Africa, the International Criminal Court and the Law-Diplomacy Nexus

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Summary

The pioneering diplomatic role of African states in the establishment of the ICC, with its unprecedented legal mandate, was a triumph for a continent with a recent history of legal — diplomatic subjugation. However, the Court’s perceived Afro-centric bias since its inception, contradiction of sovereign immunity custom, and blatant manipulation by the UN Security Council has prompted the African Union to recommend en masse withdrawal. By contrast, this article makes the case that the continent, rather than being a victim of selective, politicised justice, has capitalised on its ICC membership. The Court has become ‘Africanised’ in its substantive specialisation, its executive profile has assumed an African identity and Africa’s penchant for collective diplomacy is facilitated by quantitative advantage in ICC membership. Maximising its diplomatic agency and using the ICC’s principle of complementarity, Africa now has a unique opportunity to insert itself instrumentally at the law — diplomacy nexus in international relations.

Keywords

Africa – International Criminal Court (ICC) – international criminal justice – diplomacy – law
1 Introduction

Africa has a peculiarly existential preoccupation with both diplomacy and law. The continent has the world’s youngest states, and its history of arbitrary geopolitical dynamics (colonial fragmentation, Cold War proxy battles, state-building experiments and proliferation of regional integration projects) makes it a laboratory for the law-diplomacy nexus in international relations. On the one hand, the international status associated with state sovereignty (hard-won, in the African context!) allows for diplomatic agency: participation in the multilateral forums where structural relationships are shaped, regionally as well as globally. On the other hand, state sovereignty — validated as it is through diplomatic recognition by peers — also allows for legal agency, in the sense that sovereign states negotiate treaties and thereby participate in the evolution of international law.

One arena where the diplomacy-law nexus is particularly prominent, is the International Criminal Court (ICC). African states have played a pioneering diplomatic role in the establishment of the Court through negotiation of the 1998 Rome Statute, and the current chief prosecutor of the Court is African, as are several of its judges. However, over the years the relationship between the Court and the continent has become fraught, with critics denouncing the ICC’s ‘obsession’ with Africa. During October 2016, South Africa — initially one of the most fervent proponents of the Rome Statute — stunned the world by announcing its intention to withdraw from the Court. Critics berated the country for reneging on normative elements within its foreign policy, but the reality was that South Africa was not alone: Burundi and Gambia had also indicated their imminent withdrawal, and many other African states were mulling their status. An all-time low point in the relationship arrived on 1 February 2017 when the African Union (AU), at its summit in Addis Ababa, adopted a Resolution that recommended the continent’s collective withdrawal from the ICC.

So why has the ICC, since it assumed its operations in 2002, focused almost exclusively on Africa? At face value, there appear to be several valid reasons. The sheer number of unresolved conflicts and humanitarian crises in Africa is an obvious magnet for international criminal justice, as is the reality that national courts in Africa are relatively less likely to have the capacity to handle such cases. The Africa — ICC link is further consolidated by the fact that Africa has the largest number of states parties of the Court, proportionally speaking, compared with other regions of the world. As of November 2020, 33 African states, out of a global total of 123, have acceded to the Rome Statute. Moreover, since the establishment of the Court several of these African members have
done self-referrals, accounting for the cases that involve the Democratic Republic of the Congo (DRC) and Uganda (the Court’s first two cases) and in due course also the Central African Republic (twice), Côte d’Ivoire, Mali and Gabon.

But there are other, more insidious reasons why Africa has dominated the ICC agenda, reasons that conjure up the spectre of selective, politicised justice. Among these factors are self-referrals, the choices made by the Court itself, and the role of a powerful third party, the United Nations (UN) Security Council. The stand-off between Africa and the ICC has revealed the sharp edges of the law — diplomacy nexus, and this article will explore the subtexts in the debate. More specifically, it will offer thoughts on a modus vivendi whereby Africa capitalises on its relationship with the ICC, to ensure that neither the continent nor the cause of international criminal justice emerges as a victim.

2 The Politics of Perception

International law is traditionally not contentious: it relies on custom and precedent and usually, by the time it is codified, reflects broad agreement on specific norms within international society. The ICC is somewhat of an exception in this regard: its establishment was not based on universal values but was, rather, the product of a particular ‘moment’ in global history. It was founded in the immediate aftermath of the Cold War, at the climax of liberal triumphalism about the new world order, and at a time when humanitarian law was in ascendancy. The genocides in Rwanda and Srebrenica during the mid-1990s — in full view of international observers — provoked widespread concern about the impunity of both individuals and governments, and galvanised support for emerging norms such as the Responsibility to Protect. The various international criminal tribunals of the 20th century had contributed substantively to jurisprudence in the domain of international criminal law, but all of them (including the tribunals that followed Rwanda and Srebrenica) faced an existential limitation: they were ad hoc. An historic opportunity therefore presented to plug the institutional gap — namely the absence of a permanent international court — in international criminal law.

