



# Fragile States and the International Criminal Court: Friends or Foes?

**Fragile states are widely represented among the membership of the International Criminal Court. Why would these states invite the ICC to scrutinize their human rights records? The character and scope of this relationship has indeed not been explored yet, but there are strong reasons to do so.**

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More than half a century after the adoption of the Universal Declaration of Human Rights and the UN Convention on Genocide, there is now a growing consensus in the international community that gross violations of human rights such as crimes against humanity and genocide have to be addressed. In a truly historic shift, today any discussion on resolving conflicts and rebuilding societies with a legacy of systematic human rights violations entails calls for holding the perpetrators to account. The most significant, single actor in this field of transitional justice is the International Criminal Court (ICC). Established six years ago, the Court was set up to prosecute war crimes, crimes against humanity, genocide and, eventually, the crime of aggression. As of October 2008, this permanent and independent institution had 108 member states, among them thirty African and forty European states, including Denmark and all but one EU state.

Fragile states are widely represented among the membership of the ICC. In fact, a closer look reveals a multifaceted, special relationship between these states and the Court, reaching beyond the mere fact that fragile states often have poor human rights records.

## **FRAGILE STATES AND THE INTERNATIONAL CRIMINAL COURT**

Neither in the literature nor in state practice is there agreement on how to define fragile states. There is agreement, however, that these states often are marred by poor governance and weak legal institutions. To maintain the rule of law is a major challenge for fragile states. This is also recognized by international donors, who devote considerable efforts to (re-)establishing judicial systems, (re-)introducing human rights and

## **POLICY RECOMMENDATIONS**

- Support the ICC not only as the key institution fighting impunity, but also with a view to strengthening the rule of law in fragile states.
- Support capacity-building vis-à-vis domestic judicial systems, thus reinforcing the ICC's core principle of complementarity.
- Remain vigilant and guard the ICC's integrity and independence when the Court deals with fragile states and other interested parties.
- Devise supplementary measures of transitional justice, as ICC interventions in fragile states will never be sufficient on their own.
- Undertake a study on the impact of transitional justice, including the ICC, to be able to prioritize and maximize its positive effects in fragile states.

holding perpetrators of massive human rights violations to account – all areas which are inherently linked to the work of the ICC. This link also is evident in some of the programmatic objectives underlying both



## BOX 1

The International Criminal Court is currently dealing with four so-called situations where the Office of the Prosecutor has opened specific investigations:

- *Uganda*. This situation was referred to the Court by the Ugandan government in December 2003. In October 2005, the Court unsealed arrest warrants against five senior leaders of the rebel movement, the Lord's Resistance Army. The ICC intervention has since given rise to considerable controversy both inside and outside Uganda. Most importantly, with LRA leader Joseph Kony arguing that he would sign a peace accord if it were not for the threat of the ICC prosecutions, some observers believe the Court has turned into an obstacle to peace. There are serious doubts, however, whether national trials can bring justice to the victims.
- *Democratic Republic of Congo (DRC)*. This matter came to the ICC upon application from the DRC government in April 2004. Currently there are four unsealed arrest warrants, with three of the suspects already being in the detention unit in The Hague awaiting trial. However, the first case, against Thomas Lubanga Dyilo, has run into serious procedural difficulties.
- *Central African Republic (CAR)*. The CAR government turned to the ICC on 7 January 2005. So far only one case has resulted from this situation: Jean-Pierre Bemba, alleged leader of the "Mouvement de Libération du Congo", was charged with war crimes and crimes against humanity committed in the CAR. Bemba was arrested in Belgium and transferred to the Court on 3 July 2008.
- *Darfur*. Sudan is not a member state of the ICC. This scenario was referred to the ICC on 31 March 2005 by means of a binding resolution of the UN Security Council, a resolution Denmark successfully pushed for while it was a temporary member of the Council. In April 2007 the ICC issued arrest warrants against a junior Sudanese minister and a Janjaweed leader; in July 2008 the Prosecutor asked the Court also to issue an arrest warrant against the Sudanese President, Al-Bashir.

