

Chapter 2

Africa and the International Criminal Court: Then and Now

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2.1 Introduction

The adoption of the Rome Statute of the International Criminal Court in July 1998 was one of the greatest achievements of the international community in its effort to build a more secure world where peace, security and justice would prevail for all. During the last century, the world witnessed horrible crimes that shocked the conscience of humanity. As we all know, African people have suffered from these mass human rights violations as much as anyone else, and probably more. The long civil war in Sierra Leone, the Apartheid system in South Africa, the genocide in Rwanda and the deadly conflicts in the Great Lakes Region are just some examples. Despite this unspeakable suffering—or perhaps because of it—African people demonstrated great resilience and determination in pursuing peace and reconciliation through justice and accountability. Out of the tragic events that occurred in Africa and elsewhere, a broad global consensus emerged, and it is encapsulated in the Preamble of the Rome Statute, which states that “the most

The views expressed in this chapter are not necessarily those of the International Criminal Court.

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serious crimes of concern to the international community as a whole must not go unpunished and [that] their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. Africa has been a major actor in creating this consensus which gave life to the International Criminal Court, a permanent and impartial judicial institution designed to prosecute individuals for genocide, crimes against humanity, war crimes and the crime of aggression, when national jurisdictions are unable or unwilling to do so.

Eleven years after its creation, the International Criminal Court is working very actively to fulfil its mandate of investigating and prosecuting grave international crimes. In that regard, the support of African States Parties to the Rome Statute is much appreciated. Unfortunately, there have recently been complications in our continent’s relationship with the Court.

2.2 Africa’s Active Participation in Establishing the International Criminal Court

The creation of the International Criminal Court was a result of very complex multilateral negotiations which took place from 1995 to 1998, culminating in an international conference held under the auspices of the United Nations in Rome from 16 June to 18 July 1998. African States participated very actively during the whole process.

Prior to the diplomatic conference, African countries made efforts to adopt a common position on the establishment of the International Criminal Court. Those efforts led to different parts of the continent hosting several conferences and workshops. For instance, the Southern African Development Community (SADC) held a Regional Conference on the International Criminal Court in Pretoria in September 1997 and then again in June 1999. Senegal, in West Africa, also hosted an African Conference on the establishment of the International Criminal Court in February 1998 in Dakar, where the participants adopted a declaration in which they affirmed their “commitment to the establishment of the International Criminal Court and underlined the importance that the accomplishment of this Court implies for Africa and the world community as a whole”.¹

At the Rome Conference, African States actively participated in the debates, and African delegations were mainly led by high calibre officials—Ministers of Justice, Ministers of Foreign Affairs, and Attorneys General. Africa was represented in all commissions. Among the 31 Vice-Presidents of the diplomatic conference, eight were from the African continent, namely Algeria, Burkina Faso, Egypt, Gabon, Kenya, Malawi, Nigeria and Sudan, while the Drafting Committee was chaired by Egypt.

¹ Dakar Declaration for the establishment of the International Criminal Court in 1998. Available at <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> (accessed on 25 March 2014).

African delegates were at the forefront of pressing for a permanent, impartial and strong International Criminal Court that would address international crimes and help with strengthening national judicial systems. The Head of the South African Delegation, the then Minister of Justice, *Abdula Mohamed Omar*, speaking on behalf of the SADC States, said:

The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace. In view of the crimes committed under the apartheid system, the International Criminal Court should send a clear message that the international community was resolved that the perpetrators of such gross human rights violations would not go unpunished.²

This history demonstrates the active and strong participation of African States in the drafting and adoption of the Rome Statute. The founding document of the International Criminal Court is a result of joint ideas and joint determination to put an end to impunity for the most serious crimes of concern to the international community.

