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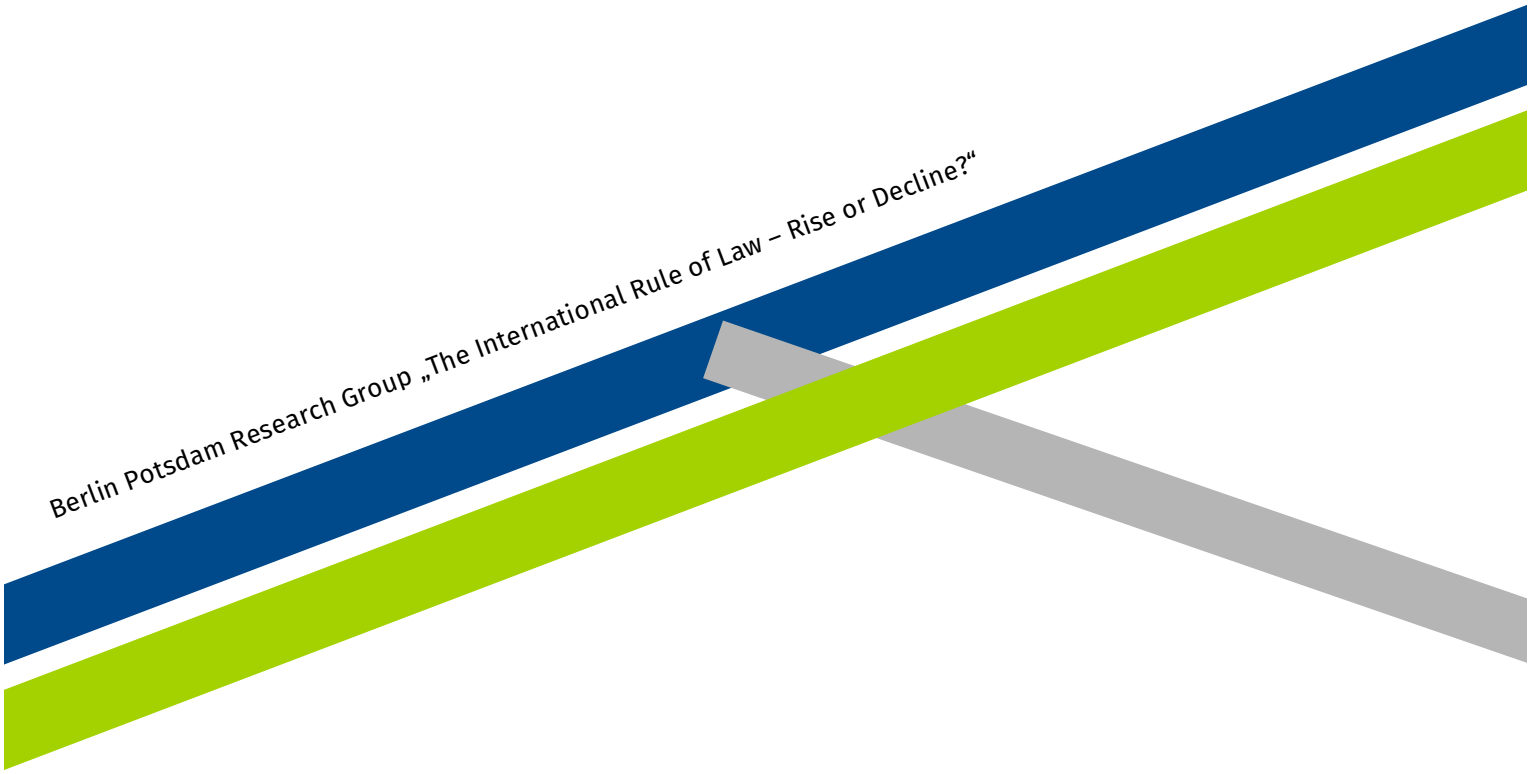

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Africa within the Justice System of the International Criminal Court: the Need for a Reform*

Balingene Kahombo[1]

Abstract:

This article re-examines the relationship between Africa and the International Criminal Court (ICC). It traces the successive changes of the African attitude towards this Court, from states' euphoria, to hostility against its work, to regional counter-initiatives through the umbrella of the African Union (AU). The main argument goes beyond the idea of "the Court that Africa wants" in order to identify concrete reasons behind such a formal argument which may have fostered, if not enticed, the majority of African states to become ICC members and actively cooperate with it, when paradoxically some great powers have decided to stay outside its jurisdiction. It also seeks to understand, from a political and legal viewpoint, which parameters have changed since then to provoke that hostile attitude against the Court's work and the entrance of the AU into the debate through the African Common Position on the ICC. Lastly, this article explores African alternatives to the contested ICC justice system. It examines the need to reform the Rome Statute in order to give more independence, credibility and legitimacy to the ICC and its duplication to some extent by the new "Criminal Court of the African Union". Particular attention is paid to the resistance against this idea to reform the ICC justice system.

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Contents:

1. Introduction

The International Criminal Court (ICC) faces the challenge of ensuring international criminal justice in a politically divided world[2]. Some observers believe that the Rome Statute was adopted on 18 July 1998 while "the idea of having a single and permanent international criminal court acting as a dominant source of international law enforcement [was] unpalatable to states"[3].

The setback began with the de facto rejection of the ICC jurisdiction by several great powers, including three permanent members of the United Nations Security Council (UNSC)[4]. In contrast, too many weak countries, among them 34 African countries out of 54 members of the African Union (AU), astonishingly rushed to sign and ratify the treaty, which therefore came into force, earlier than expected[5], on 1 July 2002. Predictably, this apparent euphoria quickly vanished as well. The ICC had to face, at the dawn of its judicial activities, stubborn resistance from Africa. It has become almost unwanted for its work. Hostility against the ICC has grown not only among African states, whether parties to the Rome Statute or not, but also at the level of the AU.

While much has already been said and written on the relationship between Africa and the ICC, this study suggests a re-examination of the issue. It traces the successive changes of the African attitude towards this Court, from states' euphoria, to hostility against its work, to regional counter-initiatives through the AU. The main argument goes beyond the idea of "the Court that Africa wants"[6] in order to identify concrete reasons behind such a formal argument which may have fostered, if not enticed, the majority of African states to become ICC members and actively cooperate with it, when paradoxically important great powers have decided to stay outside its jurisdiction. It also seeks to understand, from a political and legal viewpoint, which parameters have changed since then to provoke that hostility against the Court's work and the entrance of the AU into the debate through the African Common Position on the ICC. Lastly, the study explores African alternatives to the contested ICC justice system. It examines the need to reform the Rome Statute in order to give more independence, credibility and legitimacy to the ICC. It also analyzes its regional duplication by the African Court of Justice and Human Rights (ACtJHR) which the AU has granted criminal jurisdiction over international and transnational crimes, including those of specific concern to Africa[7]. In this regard, particular attention will be paid to the resistance against this idea to reform the ICC justice system.

Consequently, three topical issues are examined here, namely the euphoria among states at the beginning for the ICC in Africa (2), the growth of African hostility against the Court's work (3) and the regional counter-initiatives through the umbrella of the AU (4).

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[2] Africa Legal Aid, 'Conference Report: the International Criminal Court in a Politically Divided World' (Gaborone, Botswana: 21-22 October 2011), < http://www.africalegalaid.com/news/the-international-criminal-court-in-a-politically-divided-world > accessed 28 July 2015.

[3] R. JV Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal', 14 *Melbourne Journal of International Law* (2013) 1-29, at 28.

[4] China, Russia and the United States of America (USA).

[5] W.A. Schabas, *An Introduction to the International Criminal Court* (2nd edn., Cambridge: CUP, 2004), at 19.

[6] M. Du Plessis, *The International Criminal Court that Africa Wants* (Pretoria: Institute for Security Studies, 2010), at 5 and 19.

[7] See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (27 June 2014) (hereafter the Amendments Protocol).

2. The Context of African Euphoria for the ICC

In the beginning, states' euphoria in Africa for the ICC was palpable. The African attitude towards the nascent ICC was dictated by a contextual motivation particular to Africa: the belief in a global judicial humanitarianism, meant to end impunity in the continent (a), combined with a specific idea of the court African states wanted to establish to achieve this aim (b).

a) The Belief in a Global Judicial Humanitarianism Intended to End Impunity in Africa

The United Nations Diplomatic Conference on the establishment of the ICC (15 June -17 July 1998) took place when a number of African countries were facing shocking atrocities and abominable crimes[8]. Meanwhile, the continent was almost unable to find solutions by its own means. The Organization of African Unity (OAU), the predecessor of the AU, the principal regional organization, was crippled by a number of legal deficiencies. Concerning humanitarian intervention, the Cairo Declaration of 30 June 1993 restricted any regional troop deployment to an observer mission, devoid of a mandate to use force for the protection of civilians, except in the case of self-defense[9]. The consent of interested belligerent parties was also required, in accordance with the OAU obligation of non-interference in the internal affairs of member states[10]. From a political angle, the regional organization suffered from a lack of state cooperation. Its observer missions on the ground neither received sufficient personnel, nor appropriate financial and logistical means to implement their powerless mandates[11]. For the same reason, the OAU was not able to take criminal judicial measures. It had no legal power, unlike the one established in chapter VII of the Charter of the United Nations, to create an ad hoc tribunal. The African Human Rights Commission, which was mandated under the African Charter on Human and Peoples' Rights (ACHPR) of 27 June 1981[12], engendered an expectation in human rights protection[13]. But, this body solely received the power to make recommendations to the OAU Assembly. It has no judicial competence to take binding decisions upon litigant parties. The African Court on Human and Peoples' Rights was established by the Ouagadougou Protocol on 10 June 1998 to fill this vacuum. However, it was deprived of criminal jurisdiction and the Ouagadougou Protocol entered into force later on 10 January 2004.

It follows that Africa remained prey to *external* measures in response to African peace and human rights crises. This predisposition expanded at the end of the Cold War and with the beginning of hard processes of states re-democratization, after the failure of initial experiences in 1960s. In fact, there was a move to an increasingly global humanitarianism at the time as an expression of the world's solidarity with the African peoples.

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[8] The following situations are illustrative: fratricidal war in Liberia (1990), Somalia (1992) and Sierra Leona (1995); ethnic cleansing and massacres in Burundi (1993); the deadly attack against President Juvenal Habyarimana's aircraft and the ensuing genocide in Rwanda (1994); massacres of Rwandan refugees in DRC (1996); the tragedy of the Congo Wars (particularly since 1998), etc.

[9] Declaration AHG/Decl.3 (XXIX) on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 30 June 1993.

[10] See M.C. Djiena Wembou, 'A propos du nouveau mécanisme de l'OUA sur les conflits', XCVIII *Revue générale de droit international public (RGDIP)* (1994) 377-386.

[11] J.-D. Biyogue Bi Ntougou, *Les politiques africaines de paix et de sécurité* (Paris : L'Harmattan, 2010), at 21.

[12] Art. 30.

[13] G. J. Naldi, 'Future Trends in Human Rights in Africa: the Increase Role of the OAU', in M. D. Evans and R. Murray (eds), *The African Charter on Human and Peoples' Rights: the System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002)1-35, at 10.

The concept of humanitarianism may be understood here as both an ideology and a world policy. As an ideology, it contains the moral idea of having a certain sensibility to human sufferings, especially when values common to mankind are massively or systematically disregarded. As a policy, humanitarianism implies the duty to prevent the commission of widespread atrocities, to protect their victims or more generally to ensure respect for human rights, where a state fails to do so within its own territory. On 5 October 1987, the former French president, François Mitterrand, declared: "because it is proper to every human, the suffering is universal. No state can claim the ownership of sufferings it provokes or shelters"[14]. Historically, this idea goes back to the nineteenth century, particularly in Europe, where great powers (England, Russia, Germany, France and Italy) were keen to intervene abroad in order to "rescue a group of foreign nationals from oppression at the hands of their rulers"[15]. Hence, humanitarianism, and more broadly the "New International Humanitarian Order"[16], trump state sovereignty in order to safeguard some human rights standards. It strengthens the role of the international community to protect mankind against heinous atrocities and crimes, irrespective of the region and the state where they occur or the nationality of the perpetrators.

This concept has favoured a great development of various legal tools necessary to discharge this responsibility: *jus cogens* and obligations *erga omnes*, humanitarian assistance, humanitarian military interventions, coercive international political sanctions, etc. In the field of judicial humanitarianism, the Security Council established ad hoc tribunals, for the former Yugoslavia in 1993 and for Rwanda after the genocide in 1994[17]. While these tribunals were temporally limited jurisdictions, set up to address specific humanitarian situations, the need for a permanent judicial mechanism at the disposal of the international community became urgent. The ICC now had to be created. It aims to target crimes that concern the whole of humanity, since they are so odious that nobody would bear that they remain unpunished. The Court was expected to have a deterrent effect on any would-be international criminals[18].

This kind of judicial humanitarianism made Africa the favorite place to experiment with the "New International Humanitarian Order"[19], which praises the theory of "human security"[20] and the

[14] J. B. Moussavou-Moussavou, 'Du devoir d'ingérence humanitaire au droit d'ingérence humanitaire', 13 *Revue africaine de politique internationale* (1993) 9-14, at 11. The original version of the quotation in this paper is read as follows : '(…) parce qu'elle est celle de chaque homme, la souffrance relève de l'universel (…). Aucun Etat ne peut être tenu pour propriétaire des souffrances qu'il engendre ou qu'il abrite'. The translation is mine. The declaration was somewhat a political impetus to the joint initiative of the organization 'Médecins sans Frontières' and the University of Paris to promote humanitarian interventions, before the takeover of the issue by the United Nations General Assembly in 1988.

[15] S. C. Neff, *War and the Law of Nations: a General History* (Cambridge: Cambridge University Press, 2008), at 219 and 123-125.

[16] See Report of the Secretary General 'New International Humanitarian Order' (7 August 2006) UN Doc.A/61/224, at 2-4.

[17] For the International Criminal Tribunal for the former Yugoslavia (ICTY), see SC Res. 827 (1993), 25 May 1993, para.2. For the International Criminal Tribunal for Rwanda (ICTR), see SC Res. 955 (1994), 8 November 1994, para.1.

