

# Chapter 5

## Africa and the International Criminal Court: A Prosecutor’s Perspective

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### 5.1 Involvement of African States in the Rome Statute System

The topic for discussion is ‘Africa and the International Criminal Court’, which comes at a very opportune time when the relationship between African States and the Court has been somewhat tense, amongst others as a result of the Kenya trials. At some stage, there was even talk of a possible withdrawal of African States from the Rome Statute.

Let us first look at the involvement of African States in the Rome Statute system. I purposely say “system” because the Rome Statute created a comprehensive system—not just the Court, as is sometimes misunderstood—whereby the International Criminal Court complements domestic systems and acts *only* if Member States fail to act (which I will deal with later). The majority of African states (34) have ratified the Rome Statute, Africa is the most represented region of

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the world in the Rome Statute system (23 % of all States Parties). A number of African states have also adopted implementing legislation, incorporating, in whole or in part, aspects of the Rome Statute into domestic criminal codes.

In addition let me highlight the following:

- *Kofi Annan* convened the Rome Conference;
- African States led the ratification process, with Senegal as the first States Party;
- The Prosecutor is an African woman from The Gambia; she was presented as sole candidate by the African Union, and elected by consensus of States Parties;
- African judges make up 25 % of the bench;
- Approximately half of the Office of the Prosecutor's requests for assistance go to African States and around 70 % are responded to positively;
- African countries surrendered a large percentage of the suspects currently before the Court;
- UN Security Council Resolution 1593, which referred the situation of Darfur to the Court, included the positive votes of Benin and Tanzania and an abstention of Algeria; and
- UN Security Council Resolution 1970, which referred the situation of Libya unanimously to the Court, included the positive votes of Gabon, Nigeria and South Africa.

It was not until the request by the Office of the Prosecutor for an arrest warrant for President *Al Bashir* of the Sudan, in July 2008, that a controversy first arose about an alleged 'African bias', which was promoted by President *Al Bashir* himself and supported by some leaders. The confirmation of charges against the current Kenyan leaders—at the time they were not in the positions that they are in today—raised this perception of a bias against Africa to new heights, with the African Union convening a special meeting to discuss the issue and talk of a mass withdrawal of African States which, fortunately, did not materialize. Such action would have been disastrous for international justice and for Africa for many reasons, the key ones being a demonstration of a lack of commitment by African States to taking action against human rights abuses and to ending impunity for atrocities and to bringing justice for victims.

## 5.2 The Perception of 'African Bias'

So let us deal with the perception of 'African bias' which is an important issue that we cannot ignore. About targeting Africa: All the 32 persons who are or have been the subject of a Summons or Warrant of Arrest (public) are Africans. However, there are also more than 5 million African victims displaced, more than 40,000 African victims killed, thousands of African victims raped, and hundreds of thousands of African children transformed into killers and rapists. All victims are Africans.

Is this not a factor to be considered? There are so many voices in this debate, but where are the voices of the victims? We must never forget our real constituency. The constituency that the Court ultimately serves is comprised of the victims and communities affected by the massive crimes we investigate and prosecute.

About ignoring 'bigger criminals', in particular from the West: Africans are tired of double standards and justifiably so. It is, indeed, an imperfect system. But how can we try to do the best with what we have? How do we collectively try to move this to a more equitable system? The ICC Prosecutor is unfortunately not the world Prosecutor. She is the Prosecutor of 122 States Parties. The lack of universal jurisdiction is a challenge that I will touch on later.

Let us recall why the International Criminal Court was created. It was in response to a recognition that there was, and still is, a need in the world to do all we can to prevent massive crimes, to bring the perpetrators to account, and to offer some measure of justice to the victims and communities affected. Its creation was rooted in the desire to prevent a repeat of the human suffering triggered through decades of massive crimes. The Rome Statute was adopted under the leadership of *Kofi Annan*, the then Secretary General of the UN, and is largely the product of the commitment of Africa, Europe and Latin America, three regions which suffered massive crimes during the last century.