In addition, the Prosecutor has stated that he also is analysing information from other countries, including Cote D'Ivoire, Columbia, Afghanistan and Georgia. More information on the ICC's ongoing investigations can be found at [www.icc-cpi.int](http://www.icc-cpi.int) and <http://www.iccnw.org/?mod=casessituations>.

international development assistance to fragile states and the ICC. The OECD, for example, posits that international "action [in fragile states] can...lower the risk of future conflict". Similarly, the preamble of the ICC stipulates that the Court's role is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". Finally, the relationship between fragile states and the ICC also manifests itself in the first "situations" the Court currently is investigating (see Box 1). All of these concern countries that are included in international listings of fragile states. These facts speak in a clear language: there is a definite link between fragile states and international criminal justice.

## THE INTERNATIONAL CRIMINAL COURT AND FRAGILE STATES

How, then, does the ICC deal with fragile states? To start with, fragile, weak or failed states are not defined as such in the statute of the Court; in fact, they do not even exist as categories under general international law. Instead, the inbuilt relationship be-

comes most evident in the core notion underlying the very establishment and functioning of the ICC – the principle of complementarity. According to this notion, a case is only admissible before the Court where the affected state "is *unwilling or unable* genuinely to carry out the investigation or prosecution", a phrase that echoes donors' emphasis on lack of capacity and willingness in their definitions of fragile states. The EU Commission, for example, has described state fragility as "*the State's incapacity or unwillingness* to deal with its basic functions, meets its obligations and responsibilities regarding...security and safety of the populace and protection and promotion of the citizens' rights". Within the ICC statute, "unwilling" covers both the failure of proceedings and sham trials, while "unable" refers to the breakdown of the judicial system in the affected (fragile) state. In other words, the ICC is not a court of unlimited jurisdiction with primacy over national courts, but a court of last resort which can only hear cases under certain conditions. Evidently, these conditions will often be present in fragile states.



ICC Prosecutor Ocampo meeting at the Court with a delegation of community leaders from Northern Uganda in April 2005. The meeting focused on whether the ICC's intervention in Uganda was benefiting the local people or was detrimental to the peace process. (cf. <http://www.icc-cpi.int/press/pressreleases/102.html>)

### THE INTERNATIONAL CRIMINAL COURT AS FRIEND

The principle of complementarity goes even further. Under the notion of *positive* complementarity, the ICC strives to assist proceedings before national courts, building partnerships in the battle against impunity. This could include measures such as establishing platforms for dialogue with national authorities, but also providing direct assistance to the national proceedings. Moreover, the ICC statute requires that member states have procedures in place to co-operate with the Court, which means that national judicial systems have to be adapted, often requiring specific legislation. Thus ideally the ICC membership of a fragile state spurs legal reforms and helps national courts to confront massive human rights violations. Therefore, the ICC's complementarity principle also entails an important task for development co-operation, namely to assist national legal systems in drafting the requisite legislation and to build up the capacities and expertise to deal with gross human rights violations.

### THE INTERNATIONAL CRIMINAL COURT AS FOE? UNRESOLVED ISSUES

The Court is only starting to hear its first cases, and numerous questions stemming from its special relationship with fragile states remain unresolved. First, for the ICC there is the need to cooperate with the relevant government. The Court has to secure access to witnesses and evidence and will need help to have suspects arrested. Can and will fragile states deliver this kind of support? In fact, one fear is that the ICC will display a tendency to indict rebel leaders rather than members of the government in order to circumvent this problem. The ongoing investigations in the Democratic Republic of Congo and Uganda are already raising such concerns. Given that the underlying idea of development policy towards fragile states is

to stabilize them, it has to be asked whether in some situations the Court might involuntarily do the very opposite, that is, stabilize the ruling elites instead of strengthening the state and its legal institutions.

