID=18893>.
 55. See <http://www.sudantribune.com/spip.php?article36933>.
 56. After filing the appeal, the Attorney General also sought interim orders temporarily suspending the arrest warrant for al-Bashir, although this application was turned down by the Court of Appeal. See <http://allafrica.com/stories/201202171165.html>.
 57. The eight countries that have passed implementation legislation are Senegal, Burkina Faso, Kenya, Uganda, South Africa, The Comoros, Mauritius and the Central African Republic. Some countries do not have implementing legislation but have incorporated some (or all of the Rome Statute crimes) into their penal codes e.g. the DRC, Malawi and Lesotho. According to 'The implementation of the Rome Statute of the ICC in Africa countries', available at: <http://www.issafrica.org/pgcontent.php?UID=30362> and the Coalition for the International Criminal Court available at <http://www.iccnw.org/?mod=region&idureg=1>, estimates are that 16 of the 33 African states parties have drafts of domestic ICC legislation.
 58. The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The ICC Act came into force on 16 August 2002.
 59. Section 5(2) of the ICC Act.
 60. Section 3 of the ICC Act.
 61. Section 4(3)(c) of the ICC Act.
 62. See <http://www.npa.gov.za/UploadedFiles/AboutPCLUsignedoff.doc>.
 63. The CATS unit was established in 2005 and predates the establishment of DPCL, but has since been subsumed into the DPCL framework.
 64. See below; *SALC and another v NDPP and others*, 2012.
 65. See section 18(d) of Uganda's International Criminal Court Act 2010.
 66. ICC Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44. See http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB.
 67. ICC Press Release, Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, ICC-OTP-20040729-65. See <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda?lan=en-GB>; *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05.
 68. The ICD is a special division established under the 1995 Constitution of Uganda.
 69. Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division*, New York: HRW, 2012, 26.
 70. After the Constitutional Court ruling, the ICD deferred Kwoyelo's release to the DPP of Uganda and the Amnesty Commission. Since then, a legal battle has ensued relating to the process of issuing Kwoyelo with an amnesty certificate. Kwoyelo remains in prison and has still not received his amnesty certificate from the authorities. See <http://www.ucicc.org/index.php/icc/about-kwoyelo>; and <http://www.acholimes.com/index.php/perspectives/opinion/8-acholi-news/947-col-kwoyelo-asks-african-court-to-intervene-in-his-case-over-illegal-detention>.
 71. J Kagezi, Practical aspects of prosecuting and adjudicating international and transnational crimes – The East African perspective, presentation at the 7th Annual Conference of the Africa Prosecutors' Association, Windhoek, Namibia, 9 October 2012.
 72. Ibid.
 73. Articles 153 and 215 of the Congolese Constitution provide that civilian and military courts may apply ratified treaties, even in the absence of implementing legislation, so long as they are 'consistent with law and custom'.
 74. ICC Press Release, Prosecutor receives referral of the situation in the Democratic Republic of Congo, ICC-OTP-20040419-50. See <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB>.
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ABOUT THIS PAPER

The position taken by the African Union towards the ICC creates the impression that African states are resistant to international criminal justice. This paper argues that the reality is quite different. The continent provides many examples of international justice in practice. A review of selected domestic and regional efforts suggests that a richer understanding of the Rome Statute's 'complementarity' scheme is developing – one involving states, regional organisations and civil society working to close the impunity gap. Such actions are giving effect to the notion that while the ICC can provide justice through a few highly publicised trials, for justice to be brought home in any meaningful way, domestic action is essential.

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Published by the Institute for Security Studies

www.issafrica.org

Design and printing by COMPRESS.dsl

www.compressdsl.com



ISS Paper No 241

ISSN 1026-0404



The publication of this paper was made possible with the support of the Governments of the Netherlands and Norway.



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