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Retreat or Retrenchment? An Analysis of the International Criminal Court's Failure to Prosecute Presidents

Kirsten Ainley

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Introduction

The establishment of the International Criminal Court (ICC) in 2002 was seen by many as game-changing in its challenge to power politics and state sovereignty. Human Rights Watch (2002) called the ICC: 'potentially the most important human rights institution created in 50 years. It will be the court where the Saddams, Pol Pots and Pinochets of the future are held to account'. The Court was intended to end impunity once and for all through its rejection of the doctrine of Head of State Immunity and to have almost universal jurisdiction through the powers afforded to the United Nations Security Council (UNSC) to refer situations which the Court did not already have treaty-based jurisdiction over. Through the ICC, human rights were to be protected more aggressively and more consistently than ever before. However, the Court is accused of having failed in its first decade of operation to overcome the challenges of operating in an environment of great power politics, and critics of the Court are becoming increasingly vociferous. Rather than upholding human rights for all, the Court has only prosecuted Africans. It has proved toothless in the face of some of the most appalling human rights violations in recent times – in Sri Lanka, Syria, Yemen and so on. And there is no evidence that the ICC is acting as a general deterrent to mass human rights abuses.¹ The United Nations Secretary General (Ban 2016, citing Melander 2015) has acknowledged that 'in 2014 the number of deaths caused by armed conflict and atrocity crimes exceeded 100,000 — its highest level since 1994 — driven in large measure by the increased targeting of civilians'. The situation at the ICC reached crisis point with the withdrawal from the Rome Statute of South Africa, Burundi and the Gambia in October 2016, in opposition to the attempts by the Office of the Prosecutor (OTP) to prosecute heads of state in Sudan and Kenya. The Court is facing a sovereignty backlash among some sections of the Global South and many of the states which it relied upon to underwrite its authority have failed to support the Court ideologically or materially in its most challenging situations.

This chapter examines the Court's attempts to prosecute sitting Heads of States, and their repercussions, to establish the extent to which the ICC is failing or dysfunctional. In examining the cases, the chapter highlights aspects of ICC process which, perhaps

¹ There is some evidence emerging that the ICC might act as a deterrent in specific situations. Jo and Simmons (2016) show a significant reduction in civilian killing by government actors (particularly governments which rely heavily on overseas aid) when states implement statutes consistent with Rome Statute law into their domestic criminal codes. See also Hillebrecht 2016 on the ICC and Kim and Sikkink (2010) on the deterrent effect upon states of human rights prosecutions more broadly.

unexpectedly, give reasons for optimism for the Court's ability to uphold human rights in future, as well as discussing the challenges it continues to face. I argue that, while the OTP would clearly have preferred to be able to move forward in its prosecutions of Presidents Bashir and Kenyatta, its failure to do so demonstrates the ways which the Court is maturing. It is turning into a flexible and pragmatic institution whose key player, the Prosecutor, is developing an understanding of how and when to exercise the legal and political powers of the Court to greatest effect. This said, the power politics of international justice remain a substantial threat to human rights protections, and the Court may be forced to tolerate a devil's bargain on immunity for sitting Heads of State to avoid losing influential States Parties. However, the stalling of the Bashir and Kenyatta cases should be seen more as failures of States Parties to the Rome Statute to stand behind their own human rights commitments than failures of the Court itself. This conclusion is far from positive – the failures to prosecute in these cases may have far-reaching repercussions in undermining any deterrent effect that the ICC can generate, particularly at the highest levels of government – but it does at least identify where efforts to strengthen the system should focus.

Darfur

The situation in Darfur was the first to be referred to the ICC by the Security Council under its Chapter VII powers.² The referral, in 2005, granted the ICC jurisdiction over Sudan, despite Sudan not being a State Party to the Rome Statute. The referral followed reports of genocidal attacks on the civilian population in Darfur, orchestrated by a Janjaweed militia working alongside or under the control of the Sudanese government, and allegedly resulting in hundreds of thousands of deaths prior to the referral.

The OTP investigated the situation in Sudan enthusiastically, with some seeing the Council's referral as validation of the Court. Warrants of arrest were issued in May 2007 for Sudanese humanitarian affairs minister Ahmad Harun and Janjaweed militia leader Ali Kushayb, along with summons to appear for three Darfuri rebel commanders. Two years later the Pre-Trial Chamber (PTC) authorised the Prosecutor's request to issue an arrest warrant for Sudanese President Omar al-Bashir, on charges of crimes against humanity and war crimes in Darfur, and in July 2010 the PTC issued a separate arrest warrant for Bashir on charges of genocide.