The International Law Commission’s long-standing mandate to draft statutes for a permanent international criminal court was finally coming to fruition, and African states and civil society organisations were at the forefront of the diplomatic momentum that resulted in the 1998 Rome Statute. An African state, Senegal, became the first to ratify the Treaty, on 2 February 1999, doing
so even before Italy, who hosted the Convention.\textsuperscript{1} Triponel and Pearson, who investigated the extent to which African states from both monist and dualist legal systems incorporated the Rome Statute into domestic legislation after signing the Treaty, came to the conclusion that African support for the ICC exceeded mere lip-service. Rather, it revealed ‘a silent revolution in that continent’s broader acceptance of international criminal law principles’.\textsuperscript{2}

However, neither African nor other proponents of the Court could have foreseen the imminent turn of global events. The September 2001 (9/11) terror attacks on the United States (US) presaged a new era of superpower unilateralism, reaching an apex in 2003 when the US invaded Iraq on spurious charges. The Global South, spurred on by both Russia and China’s increasingly assertive leadership and vehement opposition to any dilution of state sovereignty, became more and more wary about the altruistic claims of intervention regimes. The NATO-led intervention in Libya during 2011 (authorised by the Security Council but controversially implemented when it induced regime change) seemed to prove the point. Thus, as Benjamin Schiff observes,\textsuperscript{3} ‘while the Court moved towards realization, the international context changed’. In terms of the sovereignty norm, the brief 1990s moment during which sovereignty was being \textit{circumscribed} and which saw the birth of the ICC, gave way to a new era of sovereignty \textit{affirmation} by a large swathe of international society.

As the ICC pressed on with its liberal internationalist mandate, it became embroiled in the ‘politics of perception’, as Max Du Plessis describes it.\textsuperscript{4} From a non-Western perspective it became increasingly stigmatised with accusations of Western hegemony and neo-imperialism, concepts that are anathema to the sovereignty of weaker states. Rwanda’s President Paul Kagame lamented that: ‘[W]ith ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. The ICC is made for Africans and poor countries.’\textsuperscript{5}

Concerns about Africa’s prominence on the Court’s agenda started very early in the latter’s existence, sparked inter alia by the prosecutor’s selection of cases. The authority of a prosecutor to use \textit{proprio motu} (‘on own impulse’) is a unique characteristic of the ICC and something that did not exist in previous international criminal tribunals. This individual responsibility is ‘one that

\begin{enumerate}
\item Coalition for the ICC 2020.
\item Triponel and Pearson 2010, 70.
\item Schiff 2013, 746.
\item Du Plessis 2013, 1.
\item Quoted by Schuerch 2017, 3.
\end{enumerate}
is to be exercised independently and without fear or favour’. Unfortunately, the Court’s first prosecutor, Luis Moreno-Ocampo, spent his nine-year term (2003-2012) clashing with various African leaders, who accused him of partiality. By way of example, George Mukundi recounts how Moreno-Ocampo’s public appearance in January 2004 with Ugandan President Yoweri Museveni, to announce the ICC indictment of leaders of the Lord’s Resistance Army, ‘epitomised the prosecutor’s lack of sensitivity to the equitable demands for justice for all victims of the Ugandan crisis’. The prosecutor also came under fire for his handling of indictments related to other African cases. Critics questioned his motives and slated his alleged genuflection to the interests of powerful Western actors, to the detriment of universal justice. He had, for example, selected Kenya for investigation by the ICC, despite the objections of both Kenya and the AU. On the other hand, he declined to proceed with the Palestinian case, citing technical issues (contested Palestinian statehood) a full three years after the case was referred to the ICC.

The African Union Assembly, Africa’s most prominent diplomatic forum, denounced the world’s most influential international criminal lawyer in no uncertain terms. During July 2010 it accused Moreno-Ocampo of ‘making egregiously unacceptable, rude and condescending statements on … situations in Africa’. Whatever the merits of the accusation, the tenor of the statement cast aspersions on the prosecutor’s — and by extension the Court’s — credibility.

Negative perceptions about the ICC’s ability to advance equal and universal (rather than Afrocentric) justice have also been fuelled by another of the Court’s unique characteristic, namely the system of self-referral. The Rome Statute’s provision for self-referral is a novel phenomenon in the international criminal justice domain and was adopted for expediency: under pressure of international expectations for the ICC to deliver on its mandate, it allowed the Court to become operational very quickly.