Fifty years earlier, British Prime Minister, *Winston Churchill*, referring to the Nazis' deliberate and systematic extermination of as many as six million Jews, called it a "crime that has no name". But a name was soon found: genocide—literally, the killing of a people or nation. After World War II, the Genocide Convention, adopted by the United Nations in 1948, was meant as a pledge by States to ensure that the horrors of the Holocaust would never again be repeated. But sadly, since then, the world community has consistently failed to prevent the occurrence of genocide in places like Cambodia, Rwanda, and the Former Yugoslavia. The Nazi trials and the 1948 Genocide Convention reflected a determination in the world community to prevent a recurrence of the Holocaust. But it was not enough. Thirty years after the Holocaust, the international community had no effective policy to stop the *Khmer Rouge*. Twenty years later, it could not prevent the cold-blooded executions of more than 7,000 Muslim men and boys in Srebrenica, and it neglected the *Hutu* machete-and-rape-driven killing of thousands of the *Tutsi* minority in the Rwandan genocide.

'Never again' was an unfulfilled promise. Why and how did it happen that mass murder of national, ethnic, and tribal groups continued with depressing frequency? Why did the international community fail to prevent the recurrence of crimes that shock the conscience of humanity? The hope, commitment and rhetoric after the horrors of World War II were sadly not supported by a willingness to stop or even condemn the crime itself.

The world would wait for almost half a century after Nuremberg, before the UN Security Council decided to create the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, thus making the connection between peace and international justice again.

The creation of the International Criminal Court was rooted in a strong desire to prevent a repeat of the human suffering, triggered through decades of massive crimes, a desire and commitment shared by the many African States that participated in the Rome Conference, and even more so by those that ratified the Statute. We now have the opportunity to give it meaning, if we work together, and if that commitment is still there. In 1998, in Rome, the majority view of the international community was to establish an innovative and unprecedented institution, beholden to no single State, but to humanity as a whole. Its sole purpose: to hold individuals accountable for the crimes they commit, irrespective of the individual's status, and by so doing, to prevent them happening again. Delegates at the Rome Conference recognized that accountability and the respect for the rule of law are fundamental preconditions to provide the framework to protect individuals and nations against massive atrocities, to promote peace and international security, and to manage conflicts.

The framework of the Rome Statute has created an opportunity to realize international justice by applying one standard to all its States Parties and the people that are under its protection: a framework to help societies come to terms with the past and to move forward together in peace. As a permanent, independent, judicial institution of last resort, the International Criminal Court is at the heart of a new system of international criminal justice. To achieve its goal, no more impunity for the perpetrators of massive crimes, the Rome Statute, therefore, built an interdependent, mutually reinforcing system of justice. The Statute, in its Preamble, recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", thereby giving States the primary responsibility for investigating and punishing atrocities. The legal framework of the Rome Statute is predicated upon national courts, in the first instance, holding perpetrators to account, and if not, to cooperate with the International Criminal Court in investigating and holding perpetrators to account. It is only when national courts are unable or unwilling to act that the Court, as a court of last resort, can assert jurisdiction.

### **5.3 The Work of the Prosecutor of the International Criminal Court in Africa**

The creation of the International Criminal Court responded to a need of combating the most serious crimes of concern to the international community which often remained unpunished, as national systems did not always deal adequately with such crimes, either because of a lack of investigative, prosecutorial or normative capacities, or because of a lack of a political will to do so. The system was created in this way because it recognizes the principle of primacy of states over their nationals, with the International Criminal Court serving as the court of last resort.

Complementarity is a crucial factor that is taken into consideration in determining whether to open investigations.

Let me explain how this works in practice by describing the example of Guinea, as it shows the impact of the Office's preliminary examinations activities in triggering national proceedings in accordance with the Rome Statute. As a core activity of the Office, we conduct such preliminary examinations to determine independently whether or not to open an investigation in any given situation, irrespective of how that situation has come to the attention of the Office, and by following clear and sound legal criteria established by the Rome Statute, relating to jurisdiction, admissibility and the interests of justice. They are explained in great detail in our prosecutorial strategies and our policy papers, which are public.

After the Office publicly announced that it was monitoring the serious allegations surrounding the events of 28 September 2009 in Conakry, the Office sent various, regular missions to Guinea to enquire and confirm that a national investigation had been opened into the September events, and to assess the progress. The Office has, in so doing, sought to encourage and cooperate with national and international efforts to conduct genuine national proceedings, thereby ensuring justice for victims of alleged crimes without the need for the Office to intervene, and also with a view to preventing further crimes. The judicial authorities in Guinea have indicted several officials for the alleged crimes committed on 28 September 2009, including the former Minister of Health and the current head of presidential security. A similar approach is taken in all our situations under preliminary examination, including in situations such as Colombia, Georgia, and Afghanistan, to highlight a few examples of activities outside the African continent. Once again, a key factor is whether local authorities are willing or able to pursue the matters of concern, in line with the guiding principle of complementarity that governs the Court's operations.