The situation in Sudan should have progressed to trial. It was referred to the ICC by the most powerful body in world politics – the UNSC – and the gravity of the crimes (if not the details of their commission) is virtually undisputed. The civil war has now killed hundreds of thousands (300,000 deaths were estimated by the UN in 2008, the last time reliable figures could be gathered) and displaced more than three million (Internal Displacement Monitoring Centre 2017). The conflict is still underway, with credible reports of yet more recent war crimes (Amnesty International 2016). Yet none of the arrest warrants have been executed, and Bashir has successfully repositioned himself from international pariah to controversial cause celebré of the African Union (AU). And on 12th Dec 2014 the Prosecutor

² Bosco (2014) gives a detailed account of why the UNSC made this referral, despite a majority of its Permanent Members not being State Parties of the ICC.

announced that, despite the increased brutality of crimes and the deteriorating conditions in Darfur, she was suspending the entire investigation into the situation:

‘Faced with an environment where my Office’s limited resources for investigations are already overstretched, and given this Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future.’

This decision has been applauded by the AU, which has called for the UNSC to withdraw its referral entirely (African Union 2015, 3). Rather than running a flagship prosecution against an allegedly genocidal President, the OTP has ceased investing any resources in the case, to the great disappointment of victims’ groups and human rights campaigners.

Kenya

Accusations of fraud following the 2007-08 elections in Kenya led to widespread and systematic violence – around 1300 deaths, widespread sexual violence and the displacement of hundreds of thousands (Human Rights Watch 2008; Waki Commission 2008) – in the worst political crisis in the country since its independence. The violence was brought to an end after an emergency mediation effort was established by the AU, and the AU, along with a range of other states, called for prosecutions to end the impunity long enjoyed by politicians responsible for political violence in Kenya. A Commission of Inquiry into Post-Election Violence was established, and recommended that a Kenyan Special Tribunal be created to try those senior political figures accused of organising the violence. The Commission noted that if the Kenyan government failed to establish the tribunal, the case should be passed to the ICC. The Kenyan Parliament twice voted down a bill to establish a tribunal and the evidence gathered by the Commission was subsequently passed to the ICC Prosecutor on 9 July 2009. On 5 November 2009, the Prosecutor announced he intended to seek authorisation from the Pre-Trial Chamber to proceed with the first OTP investigation launched under its *proprio motu* powers. The Chamber authorised the investigation and, in January 2012, authorised the OTP to move to trial on charges of crimes against humanity in two cases against four individuals (Francis Muthaura and Uhuru Kenyatta on the one hand and William Ruto and Joshua Sang on the other).

Given the scale of the violence in Kenya and the evidence gathered by the Commission of Inquiry, one would have expected linear progress to trials. In fact, the Kenyan cases faced crisis after crisis. Two of the accused – Kenyatta and Ruto – teamed up in the Jubilee Alliance (dubbed the ‘Coalition of the Accused’ by critics) and won the Presidency and Vice-Presidency respectively in the 2012 Kenyan elections. This made Kenyatta the second sitting head of state to be accused of war crimes at the ICC. The case against Francis Muthaura collapsed after evidence from a key witness turned out to be compromised. More dramatically still, on 5th December 2014 the Prosecutor issued a statement withdrawing charges against Kenyatta, stating that ‘I [do] not consider the available evidence to be

sufficient to prove Mr. Kenyatta's alleged criminal responsibility beyond reasonable doubt as is required at trial' (Bensouda 2014a). The Prosecutor blamed this failure to procure evidence on the Kenyan government's failure to comply with the OTP's requests for financial and phone records, the death of (allegedly seven) key witnesses and the withdrawal of other witnesses due to their fear of testifying or claims to have lied in earlier statements to the OTP. Thus, the centrepiece case in the OTP's first *proprio motu* investigation turned into a farce. A year and a half later, the other major case – against Ruto and Sang – also collapsed. On April 5th 2016, the Trial Chamber, in a 2-1 majority decision, terminated the case and vacated the charges against the accused, as they ruled that the evidence against the two was weak and the prosecution's case had broken down.³

In the remainder of the chapter I examine what these failures to prosecute tell us about the Court more broadly. First, I analyse whether the cases are examples of institutional dysfunction, looking at whether material or ideational features of the ICC itself, or the environment it operates within, might satisfactorily explain the Court's actions. Second, I compare these explanations to an alternative view: that the decisions made to suspend or withdraw cases are signs that the Court (in particular the OTP) is moving towards institutional maturity, showing an increasing ability to use its place in the international system to bolster its efficiency and legitimacy (and through these, longevity) and to achieve its institutional objectives.