Unfortunately, it has also fed into accusations of ‘victor’s justice’. In the so-called self-referrals by African states thus far only ‘criminals’ from one side of the conflict have been indicted. For instance, only the loser of the disputed 2010 presidential election in Côte d’Ivoire, Laurent Gbagbo, was extradited to the ICC (in November 2011), despite allegations of criminal wrongdoing against the winner of the election. In George Mukundi’s words:

6 Dugard 2013, 564.
7 Mukundi 2012, 21.
8 Dugard 2013.
9 AU 2010.
10 Mukwana 2017, viii.
It is not lost on curious — or indeed even casual — observers that those in authority made the self-referrals and that no one from their camps were deemed — at least by the ICC — to have committed atrocities of the magnitude that invites the Court’s intervention. This is despite evidence and an overwhelming public belief that some of those in power were responsible for similar — if not worse — atrocities.\footnote{Mukundi 2012, 21.}

Michael Mukwana recommends that, in order to protect prosecutorial independence, the office of the prosecutor should be shielded ‘from the diplomacy, dirty international politics and compromises at play in securing referrals as well as cooperation during the entire prosecution process’, by the establishment of a separate branch of the ICC to handle investigations and to interact with states.\footnote{Mukwana 2017, viii.}

It is a practical and important recommendation. Nevertheless, ICC justice is inextricably linked to ‘diplomacy [and] dirty international politics’. The pinnacle of the problem lies with the UN Security Council.

3 The Supremacy Dilemma

Unlike the International Court of Justice (ICJ) that has universal membership (its statute is an integral part of the UN Charter), the ICC is limited geographically. States that were original signatories to the Rome Statute are only Parties if their national legislatures ratified the Treaty, and as from 2000 once-off accession to the Court is required. This distinct separation between the ICC and the United Nations does not, however, make the Court any less subservient to the UN Security Council. The UN Charter bestows legal supremacy on the Security Council and if a matter is deemed to impact on international peace and security, the Council’s decisions trump state sovereignty as well as the decisions of any other international institution. In this regard Article 13(b) of the Rome Statute confirms that the Security Council has the power to prescribe or annul the Court’s proceedings and to refer cases to it regardless of whether the accused is from an ICC member state.

Referral of non-ICC member states is a grave move and thus far the Security Council has done so only twice. Controversially, both were African: the first was Darfur (Sudan), in March 2005 (Resolution 1593); and the second was Libya, during February 2011 (Resolution 1970). The selective nature of Security
Council referrals has been highlighted by the reality that several cases — Gaza, Syria, Iraq, *inter alia* — continue to be shielded from ICC scrutiny. The double standards of the Council are played up by the fact that three of its five permanent members — China, Russia and the United States — are not even members of the ICC. They can therefore manipulate the latter to ensure that it ‘does not concern itself with cases that may cause offence to these powerful nations or their allies’. A particularly crude manifestation of state-centric interference happened during 2019 when the ICC opened an investigation into crimes allegedly committed by American military personnel in Afghanistan. Initial threats from an infuriated US government did not deter the ICC and during June 2020 the Trump Administration imposed comprehensive sanctions against ‘officials, employees and agents, as well as members of their immediate families’ working at the ICC.

Whilst great power realpolitik has predictably collided with the ICC’s mandate to pursue ‘the interests of justice’ (as expressed in Article 53 of the Rome Statute), the Court’s own progressive nature has challenged the principle of state sovereignty to an unprecedented extent. In a deviation from customary international law, the ICC may indict an incumbent head of state. This is potentially subversive to the sovereignty not just of its member states, but also that of non-member states who are referred to it by the Security Council. This reality has arguably informed the decision by so many states *not* to become parties to the Rome Statute.

Thus far only two sitting presidents were indicted by the ICC, from Kenya and Sudan respectively. Sovereignty is held particularly dear by the world’s newest states and the Court’s exclusive indictment of incumbent African presidents has therefore caused an outcry. During May 2013, African heads of state congregated in Addis Ababa to celebrate the 50th anniversary of the establishment of the AU’s predecessor, the Organisation of African Unity (OAU). They issued a terse statement, condemning ‘the misuse of indictments against African leaders’.

In the case of Kenya, the ICC indicted both President Uhuru Kenyatta and his Deputy, William Ruto, for their role in post-election violence during 2007. The AU insisted on a national mechanism (Kenyan courts) to conduct the prosecution, citing the Rome Statute’s complementarity principle. However, the organisation’s appeal was rejected by the ICC as well as the UN Security

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13 Du Plessis 2013, 3.  
14 The White House 2020.  
15 AU 2013, para. 4.  
16 AU 2013.
Council, based on the argument that Kenya’s courts were not able to prosecute effectively. Remarkably, President Kenyatta did not endorse Kenya’s withdrawal from the Court, as voted for by Kenyan Members of Parliament during 2013.