There is another, complex set of questions pertaining to the role of the ICC vis-à-vis fragile states. It is held that fragile states can only make a durable turnaround to greater stability if spoilers of this process are either removed or included in the process. If the Court issues indictments against certain individuals, their inclusion in any future government is no longer an option, but their 'elimination' through prosecutions might be detrimental to the peace process. What does an ICC intervention mean for the potential conclusion of the underlying conflict or struggle for power? The current discussion on Darfur and the arrest warrant requested against Sudanese president Al-Bashir illustrates these problems very well. Similarly, in Uganda the ICC has indicted the leaders of the Lord Resistance Army (LRA), a move that seemingly prompted them to take up serious peace negotiations with the Kampala government. These so-called Juba peace talks could bring an end to a conflict that, for more than fifteen years, has displaced hundreds of thousands in Northern Uganda. Should the indictment against LRA leader Joseph Kony now be put on hold to give peace a chance, or can there be no peace and no real rule of law without justice? The Ugandan government has suggested trying the LRA leaders before national courts, raising difficult questions of priorities, sequencing, legitimacy and ownership. Is the ICC here stabilizing and helping a fragile state, is it turning into an obstacle to it, or is it being abused in a political game? Who is to decide this matter?

Denmark and other supporters of the Court should be on their guard that these questions are not answered too lightly, in a way damaging the ICC. The establishment of an independent court asserting international standards and fighting impunity is too precious an achievement. The ICC deserves and needs Denmark's lasting and unwavering commitment to it.

### THE INTERNATIONAL CRIMINAL COURT, AID AND DEVELOPMENT

It is indeed surprising how little attention has been paid so far to the factual and conceptual relationship between fragile states, development co-operation and the ICC. Development officers, international lawyers and policy-makers need to confront these questions and share their respective insights to lift the discussions beyond the traditional, disciplinary boundaries. This is in particular a task for the Danish foreign-policy and development communities, given that Denmark is a strong backer of the ICC and heavily engaged in international development work. In fact, it seems advisable to include transitional justice mechanisms such as the ICC into the whole-of-government approaches that are recommended when dealing with fragile states.



## BOX 2

Donor views on the link between fragile states, massive human rights violations and transitional justice:

- The German donor agency GTZ argues that a “successful process of peace and reconciliation also depends crucially on punishing and working through war crimes and human rights abuses, compensating the victims and restoring justice under a coherent transitional justice approach.”
- At the multilateral level, in its Principles for Good International Engagement in Fragile States and Situations, the OECD has stated that the international community needs to focus its efforts on “two main areas”. The first concerns “the legitimacy and accountability of states”, including their human-rights records, while the other deals with the “capability of states to fulfil their core functions...essential in order to reduce poverty”, including “security and justice”.

While the ICC is the most significant actor in the area of international criminal justice, it is certainly not the only one, and it cannot, based on its few prosecutions, deliver sufficient justice to any given society. An important first step could therefore be to link the discussion of the ICC and fragile states to the general question of the relationship between development assistance and transitional justice and the good practices evolving in this area. The substantial overlap in actors and issues suggests that important insights could be gained, which in turn could lead to better coordination between the two areas and a more effective use of means. The ICC has only launched its first cases and could certainly benefit from the knowledge and experience accumulated in development co-operation.

Another undertaking relevant to both development co-operation and transitional justice could be an inquiry into the impact of the various (semi-) interna-

tional criminal tribunals on the affected communities in states such as the Democratic Republic of Congo or the Central African Republic. Such a study could help establish whether and to what extent the ICC and other mechanisms of transitional justice have a positive effect on some of the goals pertinent to international assistance to fragile states and in order to do better in the future. The ICC is an idea whose time has come, but we still know too little about what its work actually means and how to respond to the difficult policy questions it raises. To explore further the relationship between the ICC and fragile states could bring us a long way.

*Martin Mennecke, Lecturer,  
Royal Danish Defence College  
ifs-un05@fak.dk*

## FURTHER READING:

*International Centre for Transitional Justice, Donor Strategies for Transitional Justice: Taking Stock and Moving Forward, 2007 (available at <http://www.ictj.org/images/content/8/0/808.pdf>).*

*UN Secretary General, The rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/616, 23 August 2004.*

**More on fragile situations: [www.diis.dk/fragile](http://www.diis.dk/fragile)**

## DANISH INSTITUTE FOR INTERNATIONAL STUDIES

Strandgade 56, DK-1401 Copenhagen, Denmark

Ph. +45 32 69 87 87 · Fax +45 32 69 87 00 · e-mail: [diis@diis.dk](mailto:diis@diis.dk) · [www.diis.dk](http://www.diis.dk)