Barnett and Finnemore (1999) suggest a useful framework for analysing institutional dysfunction, focused on four possible determinants of institutional behaviour:

- 1) material features of the institution itself (for instance processes of internal bargaining or turf wars within the institution);
- 2) material features of the environment of the institution (for instance the preferences of powerful states);
- 3) ideational features of the institution itself (in particular pathologies brought about by the bureaucratic nature of the institution);
- 4) ideational features of the environment of the institution (for instance a quest for legitimacy leading to a failure to behave efficiently, or a clash of contradictory principles in the environment leading to contradictory institutional behaviour).

Instead of discussing each possible determinant, I pick out those features of the Court or its environment likely to be most powerful in explaining its behaviour.⁴ In each case this turns out to be the material external environment, though I also consider other possible determinants towards the end of the sections.

³ The ruling of a mistrial rather than a positive no-case-to-answer decision leaves the door open to future prosecution if new evidence comes to light, though this is very unlikely (Kersten 2016a).

⁴ Barnett and Finnemore use this framework to analyse instances already determined to be examples of institutional dysfunction. I am using it rather differently – to try to ascertain if the OTP's actions are in fact examples of institutional dysfunction. By using Barnett and Finnemore's work I am assuming that the Court has power independent of the states that created it, via its legal authority. The analysis in the chapter bears out this assumption – the Court's behaviour cannot be persuasively explained simply by reference to state preferences.

The Darfur Situation as ICC Institutional Dysfunction

The suspension of the investigation in Darfur looks to be a severe embarrassment for the Court. It has shown itself, it seems, in this and the Kenya cases, to be incapable of ensuring accountability at the highest levels of government. Bashir has revelled in what he perceives to be his victory: “They wanted us to kneel before the International Criminal Court but the ICC raised its hands and admitted that it had failed ... The Sudanese people have defeated the ICC and have refused to hand over any Sudanese to the colonialist courts” (Abdelaziz 2014).

This triumphalism was entirely predictable given the history of Sudanese non-cooperation with the ICC subsequent to the Harun and Kushayb arrest warrants being issued. So why did the Prosecutor make the decision to suspend investigations? Is this a case of institutional dysfunction?

Material features of the environment of the Court suggest dysfunction. The Court is fairly severely constrained by state interests in the Darfur case as it cannot rely on the cooperation of Sudan. Sudan is not a State Party to the Rome Statute, and opposed the UNSC referral. Experience from previous international and hybrid criminal courts and tribunals demonstrates the dependence of these courts for their success on the material support of states in the form of security, economic inducements to cooperation, the enforcement of arrest warrants and so on. Without the cooperation of Sudan, the ICC relies heavily on the support of other states to enable it to do its work. As Barnett and Finnemore (1999, 72) explain, international organisations (IOs) ‘do not have the luxury of choosing the optimal policy but rather are frequently forced to choose between the bad and the awful because more desirable policies are denied to them by states who do not agree among themselves and/or do not wish to see the IO fulfil its mandate in some particular instance’. These dynamics are clearly visible here, and the Prosecutor made plain the need for UNSC states to support the Court in her statement announcing the hibernation of investigations:

‘Not only does the situation in Darfur continue to deteriorate, the brutality with which crimes are being committed has become more pronounced. Women and girls continue to bear the brunt of sustained attacks on innocent civilians. But this Council is yet to be spurred into action. Victims of rapes are asking themselves how many more women should be brutally attacked for this Council to appreciate the magnitude of their plight ... In the almost ten years that my Office has been reporting to this Council, there has never been a strategic recommendation provided to my Office, neither have there been any discussions resulting in concrete solutions for the problems we face in the Darfur situation. We find ourselves in a stalemate that can only embolden perpetrators to continue their brutality ... What is needed is a dramatic shift in this Council’s approach to arresting Darfur suspects’ (Bensouda 2014b).