The case of Sudan proved to be particularly divisive. In 2005 the Security Council referred the situation in Darfur to the ICC, and in 2009 the Pre-Trial Chamber of the Court issued a warrant of arrest for the Sudanese President Omar al-Bashir. He was charged with war crimes and crimes against humanity in the Darfur region, and in 2010 the charge of genocide was added. At its summit in Sirte during 2009, the AU refused to cooperate with the ICC in the arrest of al-Bashir and demanded that the Security Council suspend the proceedings against him.17 A stand-off ensued, as several African ICC members allowed al-Bashir to visit them officially, ignoring ICC instructions to arrest him.

The June 2015 visit by al-Bashir to South Africa to attend the 25th AU Summit, brought matters to a head. The South African Government ignored a domestic court order to arrest al-Bashir and instead facilitated his hasty departure from the country. The argument was made that he was entitled to sovereign immunity under customary international law. The resulting spat with the ICC led to South Africa’s indication, during October 2016, that it would withdraw from the Court. A vibrant debate ensued within the country and in February 2017 one of South Africa’s High Courts ruled the government’s planned withdrawal to be procedurally unconstitutional and therefore invalid. The South African government was thus forced to suspend its ICC withdrawal, although the ruling party signalled that it would push on with the plan to do so by garnering the required parliamentary support. In response, South (and wider) African civil society continued their spirited defence of the country’s continued membership.

South Africa’s knee-jerk response has been much-maligned by commentators, but it was successful in highlighting a tension at the core of the ICC’s existence: the reality of global structural power. Whither universal justice when only those leaders in marginalised parts of the world, like Africa, are held accountable for transgressions under international criminal law?

4 Africa’s ‘Collective’ Way

The al-Bashir case raises another subtext in the Africa — ICC discourse, and that is the notion that Africa acts as a diplomatic monolith. The continent is of course not a homogenous unit and African attitudes and responses — including

17 AU 2009.
those towards the ICC — are hugely diverse. Nevertheless, it is important to highlight that Africa, more so than any other region of the world, has a uniquely ‘collective’ way of doing diplomacy. The preoccupation is rooted in resentment about colonial subjugation and the arbitrary, forced division of the continent into weak geo-political units. This accounts for the ubiquitous reiterations of pan-African unity in the diplomacy of African institutions, which tend to conjure up a united front against anything that smacks of foreign domination. This explains the AU’s call (at the 2009 summit as mentioned above) for member states to prioritise their AU diplomatic duties vis-à-vis the legal obligations imposed by ICC membership.

Propensity for unconditional solidarity or ‘comradeship’ among African peers is something that perplexes political commentators and the growing number of (mostly younger) African leaders who emphasise human rather than regime security. The loyalty-versus-law tussle is therefore a problem in African diplomatic forums. For example, in the ICC context several AU members, inter alia Nigeria, Senegal and Botswana, registered their dissent when the AU adopted the collective withdrawal resolution during February 2017. Indeed, despite the AU’s purported stance, only one African state, Burundi, has thus far actually withdrawn from the Court, its behaviour less of a genuflection to AU directives than a symptom of Burundi’s governance crisis since 2015. The Gambia, which had announced its decision to withdraw from the ICC just a few months prior to the AU’s summit, reversed its decision a few weeks after the summit, courtesy of incoming President Adama Barrow’s new government. And South Africa, which at the time of writing still had an active withdrawal plan, seemed to have dialled down its own enthusiasm for a divorce. The loud ‘collective’ African voice is therefore not monolithic, but the sentiment that imbues it — ‘African solutions to African problems’ — cannot be disregarded.

The collectivity instinct that pervades African diplomacy is also evident in the continent’s multilateral approaches to justice. It is rooted in traditional systems of justice: community courts such as Gacaca (in East Africa) seek reconciliation between victims and aggressors, and rehabilitation of the latter. The methodology is inclusive, flexible and negotiated — restorative rather than retributive. One might even call it ‘diplomatic’.

This approach also informs the AU’s attitude to conflict resolution. The Union has been vocal in its opposition to the ICC’s indictment of incumbent heads of state, noting that ‘the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace’.18 In the Darfur and Kenya cases the AU did not, per se, reject the process of

18 AU 2013, para. 4.
international criminal justice, but expressed its concern about the timing of specific, high level prosecutions. It therefore formally (albeit unsuccessfully) requested the UN Security Council to defer both ICC indictments, for the sake of diplomatic processes.

Unfortunately, the Security Council’s own referrals to the ICC have been perceived as an instrument of coercive diplomacy, rather than as a tool of universal justice. Adam Smith argues that such referrals denote an international community ‘hungry for more coercive instruments’ and points out that neither the Darfur nor the Libya referral had the desired effect on the peace and stability of the respective regions. Selective, punitive, Afro-centric (and arguably counter-productive) action by the Security Council is guaranteed to provoke Africa’s collective resistance.