Wherever possible we encourage States to investigate and prosecute in situations where grave and serious crimes under international law have been committed. This is what is referred to as positive approach to complementarity, meaning that the Office encourages genuine national proceedings where possible, through publication of periodic reports, dialogue with States, support for national proceedings, etc. We monitor such situations closely. The Office of the Prosecutor has opened investigations in eight situations: the Democratic Republic of the Congo, Uganda, Central African Republic, Darfur, Kenya, Libya, Côte d'Ivoire and, most recently, Mali. In none of these countries were there ongoing national investigations at the time that these situations were brought to the attention of the Prosecutor.

The African continent has been supporting and assisting the Office at each step of its activities: in referring situations to the Office for investigation, in cooperating with the Office by facilitating investigative missions and responding to other requests for assistance, in pursuing and arresting individuals sought by the Court, and in protecting witnesses.

As previously mentioned, we must never forget our real constituency. The constituency that the Court ultimately serves comprises the victims and

communities affected by the massive crimes we investigate and prosecute. In the African situations that are before the Court, innocent people have been killed, large numbers of people have been displaced, and children's lives have been destroyed as they have been recruited or forced into becoming child soldiers. Men and women have been the victims of horrific, sexual and gender-based violence. I believe that these victims of massive crimes deserve whatever measure of justice we can bring them through our investigations and prosecutions. The lack of universal jurisdiction of the Court remains a challenge.

The Rome Statute is merely an extension of national judicial systems in the fight to end impunity. Indeed, as an institution founded on the principle of complementarity that recognizes the primary responsibility of states to protect their citizens, the true relevance of the International Criminal Court will depend on the consistent efforts of national authorities to conduct genuine investigations into massive crimes and to prosecute them, or, in the alternative, the extent to which national prosecutorial authorities support the activities of the Office. All actors have a role to play in this regard, from political leaders to civil society. In 1998, the idea of a permanent International Court was just an idea on paper. Now, the system is in motion.

#### **5.4 The International Criminal Court as an Obstruction to African Peace Processes?**

Let me turn to the issue of peace and justice, an apparent tension that those against interventions by the International Criminal Court have often cited in their contention that the activities of the Court are obstructive in peace processes.

Can there be peace without justice? Perhaps for a while. But peace with justice is surely a more stable and lasting peaceful solution. They are not mutually exclusive. Justice and accountability are necessary to achieve regional, national, and international peace. Above all, justice creates a global environment in which perpetrators of the gravest crimes find no safe haven and are held to account. Justice ensures that no one, irrespective of status, can resort to violence, rapes, and killings to gain power or maintain power, and that those who do resort to such criminal violence will be investigated and prosecuted.

The International Criminal Court is a judicial institution; it promotes lasting peace through its judicial mandate. If its activities jeopardize peace-making efforts, it would be the responsibility of the UN Security Council to ask for a temporary suspension of the Court's proceedings, as it is allowed to do under the Rome Statute.<sup>1</sup>

The relationship between the Court and Africa continues to engage the interest of many around us. It is no secret that during recent African Union summits,

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<sup>1</sup> On this issue, see Chap. 12 by *Okoth* in this volume.

international criminal justice has been regularly put to the test. AU Decisions included the refusal to cooperate with the International Criminal Court in the arrest and surrender of President *Al Bashir*, the refusal for the setting up of an ICC liaison office at the African Union in Addis Ababa, and the request that the Kenya cases be handed back to national authorities. Anti-ICC elements worked to discredit the Court and to lobby for non-support.

The International Criminal Court is, however, an African court, as much as it is a court of any other region in the world. It would not exist without the support of African States Parties to the ICC Statute. Notwithstanding the public controversies, our Office continues to receive support from African governments, NGOs, and civil society, and we serve in a very real way African victims and communities affected by the crimes we prosecute.