Yet this is not quite the straightforward example of dysfunction it may at first seem. The Prosecutor has risked enraging states rather than persuading them to assist. She has moved the OTP from passive recipient of (very) occasional UNSC assistance, to public denouncer of

the lack of UNSC commitment to its own referral. The implications of this move will be discussed in the section on institutional maturity below.

In addition to Sudan and the UNSC member states, there is another group of states who have a vested interest in the Darfur (and Kenya) investigations, and who have taken an increasingly combative stance to the ICC: the African Union. Of 54 African States, 34 are State Parties to the Rome Statute, most of them sub-Saharan, making the African grouping the largest regional grouping of State Parties. African states were central in negotiating the Rome Statute and were particularly enthusiastic about the inclusion of the crime of aggression in the jurisdiction of the Court, given the experience of most African states of military or political domination by more powerful states. The Court was imagined as an institution that could be used by weaker states to hold stronger states to account (Bekou 2014, 88; Ainley 2011). Yet the experience of sub-Saharan African states of the ICC so far is suggesting to them that the Court is just one more institution used by states with structural power to impose that power over others. Of the 10 investigations currently being undertaken by the Court, 9 are in Africa, and 8 are sub-Saharan: Sudan, the DRC, Uganda, the Central African Republic, Kenya, Côte d'Ivoire and Mali. Libya is the North African state under investigation, and Georgia, where an investigation was opened in January 2016, is the only non-African situation under investigation. Yet there are various other conflicts in which evidence suggests the commission of Rome Statute crimes, and which should therefore surely merit ICC attention. The UNSC has failed to give the Court jurisdiction over some of the most serious crimes that look to have taken place in the last decade in places such as Syria, Sri Lanka, Iraq and North Korea, while focusing on crimes committed in Africa.

African states are concerned not just about the failure of the Court to investigate crimes outside their continent, but also about the level of power they perceive European ex-colonial states to hold over the Court via funding. The biggest contributors to the ICC are EU states, specifically Germany, the UK, Italy, France and Spain, with EU states paying more than half of the ICC's budget (ICC Assembly of States Parties 2016). There is no direct evidence to suggest that providing funding to the Court buys European states influence over where investigations are opened, but it is not surprising that African states balk at the power the Europeans seem to have here. After all, 'Europe's support for the ICC dovetails neatly with the EU's apparent sense of superiority and its self-appointed mission to help Africans achieve peace and human rights, not to mention its other forms of interventionism' (Liss 2013). Finally, African states note that, outside Europe, very few powerful states are subject to the jurisdiction of the court. The US, China, Russia and India are all yet to accede to the Rome Statute system.

Never-the-less, until the ICC began seeking to prosecute sitting Presidents of African states, it had broad support from African governments. Most requests for cooperation were complied with, and states used the Court to further their interests (for instance by referring their own cases to the Court to attempt to control rebel activity on their territories). The breakdown in relations between African states and the ICC started when the ICC issued arrest warrants for Bashir, and can be seen in the AU response to these warrants.

In July 2009, the AU passed a decision forbidding its Member States from cooperating with the ICC over Bashir and later reminded its Member States of the ability of the AU to impose

sanctions on members who did not comply.⁵ The AU rejects the UNSC's power, via its referral of a non-State party to the ICC, to end the immunity for sitting heads of state found in customary international law. AU states have complied with this decision with uncomfortable fervour. Both ICC State Parties (including Chad, Djibouti, Kenya, Nigeria and South Africa) and Non-State Parties (including Algeria, Egypt, Ethiopia and Libya) have failed to arrest Bashir when he visited their territories (Bashir-Watch 2017). Not every state has complied – Malawi (which reversed its previous toleration of Bashir) and Botswana are notable exceptions who have refused Bashir entry or threatened him with arrest – but most have done so. The likelihood of the material environment of AU opposition explaining the Darfur case is discussed together with Kenya below, as the two are closely linked.

The Kenya Situation as ICC Institutional Dysfunction

The material environment is even more difficult for the ICC in the Kenya situation. As in Darfur, the Court lacks the support of the state under investigation, the states in its region and the UNSC (which is not opposed to the ICC investigation, but is unwilling to take any positive actions to support it). However, in this case, as Kenya is a State Party to the Rome Statute, its non-compliance is more of a threat to the Court.