[18] A. M. Manirabona, 'La Cour pénale internationale et la prévention des atrocités en Afrique : le difficile passage de la rhétorique à la réalité', 69 *Revue du Barreau du Québec* (2010) 277-315, at 281.

[19] M. Mamdani, 'The New Humanitarian Order', *The Nations* (28 September 2008), <*http*://www.thenation.com/article/new-humanitarian-order?page=0,0 > accessed 30 March 2015).

[20] UN Development Programme, *Human Development Report 1994* (New York and Oxford: Oxford University Press, 1994), at 22-40 ; Report of the Secretary-General on the Work of the Organization (30 August 2000) General Assembly Official Records Fifty-fifth session Supplement No. 1 (A/55/1), para.31.

doctrine of "the responsibility to protect"[21]. It means that if a sovereign state fails to protect its own people, by incapacity or (political) unwillingness, the responsibility to protect those people must be exercised by the international community. The ICC, which also acts on behalf of this community[22], is expected to contribute to the protection of common human values. It is both a symbol of world judicial humanitarianism towards weak countries failing to comply with their primary obligations which derive from the powers of state sovereignty, and one more universal tool at the disposal of the international community to protect victims of egregious atrocities by enforcing, wherever applicable, the globalized law in the name of the whole of humanity.

On both sides of this image of the ICC, Africa was widely concerned. During the United Nations Diplomatic Conference in Rome, the OAU representative declared:

> Africa had a particular interest in the establishment of the Court, since its peoples had been the victims of large-scale violations of human rights over the centuries: slavery, wars of colonial conquest and continued acts of war and violence, even in the post-colonial era. The recent genocide in Rwanda was a tragic reminder that such atrocities were not yet over, but had strengthened OAU's determination to support the creation of a permanent, independent court to punish the perpetrators of such acts[23].

Sir Phakiso Mochochoko from Lesotho was even clearer when he highlighted:

> No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur[24].

However, these standpoints appear to be an excessive, although legitimate, belief in the ideals of the ICC. They are based on a pre-conceived idea that the establishment of the ICC was the best way, a humanitarian one, to end impunity in Africa. Besides the fact that the latter statement is not necessarily true, it is also clear that it encompasses some dangers. On the one hand, the lack of a global consensus on major legal aspects of the Rome Statute was unavoidable. In addition, great powers wanted to control the new Court within the pre-existing international order in which they already exercised exorbitant prerogatives: politically, legally and economically. On the other hand, and as a consequence, the risk of politically motivated justice, but which may be fair in some cases, was evident, even more than within the framework of national criminal justice systems. That is what Africa may again learn from Michael Ignatieff's observation when he writes:

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[21] See ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center, December 2001).

[22] K. Quashigah, 'The Future of the International Criminal Court in African Crisis and its Relationship with the R2P Project', 21 *Finnish Yearbook of International Law* (2010) 89-99, at 90-91.

[23] 'Summary Report of the Plenary Meetings and of the Meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (Rome 15 June-17 July 1998) Official Records (New York 2002) UN Doc.A/CONF.183/13 (vol.II), at 104.

[24] P. Mochochoko, 'Africa and the International Criminal Court', in E. Ankumah and E. Kwakwa (eds), *African Perspectives on International Criminal Justice* (Ghana: Africa Legal Aid, 2005) 241-258, at 249. See also M. Du Plessis, 'The International Criminal Court and its Work in Africa: Confronting the Myth', ISS Paper 173(November 2008), at 2.

> Creating an international court was supposed to rescue the possibility of universal justice from the revenge frenzies, political compromises, and local partialities of national justice. International justice turns out to be as much the prisoner of international politics as national justice is of national politics. Indeed, given the stakes, international justice may be more partial, that is, more politicized, than national justice[25].

It is not clear whether or not, at the time of negotiations, African states were aware that they would become the principal recipients of the nascent ICC and its judicial activities. They had in mind the court they wanted; however the one resulting from the adoption of the Rome Statute did not reflect all their aspirations.

b) The Court Wanted by Africa and the ICC Embodied in the Rome Statute

The strained relationship between Africa and the ICC has its remote origins just in the United Nations Diplomatic Conference of Plenipotentiaries in Rome. How African states and regional organizations actively participated in negotiations during this conference, or even in earlier drafting processes of what became the Rome Statute, has already broadly been commented on and is not a matter of controversy[26]. Forty-nine African countries[27], the OAU and the Southern Africa Development Community (SADC) were present. However, this wide participation in the negotiations did not mean that the African sides blindly approved the newly-born world Court. Rather, because their expectations were not met by the outcomes of the conference, their presumed discontent was predictive of the challenges the ICC would have to face on the ground. It is therefore useful to examine what were these expectations, the gap between them and the ICC created and why, notwithstanding, African states went on to sign and ratify the new international treaty.

aa) A Number of Unrealized Expectations

Two main preparatory documents to the Rome negotiations can serve here as a means of evidence. On the one hand, some twenty-five African countries adopted the Dakar Declaration of 6 February 1998 for the establishment of the ICC[28]. It was also acknowledged by the OAU Council of Ministers on 27 February 1998 which appealed to all its member states to support the creation of the ICC[29]. On the other hand, the SADC principles of consensus on the ICC were approved by fourteen member states during the Pretoria meeting from 11 to 14 September 1997[30]. These two non-binding documents were variously reiterated in official declarations during the United Nations Diplomatic

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[25] M. Ignatieff, 'We're so Exceptional', *The New York Review of Books* (5 April 2012), quoted by D. Hoile, *Justice Denied: The Reality of the International Criminal Court* (London: Africa Research Center, 2014), at.9.

[26]Mochochoko, *supra* note 24; H. Jallow and F. Bensouda, 'International Criminal Law in an African Context', in M. Du Plessis (ed.), *African Guide to International Criminal Justice* (Pretoria: Institute for Security Studies, 2008)15-53, at 41-43; S. Maqungo, 'The Establishment of the International Criminal Court: SADC's Participation in Negotiations', 9 (1) *African Security Review* (2000) 42-53; Du Plessis, *supra* note 24, at 2-6.

[27] The following states were not present: Equatorial Guinea, Gambia, Seychelles, Somalia, Sahrawi Arab Democratic Republic and Southern Sudan.

[28] Dakar Declaration for the Establishment of the International Criminal Court in 1998 (6 February 1998), <http://www.iccnow.org/documents/DakarDeclarationFeb98Eng.pdf > accessed 12 March 2015.

[29] C. B. Murungu, 'Immunity of State Officials and Prosecutions of International Crimes in Africa' (PhD Thesis, University of Pretoria 2011), at 180.

[30] See Maqungo, *supra* note 26, at 43-44.

Conference in Rome[31]. Therefore, they represented the shared vision by the majority of African states on the court which had to be created. Notably, two legal aspects can better illustrate this vision.

First, there was the issue about the ICC's institutional status. Both Dakar and SADC groups of states were in favour of a court which could be, as a separate institution from the United Nations, "independent, permanent, impartial, just and effective"[32], whose actions should not be prejudiced by political considerations. This is why they furthered the mandate of a Prosecutor with effective broad powers to act and initiate investigations *proprio motu*, outside the hands of states parties and the Security Council. The new Court was expected to be based on the sovereign equality of all states and the consent to its jurisdiction through ratification, state referral of situations or ad hoc acceptance by third parties. African states were opposed to any form of interference of the Security Council in the functioning of the ICC. There is not a better formulation than what the Ugandan representative declared: "[…] the role of the Security Council under Chapter VII of the Charter of the United Nations should not be allowed to influence the acceptability and the independence of the Court"[33]. Although this position evolved within the SADC group of states, only a mere referral of situations by the Security Council to the independent Prosecutor, but not the power of deferral of investigations or prosecutions, appeared bearable[34]. African states presumably feared to vest a political body dominated by five permanent members (five great powers and not a single African country) with the competence to decide which situation to investigate or to influence the judicial choice of who should or not be prosecuted. They wanted to avoid settlements of political scores through international judicial means.

Secondly, African states differently perceived the scope of the ICC jurisdiction. The Court was expected to be complementary to national criminal justice systems. But, the Dakar Declaration added that complementarity also existed between the ICC and regional tribunals[35]. It is worth noting that this complementarity was required on the eve of the establishment of the AU on 11 July 2000 for the sole purpose of ending the shortcomings of the defunct OAU. Presumably, some African states already had in mind that the new organization could be in a position to create a regional tribunal to deal with African criminal matters before any *external* international judicial action. On its side, the SADC group of states requested that the new Court have jurisdiction over the crime of aggression as well as legal persons like companies and other forms of corporations[36]. Emphasis must be put here on the liability of multinational corporations. These types of legal persons are suspected of being behind some of the most serious human rights abuses on the continent when they engage in business activities (i.e. control and plundering of natural resources, trade and trafficking of weapons) with states or non-states actors in areas affected by conflicts or of limited statehood[37]. It has been demonstrated that many African countries in conflict are at

[31] 'Summary Report of the Plenary Meetings and of the Meetings of the Committee of the Whole', *supra* note 23, at 65 and 83.

[32] Maqungo, *supra* note 26, at 43. See also Dakar Declaration, *supra* note 28.

[33] 'Summary Report of the Plenary Meetings and of the Meetings of the Committee of the Whole', *supra* note 23, at 118.

[34] Maqungo, *supra* note 26, at 47.

[35] Dakar Declaration, *supra* note 28.

[36] Maqungo, *supra* note 26, at 47 and 48.

[37] J. Chella, 'The Complicity of Multinational Corporations in International Crimes: an Examination of Principles' (PhD Thesis, Bond University 2012), at 5-13.

extreme and high risks for corporate complicity in the perpetration of international crimes[38]. Consequently, it did not sound better to criminalize only individuals' behaviors, whereas a multinational company, for example, could make money in the blood of innocent people, on the detriment of their nation, and in impunity.

By the end of negotiations, the ICC embodied in the Rome Statute did not meet these expectations. The diplomatic failure was above all about the independence of the Court towards the controversial Security Council. The latter was vested, on the insistence of great powers and particularly the United States of America, with new exorbitant powers. In fact, it received the so-called deferral competence of investigations or prosecutions[39], which is actually a capability for paralyzing ICC's proceedings through a political decision. It was also attributed the power to refer to the Prosecutor, under article 13 (b) of the Rome Statute, situations implicating non-contracting states. This article was quite an unprecedented conventional provision which destroyed the basic principle of the law of treaties requiring that international agreements do not produce effects on third parties, without their consent. It seems that exceptions to this principle were (so far) simply scarce, if not impossible, to find[40]. Such a strong dependency of a judicial institution on the will of a political body, if affirmed at a national level, would simply be a legal scandal, even in dictatorial regimes. Even if international law is different from national law, this comparison can better illustrate the magnitude of powers granted to the Security Council. It is actually doubtful that this body was allocated, under Chapter VII of the Charter of the United Nations, the power to impose a treaty on a third party under the alibi of maintaining international peace and security or avoiding the practice of costly ad hoc criminal tribunals which it may establish.

Moreover, criminal responsibility of legal persons was not included in the Rome Statute, while the crime of aggression, though mentioned within the jurisdiction *ratione materiae* of the new Court, was simply postponed for future legal review and considerations. After all, the Rome Statute intentionally ignored complementarity with potential regional criminal tribunals in favour of a binary system, ICC-national jurisdictions[41]. That was also the option already agreed upon by the International Law Commission (ILC) in its Draft Statute for an International Criminal Court in 1994[42]. It means that there is no power sharing between stakeholders of universalism and defenders of a flexible regime in which regions could have a say in the matter.

[38] *Ibid*., at 10-11.

[39] Art.16 ICC St.

[40] P.-M. Dupuy and Y. Kerbrat, *Droit international public* (11th edn., Paris: Dalloz, 2012), at 338.

[41] K. Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights', 97 *Minnesota Law Review* (2012) 669-708, at 692.

[42] International Law Commission, 'Draft Statute for an International Criminal Court with Commentaries' II *Yearbook of International Law Commission* (1994) 26-74, part II., at 27. See Commentary on the Preamble, where it is stated : 'The Preamble sets out the main purposes of the Statute, which is intended to further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of persons accused of crimes of significant international concern. In particular it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions [...]' (*ibid*.).

bb) The Determining Factors of the African Attitude towards the Court Agreed Upon

It seems that the draft Rome Statute was unacceptable for many delegations, including African states[43]. But, despite their diplomatic failure, which did not appear in official speeches of satisfaction to see the advent of the judicial icon, African states voted for, signed the Rome Statute and quickly ratified it in their vast majority. Senegal was the first country to become member of the ICC on 2 February 1999. Statistically, by the end of March 2016, they constitute the largest group of states parties among 124 ICC members: 34 African states, 19 Asia-pacific states, 18 from Eastern Europe, 28 Latin American and Caribbean states and 25 from Western Europe, Northern America and Oceana[44]. Only twenty-one other African countries have not yet joined the ICC[45]. Consequently, it is interesting to know the factors which may explain their attitude of both membership and non-membership to the ICC.

(1) An Attempt of Justification of the Non-membership

There are various reasons in this respect. First, some African states not parties to the Rome Statute are those which did not attend the United Nations Diplomatic Conference of Plenipotentiaries in Rome: Equatorial Guinea (under a non-opened dictatorial regime), Somalia (a failed state lacking a legitimate representative government), Sahrawi Arab Democratic Republic (recognized by the OAU and AU, but not the United Nations) and South Sudan (not yet born). While the Sahrawi Arab Democratic Republic cannot accede to the Rome Statute due to its non-recognition as a state by the United Nations, the three other remaining countries are presumably not encouraged to join the ICC while being in a deteriorated relationship with Africa.