5 African Identity and Agency in the ICC

Africa has an understandable problem with the fact that most forums of global governance are dominated by a minority of powerful states. In the ICC’s case, however, even if it has focused disproportionately on African cases thus far, the Court has taken on an African profile that is rather impressive — and markedly different from older global governance institutions.

At the time of writing four of the ICC’s 18 judges, many of the Court’s support staff and its President, Nigerian Judge Chile Eboe-Osuji, are African. Moreover (and significantly, because the office is so commanding) the current ICC prosecutor is African. The prosecutor has much more than legal latitude, (s)he has diplomatic agency. This requires engagement with world leaders regarding conflict situations in their respective states and wide interaction with state officials in the process of obtaining information and co-operation. Within the UN context, the prosecutor reports to the Security Council when the latter so requests. The persona of the prosecutor is therefore fundamental to the image and reputation of the Court because, as Schiff observes, s/he assumes the profile of international diplomat in addition to being the executive officer of the Court.

When Fatou Bensouda (of the Gambia) took over the reins in July 2012, the AU overwhelmingly endorsed her candidacy. She had gained experience as Moreno-Ocampo’s deputy and the Union clearly hoped that she would help to thaw the strained relations between the ICC and Africa. The AU’s

19 Smith 2012.
20 Schiff 2013, 751.
collective voice was instrumental in her appointment, because Africa is the largest regional bloc in the body that elected her, the Assembly of States Parties (ASP). The ASP is an essentially diplomatic gathering that provides legislative oversight over the Court, and ICC members have equal votes in this forum. Africa makes up about one-quarter of it, roughly the same as the continent’s numerical advantage in the UN General Assembly. In the latter forum, Africa has been vocal and visible since the 1960s, contributing to the fact that the UN agenda reflects the concerns of the majority of world states, rather than a minority of dominant powers. This is evident in the output of the General Assembly, whose resolutions, over time, become sources of international law. Whilst in the UN context Africa has little prospect of changing the organisation’s ‘executive’ profile (the debate on Security Council reform is moribund and treaty-trapped), at the ICC it has that opportunity: the ASP can elect or remove the prosecutor, deputy-prosecutors and even the judges. Thus, when a hotly contested process ensued to appoint Fatou Bensouda’s successor during early 2021, Africa once again exerted its electoral agency and ensured that the AU’s preferred candidate, Karim Khan, emerged as the winner. It was a wry reminder of the AU’s troubled relations with the ICC’s first prosecutor: Khan, a British barrister, had previously acted as a defence lawyer in the ICC’s controversial case against Kenya.

Articles 121, 122 and 123 of the Rome Statute allow for amendments to the statute, and the large African cohort can therefore do more than change the face of the Court and guide its normal operations — it can also change the way the ICC works. In recent years the ASP has indeed made an array of technical reforms, and as Allan Ngari points out, even the AU’s infamous collective withdrawal resolution, while recommending that members cut ties with the Court, at the same time addressed the need to reform the ICC and the necessity to enhance Africa’s presence in the Court.21 The ASP’s commissioning during December 2019 of an independent review process, aimed at improving the performance of the Rome Statute system, was motivated in large part by Africa’s diplomatic pressure.

African domination of the ASP also strengthens the opportunity to hold the Security Council accountable for its decisions. Ngari, for example, proposes that in those instances where the Council refers a case to the ICC, it (the Council) should be pressured to use its own global authority to ensure that all UN member states comply with resulting adjudication.22 The Security Council should thus not simply have the unique privilege of referral to the ICC, but also

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21 Ngari 2017.
22 Ngari 2018, 4.
the responsibility to ensure compliance. African states, adept as they are in advocacy and multilateral diplomacy, can use their ICC presence to amplify Africa’s voice in such crucial processes of global political governance.

Phil Clark opines that the ‘ability of African states to manipulate the Court for their own ends’ is underestimated.23 He is not alone in this thinking. Oumar Ba, who theorises the instrumentalisation of the ICC, contends that even states that are presumed to be weaker in the international system — African states, specifically — can ‘leverage the international legal system in pursuit of their own national and security interests’.24 Whilst Ba has a rather cynical view of the ICC’s lofty ideals (he says the Court must ‘acknowledge that it can only deliver justice that is political, selective, and partial’),25 the message is clear: Africa has agency in the diplomacy — law nexus.

An important consideration is that the jurisprudence the ICC has generated thus far has been based almost exclusively on African cases. To a certain extent, therefore, the Court has become ‘Africanised’, and the continent can capitalise on this large stakeholdership. In this regard the practical opportunities inherent to the Court’s complementarity principle must be considered.