As a State Party, Kenya is under an obligation to comply with ICC decisions and cooperate fully with the Court. While there was an initial show of compliance by Kenya, and while Kenyatta attended a status hearing at the Court in 2014 to avoid an arrest warrant being issued for him, the relationship between Kenya and the Court has significantly deteriorated since the investigation was launched. Kenyatta and Ruto used the ICC as part of their election campaign in 2012, claiming that they were standing up against foreign interference in Kenya's domestic affairs and Kenya has attempted to undermine the Court in a number of ways. It has, for instance, campaigned for a UNSC/ Article 16 deferral of the OTP's investigation (which the African Union requested but has not been granted – see below) and made (unsuccessful) efforts to amend the Rome Statute and the Rules of Procedure and Evidence at the Assembly of State Parties in 2014 to provide immunity to sitting heads of state. The Prosecutor outlined the extent of Kenya's non-cooperation after withdrawing the charges from Kenyatta, citing the Trial Chamber's 3rd Dec 2014 finding of non-compliance against the Government of Kenya:

'the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfil its mandate under Article 64, and in particular, its truth-seeking function ... Contrary to the Government of Kenya's public pronouncements that it has fully complied with its legal obligations in this case, the ruling has confirmed that in fact it has breached its treaty obligations under the Rome Statute by failing to cooperate with my investigation ... Crucial documentary evidence regarding the 2007-2008 post-election violence, including concerning the conduct of the accused, can only be found in Kenya and is only accessible to the

⁵ State Parties to the ICC are under an obligation to comply with the Bashir arrest warrants, but Non-State parties are only 'urged' to cooperate under Resolution 1593 rather than obliged to do so.

Prosecution through the assistance of the Government of Kenya. [Other challenges to my office] include:

- A steady and relentless stream of false media reports about the Kenya cases;
- An unprecedented campaign on social media to expose the identity of protected witnesses in the Kenya cases;
- Concerted and wide-ranging efforts to harass, intimidate and threaten individuals who would wish to be witnesses [including a network of people close to the Kenyan government who the OTP has evidence showing their attempts to bribe witnesses to withdraw]' (Bensouda 2014c).

Kenya has also appealed to the African Union to assist in its efforts to undermine the Court, for instance describing the Court in October 2013 as 'the toy of declining imperial powers ... a fetid insult [to Africa]' (Latiff 2013). The support of the AU for the Kenyan position – a more wholehearted support than the AU has shown for the Sudanese position – has quite radically changed the material environment of the ICC.

The AU requested in 2013 that the UNSC defer the cases against Kenyatta and Ruto to enable them to deal with the aftermath of attacks on a Nairobi mall by al-Shabab militants. The UNSC vote to defer failed as 8 UNSC members abstained, denying the motion the majority of 9 it needed to pass, subject to the veto not being used. Of these 8, 7 were non-African ICC members (the final one being the US). The 7 who voted in favour - China, Russia, Togo, Azerbaijan, Rwanda, Morocco and Pakistan – are not members of the ICC. This split was seen as having serious consequences. Kenyan Ambassador to the UN, Macharia Kamau, said after the vote African states wanted to see reform of the UNSC to avoid powerful states imposing their will on the rest of the world. Kenya's Ministry of Foreign Affairs said in a statement that the UNSC had failed to act in the interests of the security and stability of the African continent, and 'humiliated the continent and its leadership' (Nichols 2013).

The AU followed up this failure with an Extraordinary Session of its Assembly in October 2013 to discuss its relationship with the ICC. The feared mass-withdrawal from the Court did not happen, but the AU did call on the ICC to amend the Rome Statute such that no charges are brought against AU Heads of State or Government during their terms of office, citing concerns that such charges put states at risk of instability (African Union 2013, 2). They also started to work on an 'African solution' to the ICC problem through a proposed criminal chamber of the African Court of Justice and Human Rights, which will be used to prosecute individuals accused of Rome Statute crimes. In June 2014, the AU adopted an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights. According to Article 46A *bis* of the Protocol: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office" (African Union 2014).

The relationship between the ICC and the AU looks to have broken down almost totally over the Kenya case (with the caveat that the AU did not call for a mass withdrawal of African States Parties from the Rome Statute in 2016, as was feared). President Museveni of Uganda, the first person to refer a situation to the ICC, has called on African states to

withdraw from the ICC, as the Court has become a 'tool to target' the continent. Gambia, South Africa and Burundi announced in 2016 that they would indeed withdraw, though Gambia and South Africa were in the process of reversing these withdrawals by early 2017.