Second, speaking on behalf of the Group of Arab states, Sudan advanced several arguments as to why they were not convinced by the Rome Statute that had been agreed upon. It notably pointed out: i) the fact that the treaty included general expressions concerning the crime of aggression, and that it would be many years before the Court could exercise its jurisdiction in that field; ii) the fear that the Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regardless of country, religion, or nationality; and that the text adopted might increase the powers of the Security Council over and above those set out in Chapter VII of the Charter of the United Nations; iii) the Prosecutor should not enjoy powers *proprio motu* and must be put under reasonable and logic control[46]. This position was shared by Afro-Arabic countries such as Algeria, Egypt, Libya, Mauritania and Morocco. As Libya clarified it, just at the beginning of the negotiations, the Court should not be established on the basis of hegemony and everything had to be done to avoid that those permanent members of the Security Council used their position to influence its work[47]. Morocco even added the necessity of a court free from

[43] Maqungo, *supra* note 26, at 45.

[44] International Criminal Court, 'The States Parties to the Rome Statute', <https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 30 March 2016.

[45] Algeria, Angola, Cameroon, Egypt, Eritrea, Ethiopia, Equatorial Guinea, Guinea Bissau, Libya, Mauritania, Mozambique, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, Sudan, Swaziland, Togo, Zimbabwe, Southern Soudan, Morocco.

[46] 'Summary Report of the Plenary Meetings and of the Meetings of the Committee of the Whole', *supra* note 23, at 126.

[47] *Ibid*, at 101-102.

relations with non-governmental organizations (NGOs)[48]. It had to be avoided that a state having some control over an NGO (financially or by nationality) utilized their channel to indirectly influence the work of the Court. Furthermore, Libya considered it was not acceptable that the substantive jurisdiction of this Court confined to matters of interest for some states while ignoring different issues of concern to others, including drug trafficking, organized crimes, financial and economic crimes and aggression against the environment[49].

Third, it is probably for quite similar reasons that some other African states remain reluctant to join the ICC. Angola, for example, underlined that "an international court should not have fewer guarantees of independence and impartiality than a national court in determining what crimes and criminals it would try"[50]. In this regard, the power granted to the Security Council by the Rome Statute was not acceptable. On their side, Zimbabwe and Mozambique could not be far from this line, particularly as they shared a similar position as members of the SADC group of states. Rwanda added the fact that the Court could not apply the death penalty[51].

Some of these bones of contention were also raised by several great powers to justify their stance against the new Court. For example, the United States of America argued that they could not accept the Rome Statute inasmuch as it extended the jurisdiction of the Court to nationals of third states, while it could not blindly believe in the independence of an apolitical prosecutor vested with *proprio motu* powers, without a risk of highly politicized justice against American citizens[52]. This position was shared by China[53]. In addition, the United States of America put it clear that this Court should have been entirely accountable to the Security Council for any investigation or prosecution[54]. However, India refuted the power granted to the Security Council which might arguably be destructive of the Court[55]. It criticized this regime of inequality of states in favour of the permanent members of the Security Council, underlining the message that the Court was not created for their leaders and citizens[56]. Worse, some members of the Security Council not parties to the Rome Statute would illegitimately exercise the power to bind other states not parties[57]. Finally, India questioned the independence of the prosecutor and the failure to criminalize the use of nuclear weapons[58].

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[48] *Ibid*., p.103.

[49] *Ibid*.

[50] *Ibid*., p.117.

[51] *Ibid*., p.103. However, since 2007, Rwanda has abolished the death penalty.

[52] M. Wind, 'Challenging Sovereignty? The USA and the Establishment of the International Criminal Court', 2 (2) *Ethics ∞ Global Politics* (2009) 83-108, at 88-90; G. O'Connor, 'The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court', 27 (4) *Hofstra Law Review* (1999) 927-977, at 948-956.

[53] Hoile, *supra* note 25, at 22-23.

[54] E. P. Schwartz, 'The United States and the International Criminal Court: The Case for "Dexterous Multilateralism', 4 (1) *Chicago Journal of International Law (CJIL)* (2003) 223-235, at 125-128; C. Jeu, 'A Successful, Permanent International Criminal Court. "Is it Pretty to Think So?', 26 (2) *Houston Journal of International Law* (2004) 411-441, at 433; K. Carlson, 'The International Criminal Court: Challenges and Possibilities', 6(1) *The Bulletin of Fridays of the Commission (AU)* (2014) 37-40, at 38.

[55] Hoile, *supra* note 25, at 24.

[56] *Ibid*.

[57] *Ibid*. See also G. Tiwari, 'Why India Continues to Stay out of ICC ?', *A Contrario International Criminal Law* (27 April 2013), <http://acontrarioicl.com/2013/04/27/why-india-continues-to-stay-out-of-icc/> accessed 3 August 2015.

[58] *Ibid*.

The question is now why the majority of African states joined the ICC, when a minority of them and some important great powers refused to do so, in the absence of any regime of reservation[59].

(2) An Attempt of Justification of the Membership

It is not easy to explain the *euphoric* attitude of the majority of African states to become ICC members. Each country possesses its own national specificities in how and why it intends to be bound by an international treaty. But, the surprise of their votes, signatures and swift ratifications of the Rome Statute could depend on a number of cumulative and interconnected plausible factors. Two theses come here into consideration.

i. The Free Consent of African States to the Rome Statute

It is by far the most popular thesis in the literature explaining African states' free consent to the Rome Statute. The ICC Prosecutor, Fatou Bensouda, has authoritatively recalled it when she emphasizes on Sir Mochochoko's comment on the issue which tells as follows:

> Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the Court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community[60].

Several reasons can be advanced in support of the idea of African free consent to the Rome Statute. First, the elementary fact in the series relates to classic diplomatic concessions inherent to any international negotiation. Second, there is a general idea that prior to the ICC creation, international criminal justice was already part of regional efforts to ensure respect for human rights[61]. Thus, the consent to the Rome Statute was simply a reiteration of a common African will to struggle against impunity, to promote the rule of law and peace across the continent. The conviction seemingly became irreversible after the genocide against tutsi and moderate hutu civilians that could have been prevented and avoided in Rwanda in 1994[62]. The idea is also testified by the 1996 warning by the OAU Council of Ministers, with support from the Economic Community of West African States (ECOWAS)[63], saying that it would call for the establishment of a war crimes

[59] Art. 120 of the ICC Statute prescribes: 'No reservations may be made to this Statute'.

[60] F. Bensouda, 'International Criminal Court and Africa: the State of Play', <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/International-Criminal-Justice-and-Africa.pdf> accessed 10 October 2015; Mochochoko, *supra* note 23. See also Du Plessis, *supra* note 23, at 2.

[61] See M. Kamto, 'Introduction générale : la Charte africaine des droits de l'homme et des peuples et les perspectives de la protection des droits de l'homme en Afrique', in M. Kamto (ed.), *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme -Commentaire article par article* (Brussels : Bruylant, 2011) 1-59, at 48-49.

[62] OAU, 'Rwanda: the Preventable Genocide. Report of the International Panel of Eminent Personalities' (May 2000), <http://www.refworld.org/pdfid/4d1da8752.pdf> accessed 27 May 2015.

[63] ECOWAS, 'Code of Conduct for the Members of the Council of State of the Republic of Liberia', 22 *ECOWAS Official Journal* (1996), at 119 at 121. It stipulated: 'Where a member or members of the Council are adjudged to be in breach of the provisions of the code of Conduct for members of the Liberian National Transitional Government (LNTG), and in particular, any act which impedes the implementation of the Abuja Agreement,

tribunal to try those who bore the responsibility for gross violations of human rights and peace during the armed conflict which had started in Liberia since 1989[64]. Moreover, the OAU fully supported trials against perpetrators of the Rwandan genocide[65] among them Jean Kambanda, former Rwanda Prime Minister in the course of atrocities, who was convicted and sentenced to life prison by the ICTR[66]. Third, and last, it is repeated that the African involvement in the establishment of the ICC constitutes in itself another proof that their consent to the Rome Statute was free[67]. Arguably, the idea includes the African wide participation in the United Nations Diplomatic Conference of Plenipotentiaries in Rome as well as regional initiatives aiming to assist African states in the process of ratification and implementation of the Rome Statute[68]. For example, this might be the case for the Windhoek Plan of Action on ICC Ratification and Implementation in SADC, adopted in May 2001[69]. The Windhoek Plan of Action[70] followed the Pretoria Statement on Common Understanding on the ICC in SADC Region, adopted on 9 July 1999[71], which "recommended to the relevant authorities the expeditious ratification of the Rome Statute in their respective countries"[72]. More importantly, calls for ratification also emanated from continental institutions themselves, including the African Human Rights Commission[73] and the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA)[74].

However, the strength of some of these arguments may be partly mitigated by three main criticisms. First, they seem to rest on a basic conflation with the issue at stake. In fact, the African

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appropriate steps shall be taken by the Chairman of ECOWAS', including the 'establishment of a war crimes tribunal to try human rights offences against Liberians'. This Code of Conduct was instituted by the ECOWAS Heads of State within the framework of the Peace Plan for Liberia. It was bound for the ruling Council in that time in Liberia and its members of the Liberian National Transitional Government (LNTG). See C. A. Odinkalu, 'International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda beyond the ICC', XL (2) *Africa Development* (2015) 257-290, at 269-270.

[64] Resolution CM/Res.1650 (LXIV), 5 July 1996, para.12. In this paragraph, the OAU Council of Ministers warned : 'Liberian warring faction leaders that should the ECOWAS assessment of the Liberian peace process during its next Summit meeting turn out to be negative, the OAU will help sponsor a draft resolution in the UN Security Council for the imposition of severe sanctions on them, including the possibility of the setting up of a war crime tribunal to try the leadership of the Liberian warring factions on the gross violations of human rights of Liberians'.

[65] OAU, *supra* note 62, at 261.

[66] Judgment, *Jean Kambanda* (ICTR 97-23-A), Appeals Chamber, 19 October 2000.

[67] Jallow and Bensouda, *supra* note 26, at 41; Du Plessis, *supra* note 6, at 5. See also Murungu, *supra* note 29, at 182-186; G. Werle and M. Vormbaum, 'Afrika und der Internationale Strafgerichtshof', *Juristen Zeitung* (10 June 2015) 581-588, at 581-582.

[68] G. Kemp, 'The Implementation of the Rome Statute in Africa', in G. Werle, L. Fernandez and M. Vormbaum (eds), *Africa and the International Criminal Court –International Criminal Justice Series, Volume 1* (The Hague: Springer, 2014) 61-77, at 65.

[69] *Ibid*.

[70] See 'Final Document: Conference on International Criminal Court (ICC) Ratification and Implementation for the Southern African Development Community (SADC) Region' (2001) <http://www.pgaction.org/pdf/pre/02_2001_WindhoekPlan.pdf> accessed 28 March 2016.

[71] *Ibid*.

[72] See 'Pretoria Statement of Common Understanding on the ICC', 12 *The International Criminal Court Monitor* (August 1999) 3, at 3 <http://www.iccnow.org/documents/monitor12.199908.pdf> accessed 29 March 2016.

[73] See R. Illa Maikassoua, *La Commission africaine des droits de l'homme et des peoples: un organe de contrôle au service de la Charte africaine* (Paris : Karthala, 2013), at 392.

[74] Solemn Declaration AHG/Decl.4 (XXXVI) on the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA), 11 July 2000, Stability Calabash (para.14 (l)).

participation in the negotiation process of the Rome Statute and the belief in the international criminal justice system as a means to tackle impunity for gross violations of human rights in Africa can only evidence that African states also wanted and supported, like many other countries around the world, the establishment of the ICC. But, these arguments do not tell anything more on the different issue as to whether African states freely decided to consent to the Rome Statute, although some of their primary aspirations were not met by the United Nations Diplomatic Conference of Plenipotentiaries in Rome. Logically, both issues (wanting the creation of the Court and consenting to its founding treaty) may have distinct explanations and causalities. Moreover, concerning the so-called regional initiatives to boost African ratifications of the Rome Statute, it is important to note that not all of them were exclusively Africans in nature. For example, the Windhoek Plan of Action was the result of a conference[75], sponsored by Canada and the European Union Commission, hosted by Namibia and co-organized by two private organizations (based in the United States of America and Canada respectively), that's to say Parliamentarians for Global Action (PGA) and the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) with its International Criminal Court Technical Assistance Program (ICCTAP). Likewise, the Pretoria Statement on Common Understanding on the ICC emanated from a joint conference between SADC member states and the International Committee of the Red Cross, the Community Law Center (South Africa), Amnesty International, Human Rights Watch, Lawyers for Human Rights (South Africa) and again Parliamentarians for Global Action[76].

It follows that the thesis of free consent of African states to the Rome Statute seems to certain extent very weakened. The opposite, complementary and stronger thesis explaining better the African membership to the ICC could be the context of pressure and the international strategy enticing most of African countries to sign and ratify the new treaty.

ii. The Context of Pressure and the International Strategy of Enticement of African States

According to Serge Sur, many states among the 120, which adopted by a non-recorded vote the Rome Statute, were under pressure and excessive influence of NGOs[77]. That created an unbalanced situation among states because that pressure proved to be efficient towards weak countries, but it had no chance to overcome resistance from those powerful ones or with sufficient national political support[78]. The power and influence of NGOs rest above all on their massive participation in the negotiations process[79]. The influential NGO Coalition for the International Criminal Court (CICC) accredited to Rome over 200 of its 800 member organizations (more than the number of negotiating states), with 450 representatives[80]. It seems that the coordination and support of these NGOs by the CICC, its worldwide computer network and information system deeply influenced every

[75] See Conference on International Criminal Court (ICC) Ratification and Implementation for the Southern African Development Community (SADC) Region, Windhoek (Namibia), 28-30 May 2001.

[76] R. Dicker, 'S. African Governments Adopt Common Approach to ICC Ratification', 12 *The International Criminal Court Monitor* (August 1999) 3, at 3.

[77] S. Sur, 'Vers une Cour pénale international: la Convention de Rome entre les ONG et le Conseil de sécurité', CIII *RGDIP* (1999) 29-45, at 35 and 39.

[78] *Ibid*., at 40.

[79] C. C. Jalloh, 'The Role of Non-Governmental Organizations in Advancing International Criminal Justice', 1 (1) *African Journal of International Criminal Justice* (2015) 47-76, at 62-63.