6 The Court’s Complementarity Principle and African Jurisprudence

The ICC is an option of last resort, as encapsulated by the Rome Statute’s innovative principle of complementarity. In the past, ad hoc international criminal tribunals such as those established for Rwanda and the former Yugoslavia had always stressed their superiority vis-à-vis national courts.26 This means that states parties refer cases to the ICC only if their own courts are unable or unwilling to prosecute at the domestic level.

In other words, the ICC was founded to complement rather than replace national courts in the domain of international criminal justice. The principle was incorporated into the Rome Statute as a ‘concession to state sovereignty’.27 However, more than any other region in the world, Africa needs access to the resources of the ICC. The Court draws on UN resources as well as the institutional knowledge of all the international tribunals that have been set up by the UN in the past. Moreover, the ICC has accumulated a wealth of experience

23  Clark 2019, 1.
24  Ba 2020, 3.
25  Ba 2020, 4.
26  Triponel and Pearson 2010, 71.
27  Schiff 2013, 74.
based predominantly on African conditions and can share this expertise with countries that need capacity-building for their fledgling national criminal justice systems.

As early as 2003, the prosecutor of the ICC committed to assist national counterparts of the Court with capacity-building, to deliver on the ICC’s complementarity principle. Thus, Africa has recourse to develop domestic infrastructure in African states. If utilised effectively, it will make Africa more independent and reduce the need for the ICC to prosecute international criminals from Africa.

It is already evident just how much African jurisprudence has gained from the past two decades’ journey with the ICC. In the Germain Katanga case, the Congolese warlord was convicted by the ICC and spent 12 years in jail. By the time he was released from jail in Kinshasa (where he was located, at his own request) the DRC authorities promptly rearrested him on charges that had not been dealt with by the ICC. Paul Seils and Myriam Raymond-Jetté, from the International Centre for Transitional Justice, recount how the presiding judge of the DRC High Military Court explained his country’s decision to pursue the case domestically. Major General Bivegete stressed:

... the importance of re-focusing on the primacy of the national jurisdiction to prosecute international crimes rather than on the complementarity of the ICC. The focus should not be on the ICC’s role in handling these crimes, but on the DRC’s responsibility to prosecute them.

This confidence is striking, given that in 2003 the President of the DRC requested the ICC to investigate Katanga’s crimes because of lack of domestic capacity to do so.

Another example of the expertise-building in African jurisprudence occurred in December 2019 when The Gambia filed a lawsuit against Myanmar for alleged genocide of its Rohingya minority. The tiny West African country spearheaded the case on behalf of the 57-member Organisation of Islamic Cooperation. The case was heard by the International Court of Justice (ICJ) rather than the ICC because Myanmar is not a member of the ICC, whilst both countries are parties to the 1948 Genocide Convention. The world watched, enthralled, as Aung San Suu Kyi, Nobel Peace laureate and foreign minister of Myanmar, travelled to The Hague to defend Myanmar from genocide.

28 ICC OTP 2003, 5.
29 Tladi 2014, 2.
30 Seils and Raymond-Jetté 2016.
accusations. On 23 January 2020, the ICJ ordered Myanmar to cease all persecution of the Rohingya and to protect them. Whilst it has not yet ruled on the genocide allegation, the Court clearly vindicated The Gambia’s initiative.

Evident in the lawsuit is the agency of individual Gambian jurists, specifically the country’s Minister of Justice and Attorney General, Abubacarr Tambadou, who had gained valuable expertise when he worked at the International Criminal Tribunal for Rwanda (ICTR). Indirectly, the experience, role modelling and position of the ICC’s Gambian chief prosecutor, also contributed to The Gambia’s confidence in taking on the case. The proceedings are evidence that Africa is building jurisprudence in international law, even to the extent of providing global leadership in multilateral forums — again, a legal — diplomatic nexus for the continent.

Such achievements do not negate the enormous challenges that face the continent’s judicial capacity. A major concern is the absence, at the continental level, of a functioning pan-African court to preside over international criminal justice cases. The process of establishing such a court has been somewhat perplexing, coinciding as it has with major change in the governance of African continental affairs. In 1998, the year that the Rome Statute was adopted, the OAU adopted a Protocol to establish an African Court on Human and Peoples’ Rights (ACHPR). Soon thereafter, in 2000, the OAU disbanded and was succeeded by the AU, an organisation with a much stronger mandate to exert authority in the affairs of its member states. The AU’s Constitutive Act provided for the establishment of an African Court of Justice (ACJ), but it soon became clear that capacitating two separate courts would be too taxing for the organisation.31 In the interim, the ACJ was therefore not set up, while the ACHPR continued to develop. In June 2014 the AU adopted the Malabo Protocol to merge the two concepts and to establish a single African Court of Justice and Human and Peoples’ Rights (ACtJHPR).