Can the attitudes and actions of the AU explain Court behaviour, thus demonstrating institutional dysfunction (in terms of the Court doing the bidding of states rather than pursuing justice)? While this is not straightforward to determine, the argument of this chapter is that the Court's actions in these cases are not symptoms of institutional dysfunction brought about by the material environment of the ICC. Rather than trying to appease Kenya, Bensouda has been outspoken in her criticism of its failure to comply with Court requests. And the Assembly of State Parties refused to even debate Kenya's proposed amendments to the Rome Statute. It may be that AU action has forced the ICC to cease prosecutions of sitting heads of state for now, but Bensouda has laid the blame for the Court's inability to bring these cases at the feet of the UNSC and the ICC Assembly of States Parties, rather than the AU.

To sum up this section, and reflect briefly on other possible indicators of institutional dysfunction: while the literature on the ICC provides strong evidence to suggest that the material external environment of the Court, in the shape of powerful state interests, may influence Court behaviour (Bosco 2014), such evidence in these two cases is thin. There is significant evidence of states resisting the sovereignty costs of the ICC regime, but little reason to think this has forced the Court to behave according to state demands. Plus, there is countervailing evidence that the ICC is resisting environmental pressures by provoking the most powerful states in the system in the form of the UNSC permanent members.

There is some suggestion that the ideational external environment of the Court could impact its behaviour in other cases, for instance the goals of peace and justice may be in tension in Colombia, leading to the ICC prevaricating on its course of action.⁶ However, in the Kenya and Darfur situations, we see something quite unexpected: the legitimacy of the Court has been put on the line *by the Court* and, as argued below, doing so has increased the Court's efficiency rather than being a sign of its dysfunction. We also see, in both situations, the opposite of Barnett and Finnemore's 'irrationality of rationalization' pathology. Institutions may pursue particular processes – in an OTP you might expect those processes to be investigations and prosecutions – as ends in themselves. But the situations examined here demonstrate the opposite – the Prosecutor has shelved prosecutions or suspended investigations rather than irrationally pursuing them. So, the explanations for the situations as dysfunctional behaviour are contradictory and unconvincing. The behaviour of the Court seems to be counter to UNSC state interests (as states would rather pretend that something is being done - particularly in the Kenya and Bashir cases) and counter to external cultural or normative forces that suggest it must seek legitimacy.

Institutional Maturity

⁶ Hayner (2014) discusses the tension between the interests of peace and the interests of justice in ICC decision-making. Ainley (2016) commends the ICC for its careful, if unconventional, approach to the Colombia situation.

What happens if we try to read the situations as signs of the Court's power? Could they be signs of a new pragmatism and a new flexibility, demonstrated by the OTP in particular, to pursue the objectives of the Court, broadly conceived (i.e. with a view to the success of the institution as a whole rather than the success of any individual case) in creative and provocative ways?⁷

The actions of the OTP have real practical benefit to the Court in the case of Darfur. Firstly, they free up the resources of the Court for other investigations. The Court needs successful prosecutions under its belt to build legitimacy in the international system, and freeing up resources to devote to investigations likely to result in such prosecutions makes good sense. It also demonstrates a change in the power dynamic between the UNSC and the Court. The ICC is acting like an institution relatively sure of its place in the international system rather than one that must mould itself to state- or UNSC interests to enable its survival. It is therefore starting to assert itself quite significantly. It has demonstrated through the hibernating of the Darfur investigation that the UNSC cannot soak up the Court's resources by referring cases to it without increasing its funds, and Bensouda has thrown the responsibility for accountability in Darfur back to the UNSC by requiring that the Council arrest suspects. She has also kept pressure on the UNSC with repeated referrals of Sudan to the UNSC, via the ICC Pre-Trial Chamber, for non-compliance, and threatened another direct referral: 'the Court may elect to exercise its inherent powers stemming from UNSC Resolution 1593, and directly inform the UNSC of Sudan's non-cooperation, as it did in [the Harun and Kushayb case] ... so that [the UNSC] can take any necessary action it may deem appropriate' (Office of the Prosecutor 2014).

The Kenya situation is more difficult to read as an assertion of Court interests, however it is at least facilitating the development of innovative policies in the ICC to avoid witness tampering in future, for instance through a new rule that permits introduction of a witness's 'prior recorded testimony' if he is no longer available because of intimidation or death (Roth 2014).