[80] J. Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', 11 (2) *Peace International Law Review* (1999) 361-377, at 367.

aspect of the Rome Conference and justified much of its success[81]. They formed an alliance with the Like-Minded Group (LMG) consisting of some sixty (60) countries (including Germany, Canada, Netherlands and Australia) that shared similar views on the Court which had to be created[82]. Much of the work was done during their private meetings[83], with the support team of the United Nations, thus reflecting a serious lack of transparency. It is doubtless that the treaty adopted did not exactly correspond in all of its provisions to the true intent of many individual states. David J. Scheffer, an American negotiator, testified about the final forty-eight hours of the Rome Conference as follows:

> The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the Like-Minded Group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 a.m. on the final day of the Conference, July 17. (...) This "take it or leave it" text for a permanent institution of law was not subjected to rigorous review (...) and was rushed to adaption hours later on the evening of July 17 without debate. (...) Some provisions had never once been openly considered. No one had time to undertake a rigorous line-by-line review of the final text[84].

Those wavering states voted for the Rome Statute thanks to the NGOs' lobbying[85] and the political mobilization by member states of the LMG, which believed it was "a more robust instrument than even the ICC's strongest supporters could sensibly have hoped for"[86]. Rather, it may be agreed with David J. Scheffer that a better course would have been to suspend the Rome Conference and convene it later so that all the controversial issues were further negotiated[87].

After this adoption, the pressure continued. According to Charles C. Jalloh, "once the treaty was adopted, African and other human rights NGOs quickly transformed themselves into an effective global campaign for swift achievement of the 60 ratifications required for the Rome Statute to enter into force"[88]. This campaign was combined with a second factor: an international strategy of enticement of African states towards the ICC in the name of the struggle against impunity, required for economic and development partnership. This is especially the case between the European Union (UE), Africa, the Caribbean and the Pacific Group of States under the Cotonou Agreement of 23 June 2000[89]. The strategy obviously tallied with that of NGOs, because the European Union's

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[81] *Ibid*.

[82] *Ibid*., at 368.

[83] *Ibid*., at 374.

[84] D. J. Scheffer, 'The United States and the International Criminal Court', 93 (1) *American Journal of International Law (AJIL)* (1999) 12-22, at 20. See also G. Roberts, 'Assault on Sovereignty: the Clear and Present Danger of the New International Criminal Court', 17 (1) *American University International Law Review* (2001) 35-77, at 40.

[85] C. C. Jalloh, 'Regionalizing International Criminal Law?', 9 *International Criminal Law Review* (2009) 445-499, at 450.

[86] *Ibid*.

[87] Scheffer, *supra* note 84, at 21.

[88] Jalloh, *supra* note 85, at 450.

[89] Art. 11 (7) prescribes: 'In promoting the strengthening of peace and international justice, the parties reaffirm their determination to: share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and fight against international crime in accordance with international law, giving due regard to the Rome Statute. The parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments'.

objective was "to pursue and support an early entry into force of the Rome Statute and the establishment of the Court"[90].

It follows that those authors who defend the exclusive free consent of African states to the Rome Statute do not hold *all* the facts on their side. The context of pressure, the strategy of enticement, the NGOs' extraordinary campaign for the ICC in the continent and their relay by media of propaganda have played a crucial role to convince most African states, even though not coercing them, to join the new Court. Sayman Bula Bula confirms this view when he writes:

> (…) the majority of African states, except members of the Arab League –outside Comoros- which are not parties to the Rome Statute, have subscribed to the international agreement, either under foreign pressure, or after a quick and superficial overview on subsequent international obligations. (…) Governments have naively allowed judicial interference of extra-African powers (…)[91].

For example, the case of the DRC is pertinent. The alleged ratification of the Rome Statute happened in the aftermath of the assassination of President Laurent-Désiré Kabila on 16 January 2001. It is curious to observe that, at least, two other countries (Ivory Coast and Tunisia) have also acceded to this treaty only after violent changes of their governments[92]. In the DRC, the new President, Joseph Kabila, signed the Decree-law of 30 March 2002 (a legislative Act) to authorize the ratification of the Rome Statute[93]. The true ratification through a mere presidential decree, not a legislative Act, as it was constitutionally required, never followed[94]. On the contrary, the Decree-law of 30 March 2002 has been irregularly taken for ratification[95]. It was acted upon by the depositary of the Rome Statute, the Secretary General of the United Nations, on 11 April 2002[96]. Worse, while the President was deprived of any legislative authority[97], the national Parliament which had the power to authorize such ratification by him was not associated to the procedure, although being able to

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[90] European Union, 'Council Common Position of 11 June 2001 on the International Criminal Court' (2001/443/CFSP), < https://www.consilium.europa.eu/uedocs/cmsUpload/icc0en.pdf > accessed 25 March 2015.

[91] S. Bula Bula, *Droit international humanitaire* (Bruxelles : Bruylant-Academia, 2010), at 307-308. The french original of the quotation is read as follows : '(…) la majorité des Etats africains, à l'exception des Etats africains membres de la Ligue arabe -à part les Comores- qui ne sont pas parties au Statut de Rome, a souscrit l'engagement international, soit sous pression extérieure, soit à l'issue d'un survol rapide et superficiel des obligations internationales subséquentes'. The translation is mine.

[92] Ivory Coast has ratified the Rome Statute on 15 February 2013 after the eviction of President Laurent Gbagbo in April 2011. According to the 'Décision CC n° 002/C/C/SG du 17 décembre 2003', the Ivorian *Conseil constitutionnel* (Constitutional Council) held that the Rome Statute was inconsistent with the Constitution of 23 July 2000, which allowed immunities and other forms of judicial privileges to a category of national authorities. The new regime of President Alassane Ouattara had then to amend the Constitution in order to accede to the Rome Statute. As for Tunisia, it has ratified the treaty on 24 June 2011after the eviction of President Ben Ali as a result of political events relating to the so-called 'Arab Spring', in December 2010.

[93] Officially designated as *the Décret-loi n°0013/2002 du 30 mars 2002 autorisant la ratification du Statut de Rome de la Cour pénale internationale du 17 juillet 1998*.

[94] J. Kazadi Mpiana, 'La Cour pénale international et la République démocratique du Congo: 10 après. Etude de l'impact du Statut de Rome dans le droit interne congolais', 25 (1) *Revue québécoise de droit international* (2012) 57-90, at 60.

[95] J. Kazadi Mpiana, 'La position du droit international dans l'ordre juridique congolais' (PhD Thesis, Sapienza Università di Roma 2012), at 141 and 171-180.

[96] *Ibid*., at 61.

[97] See 'Décret-loi constitutionnel n°003 du 27 mai 1997 relatif à l'organisation et à l'exercice du pouvoir en République démocratique du Congo, tel que modifié et complété à ce jour (textes coordonnés et mis à jour au 1er juillet 2000)', *Journal Officiel de la République démocratique du Congo* (May 2001) 89, at 91-101.

sit and adopt laws in other fields of national interest[98]. More strikingly, the Parliament was even able to adopt only a short period later an Act to authorize the President to ratify the AU Constitutive Act of 11 July 2000[99]. As for the ICC, everything was done quickly and in a total lack of transparency[100]. Officially, the enactment of the Decree-law of 30 March 2002 was simply justified by a matter of "emergency and necessity"[101]. It is perhaps not useless to observe that it was signed at exactly the same date as the other irregular and unconstitutional presidential Decree-law which authorized to ratify the aforementioned Cotonou Agreement between the EU, Africa, the Caribbean and the Pacific Group of States[102]. In other words, financial assistance to the new regime had to go with the option for the ICC. It does not mean that the DRC did not need international criminal justice on its territory. Rather, the manner in which this justice was sought is questioned by the darkness of the process followed to join the ICC, whose temporal jurisdiction moreover already excluded crimes committed in the country before 1 July 2002.

Thus, ratifications of the Rome Statute by African states became a way to look after their images before international partners by attempting to secure quasi certificates of good conduct about compliance with human rights obligations, the fight against impunity and the rule of law[103]. Anyway, the ICC risked to be used against political opponents and to provoke national divisions. As soon as it started focusing on leading states officials, diplomatic hypocrisy ended and hostility grew up against the Court throughout the continent.

3. The Growth of African Hostility against the ICC's Judicial Work

There is a widespread misunderstanding on the foundation of the tension between African states and the ICC. Its origin is dated back to 2009 with the delivery of the arrest warrant against the Sudanese President, Al Bashir[104]. However, even though the arrest warrant against President Al Bashir has played an important role in worsening the situation, there is evidence, in light of the details mentioned above, that the Court was questionable since 1998. Some opposition started emerging at the dawn of its judicial activities in Africa, albeit in an unofficial manner. It is not the institution as such which generates hostility or becomes unwanted, but rather its judicial work and strategy towards the continent. The ICC seems to have missed some political advises to achieve on the judicial ground[105]. It continued to exacerbate the situation, instead of bringing remedies to its denounced weakness, in a manner that pushed African states to radicalize their criticisms and join

[98] For example, Law n° 002/2001 of 3 July 2001 on the trade tribunals; Law n°016/2002 of 16 October 2002 relating to the labour tribunals; Law n° 023/2002 of 12 November 2002 on the Military Judicial Code; Law n° 024/2002 of 12 November 2002 laying down the Military Criminal Code.

[99] See 'Loi n°006/2002 du 07 juillet 2002 autorisant la ratification de l'Acte constitutif de l'Union africaine'.

[100] Bula Bula, *supra* note 91, at 302.

[101] See *Décret-loi n°0013/2002 du 30 mars 2002 autorisant la ratification du Statut de Rome de la Cour pénale internationale du 17 juillet 1998*, preamble, para.3.

[102] See the *Décret-loi n° 011/2002 du 30 mars 2002.* See also Kazadi Mpiana, *supra* note 94, at 61.

[103] P. E. Batchom, 'La double-présence au sein des institutions internationales', *CODESRIA Newsletter* (31 January 2014) 1-16, at 8.

[104] See M. Kamto, 'L'affaire Al Bashir et les relations de l'Afrique avec la Cour pénale internationale', in *Africa and International Law : Reflections on the International Organization –Liber Amicorum Raymond Ranjeva* (Paris : Pedone, 2013) 147-170, at 156.

[105] T. Murithi, 'The African Union and the International Criminal Court: an embattled relationship' Policy Brief No.8 for the Institute for Justice and Reconciliation (IJR) (March 2013), at 6 and 8 <http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf> accessed 9 December 2015.

their voices in a common position on the ICC (a), the latter being dragged into a defensive posture (b).

a) The Scope of African Criticisms

The ICC started working in 2003, after the investiture of its first Prosecutor, Moreno Ocampo. By the end of March 2016, twenty-three cases in ten situations were already initiated before it[106]. Except the situation in Georgia in which the Pre-Trial Chamber I has recently authorized investigations on 27 January 2016, all those situations relate to African countries: Uganda, DRC, Central African Republic (CAR), Sudan, Kenya, Libya, Ivory Coast and Mali. Some others are under preliminary examinations, which normally precede formal openings of investigations: Nigeria and Guinea. Statistics illustrate an active cooperation between African states and the ICC. Among these nine situations under investigations, five have been brought by states parties themselves (Uganda, DRC, Mali, CAR I and II), two initiated by the Prosecutor *proprio motu* with support by the states concerned (Kenya and Ivory Coast)[107], while two others have been referred by the Security Council (Sudan and Libya)[108]. The first case was that of Thomas Lubanga from the DRC, whose final judgment was issued on 1 December 2014[109]. All of these situations and cases are in the heart of the African position on the ICC.

aa) The Development of the African Common Position on the ICC

At the outset, the African-focused proceedings of the ICC were not opposed by states. Only some opposition parties in countries like the DRC, CAR and Ivory Coast have suspected the Court of being in the service of governments which try to hijack its mandate in order to get rid of embarrassing political opponents (Jean-Pierre Bemba, Laurent Gbagbo, etc.). Later, inter-state criticisms have emerged in addition to prior opposition of those countries which had in principle refused to join the ICC. However, they are of a different nature, (geo-) politically and legally. They took shape in the African Common Position on the ICC, pursuant to article 3 (d) of the Constitutive Act of the AU which stipulates that one of the objectives of the Union shall be "to promote and defend African common positions on issues of interest to the continent and its people". This position constitutes a regional federation of protests against the Court's work by all African states, except Morocco[110]. Its embryo was elaborated in the Communiqué of the Peace and Security Council (PSC) of 21 July 2008 which actually aimed to warn the ICC that the Prosecutor's demand to inculpate an incumbent African Head of State was unacceptable[111]. This warning was approved by the AU Assembly in

[106] International Criminal Court, 'Situations and Cases', <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 25 March 2016.

[107] About the situation in Kenya, the Prosecutor has acted upon a Kenyan report sent to him, on 16 July 2009, by the Commission of Inquiry on Post-elections Violence (CIPEV). Concerning Ivory Coast, the Prosecutor has initiated investigations before this country becomes a State party to the Rome Statute (15 February 2013) after a declaration of acceptance of the ICC jurisdiction under article 12 (3) of the Rome Statute, made on 18 April 2003. This declaration was confirmed by the letter of 10 December 2010.

[108] See respectively SC Res. 1593 (2005), 31 March 2005, para.1; SC Res. 1970 (2011), 26 February 2011, para.4.

[109] Judgment, *Thomas Lubanga* (ICC-01/04-01/06 A5), Appeals Chamber, 1 December 2014.

[110] Morocco is neither a party to the Rome Statute nor a member of the AU.

[111] PSC/MIN/Comm (CXLII), 21 July 2008, paras 3 and 9.

February 2009[112]. Since then, the latter body has adopted various decisions that are binding to all its 54 member states pursuant to article 23 (2) of the Constitutive Act[113].