The envisaged court would have jurisdiction over international crimes, but it would also observe the immunity of sitting heads of state and senior government officials — a contentious caveat that reflected the AU’s stand-off with the ICC. The immunity clause was elaborated on in the AU’s Model Law on Universal Jurisdiction, which the organisation adopted in 2015. This, too, was an indication of Africa’s participation in the dynamic development of international law. As Angelo Dube explains, Africa had been indelibly affected by the diplomatic and legal wrangling over universal jurisdiction in the run-up to the Hissène Habré trial by the Extraordinary African Chambers (EAC) in Senegal (discussed below), and the trials of various other African nationals

31 Murray 2019, 965.
by European states. States such as Belgium and Switzerland put great stock in the principle of universal jurisdiction, and the AU realised that — if not accommodated by African courts — civil society would continue to approach foreign courts in their pursuit of international criminal justice for Africans. The AU’s Model Law was therefore an effort to influence the growth of this fast-growing branch of law in legal systems on the continent.

Notwithstanding the efforts of the AU, and pending the operationalisation of the ACTJHPR, it seems that Africa is experiencing a form of ‘judicial subsidiarity’. Rather than being consciously delegated from the top down, the continent’s judicial capacity is being built up piecemeal from the bottom, one case and one court at a time.

This applies, for example, to Africa’s experimentation with hybrid models of international criminal justice, such as when ad hoc tribunals are used in conjunction with national courts, and in cases where crimes fall outside the ICC’s temporal jurisdiction. The blended model was used by the ICTR, which operated in parallel with Rwanda’s national courts and the country’s traditional Gacaca courts. The latter handled less serious offences that were related to the 1994 genocide and helped to relieve the impossible workload that the ICTR would otherwise have had to shoulder.

Another hybrid example is the trial of Hissène Habré, Chad’s former dictator who had fled into exile in Senegal after he was ousted in a 1990 coup d’état. It became the first universal jurisdiction case to proceed to trial in Africa, after the AU directed Senegal to establish the EAC for that purpose. Habré’s trial, which was funded by the international community, marked the first time a hybrid court was established by direction of a regional organisation rather than the UN. During May 2016 the EAC sentenced Habré to life in prison. Even more than a validation of evolving African criminal justice, the trial was a triumph for the many victims and their advocates, mostly from civil society, who had persisted for more than two decades in seeking justice.

The Special Criminal Court (SCC) for the Central African Republic is also an interesting example. It was established in June 2015 through domestic legislation and held its inaugural session on 22 October 2018, in Bangui. The Court has a renewable five-year mandate, and whilst it is fully integrated into the legal system of the CAR, it functions in an innovative hybrid manner. As Patryk Labuda explains:

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32 Dube 2015, 450, 457.
33 Le Roux 2016.
The SCC thus forms part of Africa’s evolving, multi-layered international criminal justice system. It does not shun international expertise or involvement, but it addresses weaknesses in the ICC’s conduct, inter alia the latter’s limited in situ investigations and lack of meaningful interaction with African stakeholders. Clark emphasises that the ICC model of ‘distant justice’ is counterproductive and efforts to remote-control African justice deprive its people of an ‘accessible form of accountability’. Local justice — essentially African solutions to African problems — is the key to lasting justice and peace on the continent and makes it imperative that the ICC adhere to its own pivotal principle of complementary.

7 A Gap for Polylateral Diplomacy

The multi-stakeholder processes as described above encapsulate a synergy between state-centric and non-state centric agency. In the foreign policy realm this is known as ‘polylateral diplomacy’. The creation of the ICC was, in itself, a milestone not just in the evolution of international law, but also in the dynamism of polylateral diplomacy. More than 90 organisations in Africa participated in the negotiations that yielded the Rome Statute, working intensely with and through the official delegations of states. During 2013, at a time when the relationship between the AU and the ICC seemed doomed, civil society stakeholders once again rallied for the same cause, essentially ‘doing’ diplomacy. On 4 October 2013, 163 African and other international civil society organisations sent a joint letter to the foreign ministers of African states parties to the ICC, urging their support for the Court.

Ironically, and in a twist of fate in the Sudan case, al-Bashir’s eventual removal from office was neither a diplomatic nor a legal feat, but the result of civil society uprising in Sudan. The transitional authority that was subsequently installed in Khartoum decided to try the deposed dictator in a domestic court. Eventually, however, in the course of peace negotiations with rebel

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34 Labuda 2019.
35 Clark 2019, 12.
36 Schiff 2013, 749.
37 HRW 2013.
groups in Darfur, the authorities agreed to hand him over to the ICC, a decision that was announced on 11 February 2020.