Where the OTP's pragmatism (and courage) is apparent is in the new Prosecutor's handling of the AU crisis. Bensouda has showed some sensitivity to the issues raised about the Court by the African Union, without capitulating to them. She has defended the Court for opening investigations to bring justice to African victims, but has made sure to open preliminary examinations elsewhere – Iraq, Palestine and Ukraine – even in the face of obviously opposed powerful state interests. Most significantly, she signalled in October 2016 her intention to open an investigation into alleged crimes in Afghanistan (Bosco 2016). This is the first time that an international criminal tribunal has targeted US nationals, and the first time the ICC has moved against UNSC permanent 5 interests. The Prosecutor has also responded to the position the AU has manoeuvred the Court into by transferring at least

⁷ See Kersten (2016b) for an extended discussion of the institutional interests of the ICC. Institutional maturity is used instead of institutional autonomy here as the ICC was set up explicitly to act autonomously. Nevertheless, there is significant overlap with Loescher's (2001) discussion of institutions (in his case the UNHCR) moving from being the instruments of states to being purposive actors with independent interests, authority and power.

some pressure on to the UNSC, even as she undertook the distasteful task of halting the investigations of the Darfur suspects and withdrawing charges from Kenyatta. In both of these cases, the OTP looks to have pragmatically and sensibly cut its losses for now – there is nowhere left for the AU to go, except perhaps to keep working on the development of an African court to apply international criminal law – an institution that, even if it does not at first have jurisdiction over sitting heads of state, is likely to reduce impunity on the continent, given the commitment shown to justice by most African states prior to the Bashir warrants.

Conclusion

The examination of the situations of Darfur and Kenya at the ICC suggests that the Court is less constrained by the material environment created by state interests than might be expected. It also shows distinct signs that the OTP, as the body of the Court that has the most frequent and extensive contact with states, is learning to use its legal and political power in practical and creative ways.

This is not to say that state power is unimportant in international justice. The ICC was created in an international system with conflicting and combined histories of colonialism, liberal pioneering and impunity (particularly for sitting heads of state); a system dominated at the time of the ICC's establishment – and to some extent ever since – by a global war on terror. States' interests in justice and their support for, or opposition to, the Court have fluctuated over time, and the ICC – which the history of international criminal justice would suggest requires state support to be effective – has had to navigate some difficult terrain. The vulnerability of the Court to powerful states (now including the collective power of the African Union) can be identified in the cases discussed above, but so can the OTP's increasing willingness to rhetorically sanction states and the UNSC when support is denied. States, for their part, have shown themselves through these cases to have a relatively thin commitment to the principles of international justice and to be largely unwilling to accept the political costs of pursuing it.

This said, the two situations may help to foster a growing commitment of states to international justice by exposing the vulnerability of the project itself. States have shown some propensity to defend the project by refusing to support calls for the UNSC to defer the Kenya prosecutions or withdraw the Sudan situation. Even in its attempts to undermine the ICC, the African Union has shown an interest in ending impunity for all but sitting heads of state via an African Court of Justice and Human Rights. But this support does not go far enough. There is little hope of the Court ever successfully trying cases in more powerful states if it doesn't have enough support from states to try cases in less powerful, Global South states. African States Parties could help the Court to move out of Africa by supporting it more vociferously – by lending it their weight – rather than by undermining it through threats to leave, failures to fulfil their responsibilities under the Rome Statute (e.g. by failing to arrest indictees on their soil) or quietism. States had the chance to demonstrate their commitment to the Court and its goals at the 2016 Assembly of States Parties (ASP), and there was widespread relief at the number of states (including a reasonably large number of African states) who professed their support for the Court rather than threatening to

withdraw from it.⁸ But the Court needs substantive and material support rather than just rhetorical statements if it is to withstand the sovereignty backlash and narrow the impunity gap.

The aim of the chapter was to examine the extent to which the ICC's failures in Sudan and Kenya were indicative of a deep-lying institutional dysfunction, signalling a contraction of human rights protections. The situations discussed illuminate the challenges faced by the ICC, but also show its increasing ability to use its political power to refuse responsibility for the failures of its States Parties or its referring body (the UNSC). In addition, and somewhat unexpectedly, the situations give reason for some optimism for the Court's success in the years ahead, if (and only if) the state supporters of the Court at least minimally fulfil their responsibilities to facilitate its work.

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⁸ Russia announced its withdrawal during the ASP, but it had never ratified the Rome Statute, so was simply withdrawing its signature, as the US had done previously. This caused an unwarranted amount of attention as the withdrawal of a signature has virtually no practical significance.

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