The allergy to see high states officials tried outside the continent was already implicit when the AU mandated Senegal, in 2006, to try, on behalf of Africa, the former Chadian President, Hissène Habré, for acts of torture and crimes against humanity, even though he was sought by Belgium as well. It was explicitly mentioned in the Declaration of the Pan-African Parliament of 15 May 2008 and other numerous decisions of the AU Assembly about what it called the "abuse of the principle of universal jurisdiction" [114] by some non-African states, particularly European ones whose indictments against African leaders and personalities "could endanger international law"[115] and impair friendly international relations and cooperation[116]. Some cases were even brought before the International Court of Justice (ICJ)[117] for violations of the foreign state sovereignty and/or the immunity right. True, African leaders are not the only ones to have been prosecuted within some European countries (Belgium, England, France, Germany, Spain, etc.). Proceedings have been also conducted against nationals of states from other parts of the world: North and Latin America (United States of America, Argentina and Chile), Asia (China, Iran, Iraq, Israel and Palestine) and the Caribbean (Cuba). But, everywhere, these proceedings have raised similar contestations. According to Charles C. Jalloh, "it is precisely the history of colonial domination between European and non-European states that makes it difficult, if not impossible, for the former colonists to render credible justice in relation to African cases- or to be perceived as doing so"[118]. These proceedings may actually hide the political will to interfere in, if not to control, the domestic affairs of the former colonized state. Judge *ad hoc* Sayman Bula-Bula pointed it out in his separate opinion in the *Arrest Warrant Case*, concerning the relationship between Belgium and the DRC[119]. It seems that some of the plaintiffs in the Belgian proceedings against Yerodia Ndombasi, former Congolese Minister of foreign affairs, were even political opponents to the ruling regime in Kinshasa[120].

Despite this clearly polluted regional context, the ICC decided to deliver, besides indictments against several rebel leaders and Sudanese officials, the first arrest warrant of 4 March 2009 against President Al Bashir for war crimes and crimes against humanity, and the second one on 12 July 2010 for genocide. These indictments actually poisoned the Court's relationship with the AU and its members. Apart from Sudan, Ethiopia, Rwanda and Zimbabwe, Afro-Arabic countries like Algeria, Libya, Egypt and Mauritania were among the most irritated. They played a crucial role in the elaboration of the African Common Position on the ICC. Beyond the continent, they also

[112] Assembly/AU/DEC.221 (XII), 3 February 2009, para.3.

[113] It stipulates: '(…) any member state that fails to comply with the decisions and policies of the Union may be subjected to (…) sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly'.

[114] See Assembly/AU/DEC.199 (XI), 1 July 2008.

[115] *Ibid*, para.5 (i).

[116] *Ibid*., para.5 (iii).

[117] See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, at 3; *Case concerning certain criminal proceedings in France (Republic of the Congo v. France)*, Provisional measure, Order of 17 June 2003, I.C.J. Reports 2003, at 102. The latter case was finally removed from the ICJ List on 16 November 2010 after Congo-Brazzaville withdrew its own application.

[118] C. C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', 21 *Criminal Law Forum* (2010) 1-65, at 62.

[119] Separate Opinion of Judge *ad hoc* Bula-Bula, *Arrest Warrant of 11 April 2000*, *supra* note 117, para.23.

[120] *Ibid*.

succeeded to drag into opposition member states of the Organization of Islamic Cooperation (OIC) which announced that the precedent would "adversely affect the credibility of the international legal system"[121]. Similar support was provided by the League of Arab States[122]. What are the bones of contentions concerning the judicial work of the ICC in Africa?

bb) The Allegations of Politics behind the Means of Law and Justice

The AU has organized several meetings in order to consolidate the African Common Position on the ICC. The most important are the ones which were held in October 2013, in June and November 2009. At each meeting, the ICC's judicial work was examined and criticized. However, participants did not aim to reject the institution. Positive criticisms to improve the Court's performance were raised. They may be grouped in two branches, in addition to the general protest against excessive procedural delays of trials, as illustrated by Thomas Lubanga and Jean-Pierre Bemba's cases[123], or one-side-focused prosecutions.

On the one hand, African states and the AU have shown that they disagree with the strategy of the Prosecutor. Concerns have been raised about why only African situations are investigated by the ICC and not others from elsewhere around the world. It has also been questioned why cases drawn from these situations involve only Africans, while non-African actors arguably also participate in conflicts and atrocities in the continent[124]. The problem posed here is thus that of selection of situations to investigate and notably that of cases to be tried by the ICC. The AU has denounced the conduct of the ICC Prosecutor, "who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan Al Bashir of the Sudan and other situations in Africa"[125]. Concerning the arrest warrant of 27 June 2011 against Muhammar Kadhafi, the former Libyan leader, it has expressed concerns on "the manner in which the ICC Prosecutor handles the situation in Libya"[126]. This was probably a protest against two things. One might be the rapidity with which the Prosecutor decided to indict Muhammar Kadhafi and his two followers (his son Saif Al-Islam Kadhafi and the head of military intelligence, Abdullah Al-Senussi). He spent only four months (for a preliminary examination and investigations) after the Security Council referral resolution of 26 February 2011, while he took almost four years before indicting President Al Bashir of Sudan. This judicial action was perceived to be a quick support for the ongoing military campaign which resulted in the change of regime in Libya[127]. Another one can be the problem of selective justice, since the ICC is targeting presumed offenders only from one side. It is a mere expression of victors' justice. About the situation in Kenya, and under the new Prosecutor's office,

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[121] Organization of Islamic Cooperation (OIC), 'The OIC Rejects the ICC's Arrest Warrant against Bashir', *10 OIC Journal* (January-April 2009) 23, at 23.

[122] See N. Bakr and S. Abdel Shafi, 'Arab Official Positions towards President Al Bashir's Indictment', in E. Moreno (ed.), *The Gap between Narratives and Practices. Darfur: Responses from the Arab World* (Madrid: FRIDE Publications, 2009), <http://fride.org/download/OP_Darfur_President_alBashir2_ENG_mar10.pdf> accessed 15 August 2015.

[123] For Thomas Lubanga, the final judgment of December 2014 was rendered eight years after his surrender to the Court on 16 March 2006. Jean-Pierre Bemba was arrested on 23 May 2008, but his judgment at the first instance is not yet delivered by the end of November 2015 (more than seven years have passed).

[124] I. Eberechi, 'Armed Conflicts in Africa and Western Complicity: a Disincentive African Union's Cooperation with the ICC', 3 *African Journal of Legal Studies* (2009) 53-76, at 56-71 and 75-76.

[125] Assembly/AU/DEC.296 (XV), 27 July 2010, para.9.

[126] Assembly/AU/DEC.366 (XVII), 1 July 2011, para.6.

[127] A. Bourgi, 'La Cour pénale internationale: le droit au service de la politique', in M. Ndiaye (ed.), *L'impunité: jusqu'où l'Afrique est-elle prête* (Paris: L'Harmattan, 2012) 59-64.

Fatou Bensouda, the AU has stated "its deep concern regarding the conduct of the Office of the Prosecutor and the Court and the wisdom of the continued prosecutions against African leaders"[128], and in particular President Uhuru Kenyatta and his Deputy, William Ruto, for their alleged implication in the 2007-2008 post-electoral violence. The Prosecutor has been suspected of being in collusion with some (geo-) political agenda. Rwanda has explicitly pointed it out at the Security Council, after the failure to defer the situation in Kenya on 13 November 2013[129]. Beyond, the AU has stressed "the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard"[130]. Hence, the African call for a review of the regulations and the policy paper regarding "the guidelines and code of conduct of the exercise of (discretionary) prosecutorial powers to include factors of promoting peace (…)"[131].

On the other hand, the disapproval of indictments against African leaders is based on four main considerations. First, the AU insists that third states' senior officials are immune from the ICC jurisdiction. Since this treaty is a convention which cannot affect the rights of third parties, the AU reaffirmed that "Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of states that are not parties to the Rome Statute (…)"[132]. As for these officials, the ones who primarily come into consideration are the AU sitting heads of state or government or anybody acting or entitled to act in such capacity.

[128] Assembly/AU/DEC.547 (XXIV), 31 January 2015, para.4 (b).

[129] SC 7060th meeting, S.PV/7060 (15 November 2013), pp.10-12. When he took the floor, the Rwandan ambassador said: '(…) Today's disappointing vote undermines the principle of the sovereign equality of states enshrined in the Charter of the United Nations, and confirms our long-held view that international mechanisms are subject to political manipulation and are used only in situations that suit the interests of some countries (…)' (p.10). Then, he warns: '(…) Justice becomes so when the vulnerable and the strong have equal protection. It is unfortunate that the ICC will continue to lose face and credibility in the world as long as it continues to be used as a tool for the big Powers against the developing nations' (p.11). Finally, the Rwandan ambassador questioned the independence of the court and the prosecutor as follows: 'On the subject of the court, let me say that, with respect to acting too precipitously, we have to be very careful about what the Council is stating. Let me say that, after five long years of procedures against Kenyan leaders, we were surprised that, suddenly, the ICC was willing to show flexibility on the very day that the African Contact Group was interacting with the Council. Whose hand was behind that? Why was it on that very day? Why did they decide that very day? (…) So how can the Council explain to me the fact that, all of a sudden, the Prosecutor said: "You know what? Let me give you four months now. It is okay, you do not need to go and bother that exclusive club. No. Get out of there." (…)No, it cannot work and it cannot continue like this. The Group was also surprised, actually, to learn that members of the Council were aware of that issue. Indeed, they asked us about the decision to request a postponement of the commencement of the case against the President of Kenya even before the decision was actually taken. That raises serious questions concerning the independence of the handling of this case' (p.12).

[130] Assembly/AU/DEC.482 (XXI), 27 May 2013, para.5; PSC/MIN/Comm(CXLII), *supra* note 111, para.7.

[131] Executive Council of the African Union, 'Report of the 2nd Ministerial Meeting of the Rome Statute of the International Criminal Court (ICC), 6 November 2009', Min/ICC/Legal/Rpt. (II), Addis-Ababa (Ethiopia), 29 January 2010, at 4.

[132] African Union Commission Press Release, 'On the Decision of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87 (7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan', n°002/2012 (9 January 2012), <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf> accessed 17 September 2015.

Second, the ideal of justice does not overcome the need for peace, stability and reconciliation in Africa. It justifies the "strong (regional) conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace"[133].

Third, the tactic of avoidance by the ICC of the complementarity principle, whereas the latter plays in favor of accountability through prevailing national mechanisms, if need be, with international support. This has been particularly posited about the situation in Sudan, in relation with the armed conflict which had broken out in February 2003 in the region of Darfur. In fact, the AU called for the government, in February 2009, "to take immediate and concrete steps to investigate and bring the perpetrators (of serious crimes) to justice and to take advantage of the availability of qualified lawyers to be seconded by the AU and the League of Arab States (…)"[134]. Clearly, it intended to support the Sudanese efforts to ensure justice, which had taken an important step with the establishment of the *Special Criminal Court on the Events in Darfur (SCCED)* since 7 June 2005. The ICC may be criticized to have ignored this initiative and abstained to support it. Then, the AU High-Level Panel on Darfur[135], which had been established by the PSC on 21 July 2008[136], and chaired by the former South African President, Thabo Mbeki, came up with new proposals. In its report concerning "the Quest for Peace, Justice and Reconciliation in Darfur" [137], it has proposed an integrated "Justice and Reconciliation Response to Darfur (JRRD)"[138] in the place of the ICC in order to fight impunity and to achieve peace and reconciliation in Sudan. This mechanism could have consisted of : i) a comprehensive, independent and integrated national criminal justice process, which included investigations and re-invigoration of all aspects of the SCCED "as the principal forum for delivering criminal justice for crimes relating to the conflict in Darfur"[139]; ii) a Truth, Justice and Reconciliation Commission (TJRC); iii) a *Hybrid Criminal Court (AU-Sudan)* to exercise "original and appellate jurisdiction over individuals who appear to bear particular responsibility for the gravest crimes committed during the conflict in Darfur, and to be constituted by judges of Sudanese and other nationalities"[140], but all of them being Africans[141]; iv) other "traditional mechanisms of justice to deal with those perpetrators who appear to bear responsibility for crimes other than the most serious violations"[142]. Seemingly, the AU High-Level Panel on Darfur excluded the ICC in its proposed JRRD for various reasons. Above all, this Court had already raised contestations and credibility problems in Sudan. Then, the ICC is a Court of last resort. Finally, the report noted that it was obliged "to take into consideration the fact that a state had taken or was taking effective justice measures to deal with relevant crimes"[143], according to the principle of

[133]Assembly/AU/DEC.482 (XXI), *supra* note 130, para.4; PSC/MIN/Comm(CXLII), *supra* note 111, para.3. The words between brackets are mine.

[134] Assembly/AU/DEC.221 (XII), *supra* note 112, para.8.

[135]It was mandated to examine the situation crisis in the region of Darfur and submit recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other hand, could be effectively and comprehensively addressed.

[136] PSC/MIN/Comm(CXLII), *supra* note 111, para.11 (ii).

[137] T. Mbeki, A. Abubakar, P. Buyoya, A. M. El Sayed, F. Mumba, K.A. Mohamed, R.A. Omaar, 'Darfur: the Quest for Peace and Reconciliation. Report of the African Union High-Level Panel on Darfur (AUPD)' (October 2009), PSC/AHG/2(CCVII) Peace and Security Council, Abuja (Nigeria), 29 October 2009.

[138] *Ibid*, para.320.

[139] *Ibid*.

[140] *Ibid*.

[141] *Ibid*., para.331.

[142] *Ibid*., para.337.

[143] *Ibid*., para.339.

(positive) complementarity. However, again, the ICC did not support the AU proposals. It stuck to the Security Council referral, which was a response, somewhat in contradiction with the AU JRRD, to a recommendation of the United Nations Commission of Inquiry on Darfur, chaired by the late Italian judge, Antonio Cassesse[144].

Fourth, the AU claims that those indictments against African leaders constitute a threat to the sovereignty of African states, the integrity and dignity of the continent[145]. The issue of the dignity of the continent relates to the colonial past of Africa. As a system of domination, economic and human exploitation, colonialism is inherently a shame and a dishonor for the continent, with the dehumanization of its peoples. In fact, it is feared that another kind of domination resurges in Africa by means of international law and criminal justice. Powerful states are suspected to utilize this way in order to get control of African states and their leaders. The perception is that the ICC, which was a common enterprise, has been transformed, in some cases, into a tool of neo-colonial agenda. This is exactly what President Paul Kagame said: "Rwanda cannot be part of that colonialism, slavery and imperialism"[146]. On his side, President Uhuru Kenyatta of Kenya, a state party, adds to humiliations he has arguably faced within and outside the ICC's proceedings the politicization of the Court[147]. According to him, the ICC is now used to try to provoke regime-changes in Africa or to secure countries favorable to policies of great powers[148].