In five situations (if one includes the situation in Côte d'Ivoire) on the African continent in which the Court has become involved, African States themselves referred the situations to the Court. In two situations the referrals came from the UN Security Council. It has only been very rarely that the Office of the Prosecutor has moved on its own motion to investigate and prosecute in situations where the State itself has been unable or unwilling to act, despite the situation crying out for a response.

One of those is Kenya, which is *sub-judice*, so I will not mention anything about the case, but it is important to understand how the Office of the Prosecutor became involved. Following the post-election violence in 2007 and 2008, pursuant to the *Waki* Commission report, the Kenyan Government was given one year, beginning July 2009, to set up a national tribunal to deal with the issue. Failure to do this would see the jurisdiction of the International Criminal Court triggered. The primary responsibility, however, lay with Kenya. Despite several attempts in 2009, Kenya's Parliament did not pass the legislation required to establish a special tribunal. On 5 November 2009, the (former) Prosecutor of the Court, *Luis Moreno Ocampo*, met with President *Mwai Kibaki* and Prime Minister *Raila Odinga* in Nairobi. He informed them that since all the statutory criteria were fulfilled, he would be seeking authorization from the Chamber to proceed with an investigation into the situation in Kenya in relation to the post-election violence of 2007–2008. At that time, the President and Prime Minister issued a joint statement in which they reiterated their constructive meeting with the Prosecutor of the International Criminal Court, stating that Kenya was fully committed to cooperating with the Court within the framework of the Rome Statute. The investigation in Kenya was thus initiated with a strong Kenyan commitment to it. A poll in early 2012 indicated that a majority of Kenya's population (over 60 %) were in favor of the Court's intervention in Kenya.<sup>2</sup>

In Northern Uganda, to mention as second example, the international community was for a long time keen to appease *Joseph Kony*, both before and after the

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<sup>2</sup> See Chap. 13 by *Materu* in this book. See also the forthcoming book of *Materu* on the international and domestic responses to the 2007 post-election violence in Kenya.

ICC warrant. *Kony*, however, was only interested in impunity and repeatedly took advantage of peace talks to re-group and re-arm his forces. He expanded his activities and intensified his campaign of rapes, abductions and killings. And he still remains at large.

The principles of the Rome Statute are contained in African seminal norms. The Constitutive Act of the African Union provides that the organization shall function consistently with the “condemnation and rejection of impunity”, among other principles. It also provides, quite extraordinarily, for the right of the African Union to intervene in a Member State in the event that war crimes, genocide and crimes against humanity are committed. This is a unique provision in the founding document of an inter-governmental organization. An end to impunity should not be an academic, abstract notion.

## 5.5 Conclusion

To be effective in our work, we must learn from experiences and constantly re-examine our strategies. We also need the assistance and support of States Parties to the Rome Statute and the international community as a whole, including NGOs and civil society. We must make common cause in the fight against impunity.

As difficult as the challenges we face may be, I believe we can succeed in our mission. No matter who it is, the states in Africa, the ordinary people of Africa or the International Criminal Court, we all want the same things—peace, stability, security, respect for the rule of law and democratic values, and justice for the victims of massive atrocities. I believe that there is sufficient commitment in Africa to ensure that we can work together at closing the impunity gap.

We cannot pretend that the world we live in today is one in which genocide, crimes against humanity and war crimes are no longer committed. But we can say most emphatically that it is a world in which we no longer expect perpetrators of such crimes to escape being held accountable. In 1998, at the Rome Conference, we turned our backs on impunity. We said “no more” to crimes without accountability. We dared to believe that a new international system, backed up by a strong court of last resort, could provide for criminal responsibility where impunity once reigned—acting for victims of past crimes while serving as a deterrent to future ones. The Court has justified those original hopes. Five of the eight situations before the Court today were the result of either a direct States Party referral or an invitation to the Prosecutor to investigate. States have given unfettered access to the Prosecutor while fully acknowledging that the person who holds that office has a duty to investigate all sides of a conflict. Not so many years ago, such steps would have been unthinkable.

Africa’s cooperative efforts should be directed at strengthening national law enforcement and judicial systems to be able to deal genuinely and effectively with massive crimes and thus exclude ICC ‘interference’. We must stand united to



ensure that this powerful tool that we all believe in, the rule of law, can serve humankind equally and consistently to redress the imbalance between the criminals who wield power and the victims who suffer at their hands. This is the only way to ensure durable and lasting peace in our societies.