African States were also among the earliest to ratify the Statute, allowing it to enter into force on 1 July 2002. Currently, of the 122 States Parties, 34 are African countries.³ That makes Africa the biggest regional group in the Assembly of States Parties, the oversight and legislative body of the International Criminal Court.⁴ The first and the most recent countries to ratify the Rome Statute are African, that is Senegal and Cote d'Ivoire, respectively.⁵

2.3 Africa and Situations Before the International Criminal Court

States mandated the International Criminal Court to investigate and prosecute the crime of genocide, crimes against humanity, war crimes and the crime of aggression. However, the Rome Statute does not give the Court universal jurisdiction. The Court may only exercise jurisdiction over crimes committed on the territory of a State Party, or by a national of a State Party. The only exception can

² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998 Official Records, Volume II, United Nations, New York, 2002, p. 65.

³ Chronological list of ratifications by African States: Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic, Benin, Mauritius, Democratic Republic of the Congo, Niger, Uganda, Namibia, Gambia, Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Congo, Burundi, Liberia, Kenya, Comoros, Chad, Madagascar, Seychelles, Tunisia, Cape Verde, Côte d'Ivoire.

⁴ States Parties by regional group as at 8 November 2013: 34 African States; 18 Asia-Pacific States; 18 Eastern Europe States; 27 Latin American and Caribbean States; and 25 Western European and other States.

⁵ Senegal ratified the Rome Statute on 2 February 1999 and Cote d'Ivoire on 15 February 2013.

be made by the United Nations Security Council, if it uses its powers under Chapter VII of the UN Charter to refer a situation to the Prosecutor of the International Criminal Court.

The Rome Statute also allows a State Party to refer a situation to the Prosecutor, who can also open investigations on his/her own initiative after authorization by a Pre-Trial Chamber. These mechanisms ensure that the Court is accessible in various ways—while also providing a system of checks and balances. Two actors are always required for the opening of an investigation: this can be (1) a State Party and the ICC Prosecutor, or (2) the Security Council and the ICC Prosecutor, or (3) the ICC Prosecutor and the ICC Pre-Trial Chamber.

After eleven years of existence, the International Criminal Court has experienced all three triggering mechanisms:

- Four situations were self-referred by States Parties: Uganda, Democratic Republic of the Congo, Central African Republic and Mali.
- Two situations were referred by the UN Security Council: Darfur (Sudan) and Libya.
- Two investigations were opened by the Prosecutor *proprio motu*: Kenya and Cote d'Ivoire.

These examples demonstrate that diversifying the ways in which a situation can be brought to the Court can help fill the impunity gap. But it also underlines that African States Parties have themselves actively engaged in situations where they found that the International Criminal Court could help them to restore and sustain peace, and provide justice to victims of atrocities. Numerous African States have provided excellent cooperation to the International Criminal Court to assist the investigations and court proceedings.

One must highlight that the Court does not have primacy over national courts, and in this respect it differs from the various *ad hoc* tribunals that were created by or with the support of the United Nations. The relationship between the International Criminal Court and national criminal jurisdictions is based on the complementarity principle that gives States the primary responsibility to prosecute the most serious crimes.⁶ In other words, the Court is a court of last resort that should only be relied on when absolutely necessary. Consequently, it is critical for African countries to strengthen their judicial systems so as to address the most serious offenses against international law at the national level, and to ensure that African victims have justice at home.

The complementarity principle offers an opportunity for Africa to take credible ownership of justice for atrocity crimes—by taking legislative measures required to incorporate the Rome Statute provisions into domestic legislation,

⁶ Preamble (6) of the Rome Statute: “[...] it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

by strengthening national jurisdictions' capacity to deal effectively with the serious human rights violations on the continent and by supporting the global movement against impunity for the most serious crimes.