Therefore, African states agreed on three principal responsive measures. First of all, the AU has requested the Security Council to defer, under article 16 of the Rome Statute, all the situations in which cases had been initiated against sitting African heads of state (Sudan, Libya and Kenya). Secondly, it has been decided that no African states should cooperate in compliance with ICC's arrest warrants against President Al Bashir and the Libyan leader, Muhammar Kadhafi, before his death. This decision has created a dilemma for African ICC members with their competing obligation to cooperate under the Rome Statute or, if applicable, pursuant to relevant resolutions of the Security Council or any other international treaty. Thirdly, the understanding of the immunity regime has been extended to include senior officials of *any* AU member states and thus would require the amendment of article 27 (2) of the Rome Statute.

Against this position, many voices have risen to defend the ICC. What are the counter-arguments presented?

b) The Defense of the ICC

Counter-arguments to African criticisms can be split in three groups: the alleged continuing support for the ICC in Africa, the vindication of the Office of the Prosecutor and the search for justice before any political concern over peace.

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[144] See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), para.647.

[145] Assembly/AU/DEC.547 (XXIV), *supra* note 128, para.17 (c).

[146] N. Fritz, 'Black-White Debate Does no Justice to a Nuanced Case', *Business Day* (13 August 2008), quoted by Du Plessis, *supra* note 24, at 1-2.

[147] U. Kenyatta, 'Speech by his Excellency Hon. Uhuru Kenyatta, President and Commander in Chief of The Defence Forces of the Republic of Kenya at the Extraordinary Session of the Assembly of Heads of State and Government of the African Union (12 October 2013), Addis Ababa (Ethiopia)', in Hoile, *supra* note 25, at 427-428.

[148] *Ibid*., p.425.

aa) The Continuing Support for the ICC in Africa

Presumably, the matter of African contestations against the ICC was underestimated. It has been advanced perceptions of division based on a pluralism of views on the Court in Africa[149]. It means that the AU position is not the one of individual states or more less that which is shared by the African peoples and the civil society organizations. It has been constantly affirmed that, despite criticisms, there is still a strong support for the ICC within the continent[150].

This perception of division is actually inconsistent with the facts. First of all, it is worthy to recall that this Court owes its legal existence to the will of sovereign states, whose governments are supposed to be representative of their peoples. In this representation function, they do not go in competition with any civil society organization, no matter how big it is. The ICC remains an interstate jurisdiction.

Secondly, the AU and its member states are not against the ICC as such. They simply disapprove a part of its proceedings and judicial strategy in Africa. True, there have been attempts by some states (Kenya, Uganda, Sudan, Zimbabwe, Ethiopia, Namibia, South Africa, etc.) to incite the entire regional group to reject and withdraw from the institution. However, it is still very hard to predict whether this incitation could be successful or it would just remain a political and diplomatic means to pressure that African protests, requests and proposals are duly considered by other ICC's member states and the rest of the international community, beginning by the United Nations Security Council. Still, Africa strongly needs justice to tackle mass atrocities across the continent and the ICC may continue to play a role in the matter. This explains why many African states have continued to stress the ICC importance during sessions of the Assembly of States Parties (ASP). Despite the crisis, some others have decided to refer new situations to the Prosecutor (Comoros, Mali and CAR II)[151], to actively cooperate with the Court in specific cases (DRC), to ratify the Rome Statute (Seychelles, Tunisia, Cape Verde and Ivory Coast)[152] or to adopt domestic legislations to implement it at the national levels (Uganda)[153].

Thirdly, it is a matter of fact that the African Common Position on the ICC, replaced in a plural Africa, may be sometimes violated by a few number of states or denounced by some civil society organizations. But, these violations and denouncements evidence the strength of this position, which is combated, rather than a strong support for the ICC's controversial work in the continent.

True, some states' disagreements appear at odd times about compliance with the arrest warrant against President Al Bashir[154]. Chad entered reservation to the AU non-cooperation decision in July 2009, but it did not maintain it to similar subsequent regional decisions. Like Kenya, Malawi, the DRC, South Africa and many other countries, visited by Al Bashir, it changed its position and chose

[149] See C. Ero, 'Understanding Africa's Position on the International Criminal Court', in The Foundation for Law, Justice and Society, *Oxford Transitional Justice Research: Debating International Justice in Africa* (Oxford: OTJR Collected Essays, 2008-2010)11-15, at 11.

[150] Bensouda, *supra* note 75; E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law* (2011)1-14, at 4-6 and 7-8.

[151] Respectively on 31 May 2010, 13 July 2012 and 30 May 2014.

[152] Respectively on 10 August 2010, 24 June 2011, 10 October 2011 and 15 February 2013.

[153] See The International Criminal Court Act 2010, Acts Supplement *to the Ugandan Gazette No.39 Volume CIII dated 25th June, 2010*, at 1-69.

[154] See P.A. Kasaija, 'Kenya's Provisional Warrant of Arrest for President Omar al Bashir of the Republic of Sudan', 12 (2) *African Human Rights Law Journal* (2012) 623-640, at 623-640.

to obey the AU decisions[155], despite regular ICC's protests and notifications of non-cooperation to the Assembly of States Parties and the Security Council.

Actually, the Court is not powerful enough to work against the will of independent states and without sufficient regional support. There is always a need for a dialogue with the most interested actors in the region concerned[156]. That could have avoided that the Prosecutor suspended her investigations in the Darfur region in Sudan on 12 December 2014[157], while he had already withdrawn charges against President Uhuru Kenyatta since 5 December 2014 on the ground of a lack of evidences[158], after more than five years of judicial waste of time. In the view of the AU, a similar withdrawal must apply to the Kenyan Deputy President, William Ruto[159]. Anyway, there is still a trend to vindicate the Office of the Prosecutor.

bb) An Attempt to Vindicate the Office of the Prosecutor

Here, the argument suggests that the Prosecutor and his office have nothing to do with African contestations. It is argued that African situations have been initiated by states themselves or with their support or through referrals by the Security Council. This argument though formally tenable is extremely fallacious in its merits. In fact, as mentioned above, Africa's criticisms do not hinge on referrals of African situations to the ICC, including those by the Security Council which African member states also voted for[160]. It is not right to pretend that the Prosecutor and his office are blamed for that, and namely for the actions of the Security Council[161]. Such statement sheds a deliberate confusion on the role of the Prosecutor, who is actually the central engine for the ICC's success[162]. About his competence, a distinction must be made between the power to initiate/refer situations to the Court, granted to him, states parties and the Security Council, from that which he exclusively holds for the selection of cases. To this effect, he makes some discretionary choices about incidents to investigate, crimes and suspects to be brought before the Court. The Pre-Trial Chamber has the power to control, not that discretion, but only the legality of the Prosecutor's choices (e.g. the admissibility of a case) and evidences submitted, for which he and his office are totally accountable. Judges do not have any power to compel the Prosecutor to a legal choice or to an assessment of what he intends to do. Only can the Pre-Trial Chamber review the decision of the Prosecutor not to proceed, notably when his decision is based on the preservation of the interest

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[155] See P. Oyugi, 'Cooperation Disputes between African States Parties to the Rome Statute and the International Criminal Court: Is the End Anywhere Near?', 2 *Speculum Juris* (2014) 123-142, at 125-141.

[156] A. Fall, 'Improving Political Dialogue to Address Contentious Issues: the Case of the International Criminal Court (ICC)', 6(1) *The Bulletin of Fridays of the Commission (AU)* (2014) 41-44.

[157] D. Smith, 'ICC Chief Prosecutor Shelves War Crimes Probe', *The Guardian (*14 December 2014), <http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan> accessed 12 March 2015.

[158] Decision on the Withdrawal of Charges against Mr. Kenyatta, *Uhuru Muigai Kenyatta* (ICC-01/09-02/11), Trial Chamber V (B), 13 March 2015, para.4.

[159] Assembly/AU/DEC.547 (XXIV), *supra* note 128, para.8.

[160] For the referral of the situation in Sudan, Benin and Tanzania voted in favor of the resolution 1593 (31 March 2005), while Algeria abstained. Instead, for the situation in Libya, all African states voted unanimously for the resolution 1970 (26 February 2011): Gabon, Nigeria, South Africa,

[161] Bensouda, *supra* note 60, at 30.

[162] H.-P. Kaul, 'The International Criminal Court: Current Challenges and Perspectives', 6 *Washington University Global Studies Law Review* (2007) 575-582, at 579.

of justice according to available information in his hands[163]. Judges would therefore ask him to reconsider his decision, but he remains free for subsequent considerations.

Concerning African situations, the selectivity of cases is a concrete problem[164]. In fact, the prosecutorial choice does not reflect the complexity of African crises and armed conflicts, whose actors are not exclusively Africans, even if the latter remain, in most cases, the primary actors directly responsible for atrocities. *External* participation in African crises and armed conflicts may take different forms: illicit trafficking of weapons likely to be used in the commission of crimes, illegal control over natural resources and illicit trade with armed groups in knowledge of the use of generated money in criminal activities, mercenarism, direct foreign military intervention, etc. For example, concerning Libya, the military campaign which overthrew Muhammar Kadhafi in 2011 implicated the governmental army against Libyan rebels, supported by a coalition of the North Atlantic Treaty Organization (NATO) member states, headed by the United States of America, the United Kingdom and France. This was the so-called NATO military "Operation Unified Protector". About the situation in Ivory Coast, and outside Ivoirians, two other forces have been active in the country: the United Nations Peace Keeping Operation (ONUCI) since 27 February 2004, and the French troops acting in the framework of the so-called "Operation Licorne", in a conflict which had started in 2002 and officially ended on 11 April 2011 with the capture of defeated President Laurent Gbagbo.

In the judicial field, the situation in Libya shows that non-Africans could also face ICC proceedings. The fact that there have been contradictory reports on eventual crimes by NATO forces in this country[165] could have motivated the Prosecutor to have his own in-depth sight into the matter[166]. A counter-argument could be found in the complementarity principle which may have prevented the ICC from investigating alleged committed crimes in favour of national jurisdictions. However, none of the concerned NATO member states (especially those which are parties to the Rome Statute) seems to have initiated genuine criminal proceedings in this regard, despite several calls for investigations and eventual prosecutions by two authoritative western NGOs, Amnesty

[163] See Art. 53 (3) (b) ICC St.; Decision on Application under Rule 1003, *Situation in Darfur, Sudan* (ICC-02/05), Pre-Trial Chamber I, 4 February 2009), para.21-26.

[164] M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 (2) *Michigan Journal of International Law* (2012) 265-320, at 271-274.

[165] The Human Rights Council of the United Nations Inquiry Commission has Vindicated NATO Forces. See UN Human Rights Council, 'Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) A/HRC/17/44, at 6; 'Report of the International Commission of Inquiry on Libya' (18 March 2012) A/HRC/19/68, at 17 and 21. Reversely, findings in a report issued by some organizations appertaining to the Arab civil society, with participation of one Sweden civil organization, have incriminated NATO forces. See Arab Organization for Human Rights (AOHR), Palestinian Center for Human Rights (PCHR) and International Legal Assistance Consortium (ILAC), 'Report of the Independent Civil Society Fact-Finding Mission to Libya' (January 2012), para.196, at 201-204 <http://www.pchrgaza.org/files/2012/FFM_Libya-Report.pdf> accessed 26 September 2015.

[166] This kind of failure to investigate on crimes potentially committed by powerful states is not new. The ICTY Prosecutor also refused to investigate NATO alleged committed crimes during the war and air bombings in the former Yugoslavia (from 24 March to 9 June 1999). See International Criminal Tribunal for the former Yugoslavia, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (8 June 2000), <http://www.difesa.it/SMD_/CASD/IM/ISSMI/Corsi/Corso_Consigliere_Giuridico/Documents/72470_final_report.pdf> accessed 25 September 2015. See also A-S. Massa, 'NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia not to Investigate: an Abusive Exercise of Prosecutorial Discretion', 44 (2) *Berkeley Journal of International Law* (2006) 610-649, at 627-633 and 643-646.

International and Human Rights Watch[167]. Obviously, there is a lack of (political) will to investigate and/or to prosecute the potential offenders. The same criticism applies to the situation in Ivory Coast, where the French have played a crucial military role since the outbreak of the armed conflict and particularly during the 2010-2011 post-electoral violence. Criminal investigations have been requested even by some French parliamentarians themselves, but to no avail[168].

Non-African cases could also be possible in the situation in the DRC which bears a wide regional and international implication in atrocities[169]. The Prosecutor has chosen, outside those who had sponsored violence there, to focus on small fishes from the Ituri region: Thomas Lubanga, Bosco Ntaganda (his Rwandan presumed co-author), Germain Katanga and the acquitted Mathieu Ngudjolo. Worse, since the Congolese self-referral of 19 April 2004, he has so far done nothing, with his unfinished investigations, for the appalling events which continue to strike innocent civilians in northern Katanga, North and South Kivu provinces, except prosecutions of two presumed leaders of the Rwandan rebellion (Callixte Mbarushimana and Sylvestre Mudacumura)[170], but quite second figures of the Congo tragedy.

Outside Africa, the Prosecutor can be blamed for his lack of initiative[171] where the criteria for the exercise of his powers are met: ICC jurisdiction, admissibility conditions (complementarity and gravity), and the interests of justice. Some preliminary examinations that have been opened either late and suspiciously in reaction to African criticisms or on communications by human rights organizations cannot be an excuse for him and his office[172].

cc) The Interaction between Peace and Justice

If a court does not rely on a good prosecutor, the latter can blemish the reputation of the entire institution. He should be independent of mind, vigorous and firm in his judicial choices, cooperative, political, diplomat and strategist. These qualities are required by the state of the international context in which the ICC operates: a politicized international society whose principal actors remain sovereign states, having diverging interests of every kind. Hence, the ICC Prosecutor must be aware of all the stakes, and political ones in particular, which may derive from his judicial

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[167] Amnesty International, 'Libya: the Forgotten Victims of NATO Strikes' (March 2012), <http://www.amnesty.ch/de/laender/naher-osten-nordafrika/libyen/nato-einsatz-die-vergessenen-opfer/bericht-libya-the-forgotten-victims-of-nato-strikes-.-maerz-2012.-22-seiten> accessed 25 September 2015 ; Human Rights Watch, ' Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya' (May 2012), <http://www.hrw.org/sites/default/files/reports/libya0512webwcover.pdf> accessed 25 September 2015.