The nurturing of a vibrant, ‘justice-savvy’ continental civil society is essential for the bottom-up evolution of international criminal justice in Africa. African political processes and African diplomacy are historically elite-driven, with insufficient stakeholder vetting. Governance in Africa needs more transparency and accountability, and this is where African civil society has a crucial role to play: it must ensure that the continent adheres to international norms and conventions. By the same token, at the level of global governance civil society must keep the pressure on forums such as the ICC to adhere to its mandate, and to reform its modus operandi where necessary.

Civil society can also assist with the capacity gaps that African governments have in legal studies and research that complement international criminal justice. Experts in Treaty Law, for example, have an essential role in ensuring that Africa benefits rather than suffers when law and diplomacy intersect. An example is the negotiation of treaties such as the Rome Statute. African states should be aware of the nuances and the implications of their international legal commitments, so as to avoid ‘buyer’s remorse’. This also applies to the drafting of UN Security Council resolutions. For example, when UN Security Council Resolution 1973 of 2011 mandated an intervention in Libya, three African states were non-permanent members of the Council: South Africa, Nigeria and Gabon. All three states supported the Resolution and all three later regretted their support. The NATO-led intervention in Libya overstepped its mandate, but the mandate was also poorly formulated in the Resolution itself.

For every international obligation entered into there should be African agency in drafting the legal document. A home-grown pool of legal expertise is critically important to strengthen Africa’s legal-diplomatic footprint in international relations.

8 Conclusion

In the immediate post-Cold War era the world appeared ready to question hitherto sacrosanct principles of the international system. The normative introspection that defined the 1990s was, however, of short duration, and suspicions arose about liberal ruses that gave Western states the opportunity to meddle in the affairs of weaker, non-Western others. This narrative has also infected relations between Africa and the ICC. Africa, which was denied membership of international society until just a few decades ago, owes its sovereign identity to the legal-diplomatic confluence and Africans are therefore understandably concerned about their treatment in forums of global governance. In
the case of the ICC the continent has borne the brunt of scrutiny, and a quarter of a century into the Court’s existence, this ill-fated image persists.

An important catalyst in these ‘politics of perception’ is the role of a third party, the UN Security Council. The Council personifies the law — diplomacy nexus in the sense that it is both a diplomatic gathering and the most powerful institution under international law. Like the ICC (and Africa!) the Security Council owes its legal existence to diplomatic processes, but the progressive ICC with its ideals of a ‘justice cascade’ sits uncomfortably with the realpolitik of the UNSC. This creates ambiguity in the universal justice debate: the legal independence of the Court and its quest to pursue ‘the interests of justice’ are arguably threatened by the state-centric interests of the Security Council, a diplomatic-political (and anachronistic, in terms of its membership) body.

Whilst critics of the ICC decry its inability to deliver on ‘universal’ justice, proponents believe that the Court is a work in progress and that its shortcomings should not stop efforts to obtain justice when and where it is possible to do so. This is particularly important in the case of Africa, because the continent suffers from a disproportionately large incidence of humanitarian catastrophe. The Rome Statute’s unprecedented mandate is a deterrent for acts of impunity, and Africa’s population of more than a billion people deserves assurances of accountability. As Dire Tladi reminds us, the leading role that African actors took in establishing the ICC was driven at least in part by the ‘never again’ mantra, and as a result ‘the rationale for the ICC was never just about ensuring accountability for atrocities committed but also about preventing future atrocities’.38

The inordinate focus of the ICC has turned Africa into a laboratory of the Court’s evolution, but Africa’s domination of the Court’s agenda has boosted the continent’s own jurisprudence. Across Africa international criminal justice is being pursued with innovative methodology. The strides that have been made thus far, can be enhanced to an even greater extent if Africa taps into the Court’s complementarity obligations, and if strategic partnerships are formed with an often-shunned resource: African civil society. In many cases civil society organisations in Africa are the only connection between grassroots communities and governments, and the ICC should invest more effort into cultivating polylateral diplomacy with these important actors, so as to strengthen the efficiency and legitimacy of the Court.

The delivery of international criminal justice is a global public good, and the strengthening of the Rome Statute system is therefore much more than just an African concern. Accordingly, the lessons Africa has learnt through its experience with the ICC have wider significance for the international community.

38 Tladi 2014, 2.
Many states that have not acceded to the Rome Statute might be swayed by how the relationship develops, and some of the current members might also rethink their engagement — for better or for worse.

The intense relationship with the ICC has yielded unforeseen consequences: not only has the Court become Africanised in its agenda, its executive profile has also assumed an African identity. This offers an historical opportunity for Africa: with its penchant for collective diplomacy, the quantitative advantage in the ICC (African dominance of the ASP) can be used qualitatively, namely to reform the Court. Indeed, Africa now has unique opportunity to turn the tables and to insert itself instrumentally at the centre of evolving criminal justice. Its diplomatic agency will impact on the wider discourse on normative and structural challenges in international relations.

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