2.4 Africa's Support and Criticism of the International Criminal Court

Africa's history is one of incredible human richness, of resilience, strength and unity—but our continent has also experienced bloody conflicts, gross violations of human rights and genocide. By supporting the International Criminal Court, Africa aligns itself with its own values of justice and commitment against oppression and impunity. The concepts of justice and accountability are part of African traditions and cultures. African societies have shown the ability to deal with the legacy of violent conflicts by promoting justice for victims and enabling the restoration of community relations and reconciliation. To this end, we must never forget what the ultimate purpose of the Rome Statute and the International Criminal Court is—to put an end to acts that are destroying humanity. How many more millions have to be killed, deported, tortured and raped before we manage to stop these despicable acts?

Against this background, it is worrisome that some African leaders have started to employ harsh rhetoric about the International Criminal Court, accusing the Court of “targeting Africa”—whereas the reality is that the Court is helping pursue justice for victims in Africa, and is doing so largely at the explicit request of African States.

To state this clearly: the proceedings before the International Criminal Court are fully in conformity with the Rome Statute, including the cases against sitting Heads of State. Article 27 of the Statute explicitly states that the official capacity of any person shall in no case exempt them from criminal responsibility. One cannot help but ask: why should the International Criminal Court be criticized by States for doing exactly what they—the States—created the Court to do?

Of course, if the States Parties to the International Criminal Court identify shortcomings in the Rome Statute or the other legal documents, such as the Rules of Procedure and Evidence, they have every right to propose amendments to these instruments—but in the meantime, the existing legal documents in force should be respected, and the International Criminal Court should not be blamed for applying them. Of course the public is welcome to scrutinize the Court's work and provide constructive criticism—the proceedings and the Court's decisions are transparent and public for anyone to observe and assess. I for one, am fully prepared to recognize that the International Criminal Court is not a perfect institution—there is always room for improvement.

Indeed, the Court is continuously working hard to identify ways to enhance its effectiveness and efficiency in various ways: the Prosecutor has recently adopted a new prosecutorial strategy with the aim of strengthening the process of investigations and prosecutions; the Registrar is re-structuring the various support

services of the Court with the aim of improved efficiency, and the Court as a whole is engaged in a Lessons Learned process, in which it aims to identify possible measures to expedite judicial proceedings. I personally have the honour to preside over the Lessons Learned working group, and I am glad to note that two concrete Rule amendment proposals that originated in this working group are on the agenda of the Assembly of States Parties this year, having previously been endorsed by the relevant preparatory bodies of the Assembly.

Despite these various measures to enhance the Court's work, one thing remains clear: the Court cannot cure any defects of the Rome Statute—our job is to interpret and apply the Statute. After all, the International Criminal Court is a court, a judicial body that must respect its legal framework. Anything else would be unthinkable for judges! We have limited room for discretion in the interpretation of the Rome Statute, and the Appeals Chamber, where I sit as a judge, has made clear that this discretion must be exercised with caution.⁷

Let me give you one example: the Court recently considered the request of an accused person to be absent from the courtroom during parts of his trial. The Appeals Chamber had to look at this in light of the Rome Statute's rather explicit provision that "[t]he accused shall be present during the trial". In the end, the Appeals Chamber ruled that the absence of the accused *can* be permissible, but only under exceptional circumstances when strictly necessary.

Whereas the Court is a judicial organ, the Assembly of States Parties, on the other hand, is a political body, consisting of States Parties who effectively constitute the Court's legislature, with the power to amend the Statute and other aspects of the legal framework.

All 122 States Parties are members of the Assembly, with equal rights in the decision-making on various issues such as the adoption of normative texts and of the budget, the election of the judges, the Prosecutor and the Deputy Prosecutor.

Let me reiterate that the States Parties can and indeed should consider ways to enhance and improve the International Criminal Court through amendments to the Court's legal framework. And the correct forum for these discussions is the Assembly of States Parties—ultimately, it is incumbent on the Assembly to identify shortcomings, to find the correct solutions to address them, and in this way shape the future course of the International Criminal Court.