[168] Assemblée nationale (France), 'Proposition de résolution visant à créer une commission d'enquête sur le rôle de la Force Licorne en Côte d'Ivoire' N° 131 (26 juillet 2012), at 5-7 <http://www.assemblee-nationale.fr/14/pdf/propositions/pion0131.pdf> accessed 26 March 2015.

[169] J. B. Mbokani, 'La Cour pénale internationale: une Cour contre les Africains ou une Cour attentive à la souffrance des victimes africaines', 26 (2) *Revue québécoise de droit international* (2013) 47-100, at 75-76.

[170] While Sylvestre Mudacumura is at large since the issuance of the arrest warrant of 12 July 2012, the Pre-Trial Chamber declined to confirm charges against Callixte Mbarushimana on 16 December 2011.

[171] R. Adjovi, 'L'Afrique et le droit international pénal', 17 *African Yearbook of International Law (AYIL)* (2011) 3-11, at 10.

[172] By the end of March 2016, here are the on-going preliminary examinations: Afghanistan (2007), Colombia (2012), Iraq (re-opening in 2014 after closing in 2006), Ukraine (2014) and Palestine (2015). Moreover, the preliminary examination of the situation in Georgia commenced on 14 August 2008 and resulted into investigation proceedings only on 27 January 2016, i.e. more than seven years later. Other preliminary examinations of situations in the Republic of Korea (2011), Honduras (2010) and Venezuela (2006) have also been closed owing to the lack of reasonable basis to initiate investigations.

action and take all the relevant contextual factors into consideration. He should not hide himself behind abstract and formal provisions of the Rome Statute, while making unwise assessments and judicial choices.

If a crime is alleged to have been committed, nothing in the Rome Statute prevents the Prosecutor from initiating investigations or to prosecute with due regard to contextual factors on the ground [173], particularly peace process negotiations. No deadline is fixed between the commencement of investigations and when indictments may be launched. In addition, the expression "interests of justice" it has been referred to in article 53 (1) (c) or 53 (2) (c) of the Rome Statute for the exercise of the Prosecutor's discretionary powers could receive a broad interpretation to allow, on a case-by-case evaluation, a decline of investigations for the purpose of peace promotion, notably if these investigations may lead to indictments and/or arrest warrants against senior officials of states subject to armed conflicts or instability. The reason is that leaders in a continent like Africa need positive support to stabilize their fragile countries, instead of putting oil on the fire through expeditious prosecutions.

It is a concern that the Prosecutor maintains that "interests of justice" are not "interests of peace"[174], while the Rome Statute has connected both indirectly in the preamble[175] and expressly in article 16[176]. It means that justice does not prevail over peace, but both values should work together, and this connection must be each time reflected in a well-balanced prosecutorial strategy. Promoting peace, security and stability can be part of the interests of the victims and then a substantial reason to believe that continuing investigations could not serve the interests of justice.

The AU High-Level Panel on Darfur (Sudan) captured this relationship between peace, justice and even reconciliation in its report to the PSC in October 2009. It stated:

> It is self-evident that the objectives of peace, justice and reconciliation in Darfur are interconnected, mutually interdependent and equally desirable. However, it is also equally self-evident that the most urgent desire of the people of Darfur is to live in peace and security. This is a universal Sudanese demand, particularly underlined by the Internally Displaced Persons[177].

The decline of investigations may be reconsidered at any time[178]. Therefore, it could not be a source of impunity. Moreover, a claim for peace promotion should not be rejected just on the

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[173] T. Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: the Politics of ICC Cases in Kenya and Sudan' (CODESRIA Conference on International Justice, Reconciliation and Peace in Africa: the ICC and Beyond, Dakar, 10-12 July 2014), at 21 <http://www.codesria.org/IMG/pdf/14_tim_murithi.pdf> accessed 16 April 2015.

[174] See International Criminal Court, 'Policy Paper on Preliminary Examinations' (November 2013), at 16-17 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf> accessed 27 March 2015; 'Policy Paper on the Interest of Justice' (September 2007), at 1 <http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> accessed 27 March 2015.

[175] Preamble, paras 3-5 ICC St.

[176] This is the case of deferral of investigations or prosecutions by the Security Council on the basis of maintaining peace and security.

[177] Mbeki, Abubakar, Buyoya, El Sayed, Mumba, Mohamed, Omaar, *supra* note 137, para.293.

[178] Art. 53 (4) ICC St.

ground that it is of a political nature for which a judicial institution is not the appropriate forum[179]. If the ICC must be anti-politics[180], it needs, however, not a politicized, but a more political Prosecutor[181] so that it becomes, not against states, but truly anti-impunity.

The refusal to consider any factor of peace promotion in the prosecutorial strategy encourages, rather than avoids, deferral requests to the Security Council, whose success or failure to stop on-going investigations or prosecutions ultimately affects the credibility of the ICC. It is also inconsistent with the idea of positive or proactive complementarity, which requires that states' tribunals are incited and supported to carry out trials for ICC's crimes by themselves[182], rather than "the ICC taking advantage of the situation and supplant national jurisdictions by intervening into the situation"[183].

It seems that the Court had to find "exemplary and successful handled cases"[184] and to prove by the way to the world that it was "a meaningful and useful institution"[185]. This thus explains, though only in part, the trials of individuals (small fishes) who could have been prosecuted, without problem, at the domestic level. It also enlightens the policy behind the indictments of sitting heads of state. Even though, the ICC seems to have made only little judicial progress. Its prosecutions have receded (Kenya, Soudan and Libya) after bad choices and an unwise prosecutorial strategy. On a positive side, the judicial crisis gives an opportunity to rethink the ICC justice system in which a proportion of regionalism should be incorporated.

4. The Regional Counter-Initiatives to the ICC Justice System

Instead of contributing to the destruction of the ICC justice system, which remains useful for the world peace and human rights protection, Africa has developed two main wise alternatives: the establishment of what may be called the Criminal Court of the AU (a) and several amendment proposals which could lead to a concrete reform of the Rome Statute (b).

a) The Establishment of the Criminal Court of the African Union

The Criminal Court of the African Union reflects two primary ideas. It implies a regional claim to participate in the international struggle against impunity and that the ICC, although the most current prominent symbol of international criminal justice, is not the end of the story[186]. There is no

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[179] F. Mohammed Rashid, 'The Interests of Justice under the ICC Prosecutor Power: Escaping Forward', in C. Esin, J. Johanssen, C. Lake, P. Schwartz, M. Tamboukou and F. Mohammed Rashid (eds), *Crossing Conceptual Boundaries* (London: University of East London, 2013) 53-69, at 56.

[180] A. Tiemessen, 'The Anti-Politics of the International Criminal Court' Working Paper Series (Center for Transitional Justice and Post Conflict Reconstruction)(2010), at 1-2 <http://tjcentre.uwo.ca/documents/Tiemessen2.pdf> accessed 4 May 2015.

[181] See also R. H. Mnookin, 'Rethinking the Tension between Peace and Justice: the International Criminal Court Prosecutor as Diplomat', 18 *Harvard Negotiations Law Review* (2013) 145-174, at 145-446.

[182] W. W. Burke-White, 'Proactive Complementarity: the International Criminal Court and National Courts in the Rome System of International Justice', 49 *Harvard International Law Journal* (2008) 53-108, at 54-55.

[183] M. Hansungule, 'The African Union and the International Criminal Court-ICC: Jurisdiction and Legality', in M. Ndiaye (ed.), *L'impunité: jusqu'où l'Afrique est-elle prête* (Paris: L'Harmattan, 2012) 77-111, at 107.

[184] Kaul, *supra* note 162, at 577.

[185] *Ibid*, at 578.

[186] G. Kemp, 'Taking Stock of International Criminal Justice in Africa: Three Inventories Considered', in B. Van der Merwe (ed.), *International Criminal Justice in Africa: Challenges and Opportunities* (Nairobi: Konrad Adenauer Stiftung, 2014)7-32, at 9.

obstacle of any kind in the Rome Statute for further legal developments. The United Nations Charter is itself a tool of promotion of regionalism, clearly recognized in chapter VIII concerning "regional arrangements"[187].

aa) The Legal Pedigree

Historically, the project for the establishment of a regional criminal court is older than the African Common Position on the ICC. It was already invoked in 1980 "when the draft African Charter on Human and People's Rights was being discussed"[188] because "the government of Guinea proposed the establishment of a court to try violations of human rights and other international crimes"[189] in Africa. The proposal was, however, rejected as inopportune, the purpose being at that time only the establishment of a human right commission rather than a court[190]. But, in July 2000, the project received another twist. The Constitutive Act of the AU has stipulated "the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, *namely*: war crimes, genocide and crimes against humanity"[191]. Concerning Hissène Habré's trial, this provision was given a quasi judicial interpretation, when the Assembly decided, in 2006, that the case fully fell under the competence of the UA[192]. This interpretation justified the regional referral of the matter to Senegal and later the creation of the African Extraordinary Chambers[193] in order to try the former Chadian President, following attempts of such kind in Sudan, in the Darfur region[194].

Since July 2000, at least four main factors have occurred and influenced the realization of the project. Firstly, a Committee of Eminent African Jurists was charged by the AU, in January 2006, "to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial (…)"[195] and "to make concrete recommendations on the ways and means of dealing with issues of a similar nature in the future"[196]. In its report, the Committee recommended that "the on-going process that should lead to the establishment of a single Court at the African Union level should confer criminal jurisdiction on that Court"[197]. Secondly, since 2007, the African Charter of democracy, elections and governance has provided that "perpetrators of unconstitutional change of government may also be tried before the competent Court of the (*African*) Union"[198]. Thirdly, in

[187] Art. 52 (1) of the UN Charter stipulates: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations'.

[188] M. Du Plessis, T. Maluwa and A. O'Reilly, 'Africa and the International Criminal Court', 01 *International Law* (2013) 1-13, at 9.

[189] *Ibid*.

[190] *Ibid*.

[191] Art. 4 (h) Constitutive Act of the African Union (11 July 2000). The Italics are mine.

[192] Assembly/AU/Dec.127 (VII), 2 July 2006, paras 3 and 5 (i).

[193] See *Accord entre le Gouvernement de la République du Sénégal et l'Union africaine sur la création des Chambres africaines extraordinaires au sein des juridictions sénégalaises*, 22 August 2012.

[194] B. Kahombo, 'The Project for the Creation of a Pan-African Criminal Court', 14 *African Law Study Library* (2013) 71-91, at 80-83.

[195]Assembly/AU/Dec.103 (VI), 24 January 2006, para.3.

[196] *Ibid*., para.4.

[197] African Union, 'Report of the Committee of Eminent African Jurists on the case of Hissène Habré' (2006), para.39 <http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf> accessed 28 March 2015.

[198] Art.25 (5). The word in italics is mine.

February 2009, due to the judicial crisis engendered by the "abuse of the principle of universal jurisdiction" and subsequent indictments of African officials in Europe[199], the AU Assembly acceded to the last recommendation of the Committee of Eminent African Jurists and requested the Commission of the Union, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, "to examine the implications of the Court being empowered to try international crimes *such as* genocide, crimes against humanity and war crimes (…)"[200]. This request was later strengthened, but not triggered, by worse relations between Africa and the ICC. It is not therefore true to assert that the project intends to be simply "a conscious snub to the ICC by the AU"[201]. Fourthly, at last, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, whose draft was endorsed by the Executive Council in 2012[202], was finalized, then adopted and submitted by the AU Assembly to the ratification of member states on 27 June 2014. It is this Protocol which establishes the so-called "Criminal Court of the AU". It is not just a "protest treaty"[203] against a real or presumed unfairness of universal mechanisms. There is also a tendency towards a judicial self-reliance which may enable African states to solve criminal matters of the region by themselves, instead of waiting each time for the help of the international community. In addition, from a purely legal angle, the Protocol could lead to an extension of the reach of international criminal justice for those African states not parties to the Rome Statute; what is potentially a good thing on the continent.

bb) The Status of the New Court

The new criminal jurisdiction is not a separate institution from the AU. It has been integrated in the African Court of Justice and Human Rights (ACtJHR)[204], established by the Protocol of 1 July 2008, as one of its three judicial sections: *General Affairs Section*, *Human and Peoples' Rights Section* and *International Criminal Law Section*. This institutional mixture of competences is an unprecedented one in the world. Moreover, it is provided for a Defense Office, led by the Principal Defender, who is vested with equal status to that of the Prosecutor. Another innovation is the provisions about corporate criminal liability in addition to individual criminal responsibility[205]. This is a historic and milestone event, significantly contributing to the development of international criminal law, because it is the first time that a treaty *expressly* provides for corporate liability under the criminal jurisdiction of an international court. Parallel to this regional development, in January 2015, the Appeal Panel of the Special Tribunal for Lebanon has delivered the first judicial decisions supporting criminal jurisdiction over corporations, specifically for the offence of contempt (of

[199] See C. B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice (JICJ)* (2011) 1067-1088, at 1069 -1072.

[200] Assembly/AU/Dec.213 (XII), 3 February 2009, para.9. The emphasis in italics is mine.

[201] G. Abraham, 'Africa's Evolving Continental Court Structures: at the Crossroad?', SAIIA Occasional Paper 209 (January 2015), at 12 <http://www.saiia.org.za/doc_view/669-africa-s-evolving-continental-court-structures-at-the-crossroads> accessed 6 July 2015.

[202] See Executive Council of the African Union, 'The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General', EX.CL/731 (XXI), Addis-Ababa (Ethiopia), 13 July 2012.

[203] See A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects', LX *Netherlands International Law Review* (2013) 27-50, at 42.