This is why it is positive that African States Parties have brought some concrete proposals to the Assembly of States Parties. I appreciate that the views of African States Parties may be informed by discussions held in the context of the African Union, but ultimately I believe that the States Parties should ensure that they, as the primary stakeholders, founders and owners of the Rome Statute system—as opposed to the countries that have not yet joined the International Criminal Court—will take the collective responsibility for the development of the Court.

⁷ Cf. Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's request for excusal from continuous presence at trial", 25 October 2013, ICC-01/09-01/11-1066.

The legal framework of the International Criminal Court is adopted by States Parties that can also amend it, preferably in a way that improves the interests of justice, the needs of victims and the rights of accused persons, in accordance with general principles of international law. I trust that the Assembly will discuss the proposals before it thoroughly and take the necessary time to ensure that any amendments adopted are carefully drafted, do not violate the Statute and are fully considered.

What is important is to retain the division of roles between States, the Assembly and the Court. The Court cannot and must not be drawn into politics. Conversely, States and the Assembly should provide the Court with the required cooperation and give us the necessary space to conduct our judicial mandate without interference.

The relationship between African States and the Court has probably never been as tense and strained as it is today. And this is quite disappointing given the role that African states played in bringing the International Criminal Court to life. A lot of unfortunate statements have been recently made by African leaders, and while I am not going to repeat them, I wish to reject such outrageous accusations in the strongest possible terms.

The staff of the Court is devoted to the mandate that it has been given under the Rome Statute and discharge the mandate professionally and without fear or favour. The Court employs many Africans in top positions, e.g. four Judges, the Prosecutor, the Head of the Jurisdiction, Complementarity and Cooperation Division, the Principal Counsel for the Defence, Ms *Batohi*, Legal Advisor to the Prosecutor, who is here with us, and many others, including myself as a Judge and the First Vice-President. Hundreds of African legal practitioners have made the International Criminal Court what it is. Frankly, it is absolutely ridiculous to accuse the Court of being racist.

The International Criminal Court does not only fight impunity by punishing perpetrators. The Rome Statute also enables the victims to participate actively in the judicial proceedings and to apply for reparations. Victims can lead evidence, question witnesses, challenge admissibility of parties' evidence etc. Furthermore, a Trust Fund for Victims is extending humanitarian assistance to tens of thousands of African victims that have been affected by the crimes under the ICC's jurisdiction. I have often wondered whether anybody has paused to seek the views of the countless victims who have been affected by the alleged mass crimes that the International Criminal Court is trying. Do we ever put ourselves in their shoes? For many of them, the International Criminal Court may be the only viable avenue to see justice done for the wrongs they have suffered.

Africa's commitment to the Court is a crucial aspect of the continent's commitment to the international rule of law. Today, there is widespread conviction that sustainable development and lasting peace are not possible without the rule of law and accountability. It is very important for Africa to take credible ownership of the justice and accountability process in dealing with atrocity crimes in our continent, and to provide strong support for international justice mechanisms.

If Africa wants to take responsibility for its children, its people, and its future, I am deeply convinced that supporting the development of a strong International Criminal Court and playing an active part in States Parties' discussions of the challenges it faces, is absolutely the right thing to do.

2.5 Conclusion

Allow me to tabulate a few challenges the Court faces today:

1. Politicization—This is more pronounced today than at any other time. But regardless of this, the Court is still the best place to be, especially for young professionals.
2. Length of proceedings—Admittedly the Court's proceedings are lengthy, but the Court is presently looking into ways and means of expediting its processes, especially through the "lessons learned" exercise. This will also address the issue of diversity of or plurality of decisions that might lead to uncertainty.

However, there have also been remarkable successes, chief among which so far is that the Court has produced solid jurisprudence and applies high professional standards. At the moment the Court is going through a very stormy period and I am convinced that if it weathers this storm, there is a bright future for it and international criminal justice.

From Rome to The Hague, from Tunis to Cape Town, the spirit of the International Criminal Court remains the same: putting an end to impunity for the most serious crimes that affect the international community as a whole. That is the spirit that should guide our future actions.