[204] This Court is a merge of the African Court of Human and Peoples' Rights, established by the Ouagadougou Protocol on 10 June 1998, with the Court of Justice of the AU (CJAU), created by the Constitutive Act of 11 July 2000.

[205] Art. 46B and 46C, Amendments Protocol.

court/judge), even though without an explicit provision granting such jurisdiction[206]. Both legal precedents could contribute to further the work of the Human Rights Council which adopted, on 26 June 2014, resolution 26/9 by which it decided to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, "whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"[207].

In contrast, the new AU criminal jurisdiction raises numerous concerns[208]. Four of them can be quickly pinpointed here.

Primo, the Protocol of July 2008 has been amended, though not yet in force, whereas the better to do could have been to re-write the instrument and avoid a useless overlapping of protocols. Hence, it is not sure if a state which ratifies the Protocol of July 2008 will consent to the amendments as well. Reversely, those states which only ratify the amendments may remain outside the Court's jurisdiction if they do not also consent to its founding treaty.

Secundo, the *International Criminal Law Section* will seat over fourteen different crimes: four ICC's crimes (aggression, genocide, crimes against humanity and war crimes) and ten more crimes among which some are transnational (unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources). This has been criticized as being too much for a Court, already heavy in its mandate, with potential insufficient financial means[209]. But, it can be objected that the jurisdictional overreach does not necessarily mean that there are too many cases to try. Since the Court is a regional one, with a jurisdiction complementary to national tribunals, the number of cases brought before it would be sensibly reduced. Moreover, everything depends on expeditious and professional judges, prosecutors and defense councils, as well as the political will of African states to cooperate and support politically and financially its judicial work. Here lies the real chance for its efficiency and success.

Tertio, however, there are still some serious doubts whether African states will be ready to ratify the amendment Protocol and to leave free hands to the ACtJHR to exercise independently its criminal jurisdiction. Yet, many of them hardly accept regional judicial mechanisms of human rights monitoring. For example, in 2010, the SADC Tribunal was suspended because of the increasing and

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[206] Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, *New TV S.A.L. and Al Khayat* (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015, para.91; Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, *Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin* (STL-14-06/PT/AP/AR126.1), Appeals Panel, 23 January 2015, para.71. See N. Bernaz, 'Corporate Criminal Liability under International Law: the *New TVS.A.L.* and *Akhbar Beirut S.A.L.* Cases at the Special Tribunal for Lebanon', 13 *JICJ* (2015) 313-330, at 315-316.

[207] HRC Res. 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (A/HRC/RES/26/9), 14 July 2014, para.1 <https://documents-dds ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> accessed 31 January 2016.

[208] See Abraham, *supra* note 201; Abass, *supra* note 203; E. Owiye Asaala, 'The African Court of Justice and Human and Peoples' Rights: an Opportunity for International Criminal Justice?', in B. Van der Merwe (ed.), *International Criminal Justice in Africa: Challenges and Opportunities* (Nairobi: Konrad Adenauer Stiftung, 2014) 33-56, at 35 and 48-55.

[209] Kemp, *supra* note 186, at 7-32, at18; Bensouda, *supra* note 60, at 34.

successful individual petitions against member states, notably Zimbabwe[210]. In August 2012, Heads of Sate gathered in Maputo (Mozambique) extended this suspension and decided to expunge disputes between member states and individuals from the competences of the Tribunal[211]. In February 2013, the decision was traduced into a draft agreement which was consolidated in the new Protocol prescribing its composition, powers, functions, procedures and other related matters[212], adopted in Victoria Falls (Zimbabwe) on 18 August 2014[213]. Likewise, up to the end of March 2016, only seven states (Ghana, Burkina Faso, Ivory Coast, Mali, Malawi, Tanzania and Rwanda) have accepted the jurisdiction of the African Court on Human and Peoples' Rights with respect to individual petitions[214]. It is therefore feared that the AU Criminal Court becomes a still-born regional criminal jurisdiction.

Quarto, the Court's relation with the ICC, which it duplicates to some extent, remains mysterious. The amendment Protocol has not referred to the Rome Statute in the same way as the latter had ignored regionalism. As Kristen Rau has mentioned it, it seems to be a deliberate omission by African states and the AU[215]; what implies a manifestation of the traditional balance of powers between universalism and regionalism. A compromise must be found: the reform of the Rome Statute.

b) The Necessary Reform of the Justice System Embodied in the Rome Statute

There is a need to reform the justice system of the Rome Statute, not just to amend one or several of its provisions. It is important to safeguard the ICC from a potential collapse and to make it more useful and effective in the struggle against impunity.

aa) The Need for a Legal Reform

This need is explained by three main perspectives.

The first one is that regions (Africa being the first to do so) may continue to claim more control over the repression of international crimes on the detriment of the universal level. There would be "new geographies of justice"[216] in the future that the Rome Statute must expressly take into

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[210] B. Kahombo, 'Le chantier de la justice communautaire africaine : entre fragmentation et tentative d'unification', in O. Ndeshyo (ed.), *Le nouvel élan du panafricanisme, l'émergence de l'Afrique et la nécessité de l'intégration continentale –Les actes des journées scientifiques consacrées à la commémoration de la journée de l'Afrique : 2011-2012-2013-2014* (Kinshasa : Editions CEDESURK, 2015)337-348, at 346.

[211] F. Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction', 13 (1) *Human Rights Law Review* (2013) 153-165, at 154. See also A. Van der Vleuten and M. Hulse, 'Governance Transfer by the Southern African Development Community (SADC)', 48 *SFB-Governance Working Paper Series* (December 2013) 1-98, at 61.

[212] Kahombo, *supra* note 210, at 346.

[213] See Art. 33 and 34, Protocol on the Tribunal in the Southern African Development Community (2014), <http://www.tralac.org/images/Resources/SADC/SADC%20Protocol%20on%20the%20Tribunal%202014.pdf > accessed 30 March 2016.

[214] See 'Statistics of Ratification –Declaration –Cases', <http://en.african-court.org/index.php/basic-documents> accessed 26 March 2016.

[215] Rau, *supra* note 41, at 690.

[216] T. McNamee, 'The ICC and Africa. Between Aspiration and Reality: Making International Justice Work Better for Africa. Reflections on a High-Level Roundtable, Co-hosted by the Brenthurst Foundation and the Africa Center for Strategic Studies', Discussion Paper 2/2014 (18-19 March 2014), Addis-Ababa (Ethiopia), at 14.

consideration[217]. Vertical relations between the ICC and any emerging regional criminal court should be anticipated and harmonized in advance. This would not be a loss for the ICC. On the contrary, the diversification of enforcement mechanisms of law may strengthen the quest for justice and the fight against impunity. There are not many ways to follow. The international community in a whole should accept and support the idea of the regionalization of international criminal justice[218], because, as Heike Krieger has rightly put it, "there is a strong presumption that effective enforcement requires a multilevel system"[219]. This system should be integrated in a manner that each level (universal, regional and national) stands in an institutional and legal relationship with another. Thus, the regionalization process should not be perceived as a negation of the existing system of (global) international criminal law[220].

The second perspective relates to the redefinition of the immunity regime for sitting senior states officials, particularly heads of state. The ICC-Africa relationship shows that the Rome Statute regime borne by articles 27 and 98 is prone to a lot of misunderstandings, and the controversial decisions of the ICC Pre-Trial Chamber, issued on12 and 13 December 2011, affirming an exceptional waiver of immunity for sitting heads of state under customary international law before international tribunals[221], has not put an end to the debate. Rather, from an African perspective, there seems to be, if such an exception would be legally found, a clear *mutus dissensus*[222], an abrogating will of that so-called international custom which, in particular, the AU and 54 African states say they do not recognize[223]. Their *opinio juris* has been best expressed in the AU decision of 12 October 2013 as follows: "no charges shall be commenced or continued before any international court or tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their tenure of office"[224]. Later, this provision was included in the AU amendments Protocol which added to the list of beneficiaries of personal immunities "other senior states officials" [225] in case of charges brought before the ACtJHR. These officials could be determined by the African Court on a case-by-case basis. On its side, the ICC continues to exacerbate the lack of clarity in law. Having left aside the thesis of exceptional waiver of immunity of heads of state under customary international law, it now pretends to have found a solid legal basis for its action in the theory of implicit waiver of immunity (as for President Al Bashir) by virtue

[217] See also J. de Hemptinne, 'The Future of International Criminal Justice: a Blueprint for Action', in A. Cassese (ed.), *Realizing Utopia: the Future of International Law* (Oxford: Oxford University Press, 2012) 585-595, at 587-592.

[218] See also A. Soma, 'L'africanisation du droit international pénal', in Société africaine pour le Droit international (SADI), *L'Afrique et le droit international pénal* (Paris : Pedone, 2015) 7-36, at 12.

[219] H. Krieger, 'A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood', 62 *SFB-Governance Working Paper Series* (June 2013) 1-46, at 27; Krieger (ed.), *Inducing Compliance with International Humanitarian Law -Lessons from the African Great Lakes Region* (Cambridge: CUP, 2015), at 539.

[220] Soma, *supra* note 218, at 12.

[221] Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011, paras 36-43; Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011, para.13.

[222] J. Mouangue Kobila, 'L'Afrique et les juridictions pénales internationales', 17 *AYIL* (2011) 13-55, at 41.

[223] Assembly/AU/DEC.397 (XVIII), 30 January 2012, para.6.

[224] Decision Ext/Assembly/AU/DEC.1 (Oct.2013), 12 October 2013, para.10 (i).

[225] Art. 46A *bis,* Amendments Protocol.

of resolution 1953 of the Security Council[226]. The reason behind this theory is that a Security Council referral of a situation to the ICC would implicitly signify removal of immunity, unless it is otherwise determined by its resolution[227]. For example, the Security Council has immunized nationals of some third states (especially contributing states to peace keeping operations or UN authorized military intervention) concerned by a situation of a state not party which it has referred to the ICC[228].

All these contradictory languages on the immunity regime (personal, but not functional) before international tribunals justify and strengthen the need for clarification and reform. There has to be found a balance between the struggle against impunity and the interests of weak countries to which any exceptional regime of personal immunity would be in reality exclusively applicable, not to leaders of big powers. It is now a presumption that the extreme conventional regime of the irrelevance of immunities provided for by the Rome Statute clashes with state sovereignty and the complexity of international relations.

Third, it is important to frame differently the relationship between the ICC and the Security Council. In the past, there have been profound problems of politicized justice[229] with a selective application of articles 13 (b) and 16 of the Rome Statute. With respect to article 13 (b), the Security Council has rushed to refer the situations in Sudan and Libya to the ICC, but failed to do so in other countries (Palestine and Syria)[230]. Likewise, the Security Council has several times resorted to article 16 of the Rome Statute[231], on the request of the Unites States of America[232], but refused to do so for the situations in Kenya and in Sudan; what the AU qualifies as "a sense of lack of consideration for the entire continent"[233]. It is not surprising, therefore, that the AU has endorsed the proposal by South Africa to amend article 16 in a manner that where the Security Council fails to decide within six months of receipt of the request, the General Assembly exercises that power[234] pursuant to resolution 377 (V) of 3 November 1950, the so-called "Uniting Peace Resolution"[235]. However, article 13 (b) should remain untouchable in order to safeguard the power of the Security Council (but

[226] See Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, *Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 13 June 2015, para.6; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, *Omar Hassan Ahmed Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014, para.29.

[227] See *E. David,* 'La Cour pénale internationale', *313 Recueil des Cours de l'Académie de Droit International* (2005) 325-454, at 424; *D. Akande,* 'The Legal Nature of Security Council Referrals to the ICC and its Impact on al-Bashir's Immunity', 7 *JICJ* (2009) 333-352, at 340-342.

[228] This is the practice of the Security Council concerning referrals of situations in Darfur (Sudan), Libya, Bosnia and Liberia. See respectively SC Res.1593 (2005), *supra* note 108, para. 6; SC Res. 1970 (2011), *supra* note 108, para. 6; SC Res.1422 (2002), 12 July 2002, para.1; SC Res.1497 (2003), 1 August 2003, para.7. See also Abass, *supra* note 232, at 263-267. The practice has been criticized to be discriminatory and for exceeding the power of referral of situations to the Court.

[229] See also M.L. Cesoni and D. Scalia, 'Juridictions pénales internationales et Conseil de sécurité: une justice politisée', 25 (2) *Revue québécoise de droit international* (2012) 37-71, at 54-59.

[230] About Palestine, the main opposition has come from the United States of America, while Russia has resorted to its veto power concerning the situation in Syria.

[231] SC Res. 4222 (2002), 12 July 2002, para.1; SC Res.1487 (2013), 12 June 2013, para.1.

[232] See A. Abass, 'The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court', 40 *Texas International Law Journal* (2005) 263-297, at 263-264.

[233] Assembly/AU/Dec.493 (XXII), 31 January 2014, para.8.

[234] Executive Council of the African Union, *supra* note 131, at 6.

[235] See UNGA Resolution 377 (V) A, 3 November 1950, para.1.

reformed) under Chapter VII of the Charter of the United Nations[236]. Thus, a new regime in this respect would help to protect the independence of the Court.

bb) The International Resistance against the Idea of a Legal Reform

Since the African Common Position on the ICC has been formulated, almost nothing has moved in the direction of reforms demanded by Africa. The ICC's defenders (ICC's employees, western great powers, EU, international NGOs, pro universalism international lawyers, etc.) have opposed a fierce resistance to such perspectives. Beyond diplomatic pressure on African states, several means, including media and propaganda, have been used to divide them, with relative success so far. The AU has itself recognized the limited influence that the African group of states parties to the Rome Statute had in the decision process of the Assembly of States Parties during the 2009 and 2010 sessions[237]. In general, only few states supported the African proposals[238]. Hence, with respect to the amendment of article 16 submitted to the Assembly of States Parties during the 2009 session, the AU observed: "only two African states namely Namibia and Senegal took the floor to support the proposal while thirteen (13) non-African states took the floor against the proposal"[239].

How to justify such a strong opposition to amend the Rome Statute and, *a fortiori*, to reform the justice system it bears? Three hypotheses can be advanced here[240]: i) protection of professionalism (ICC's employees and NGOs); ii) refusal of any power sharing between universal and regional levels to preserve an instrument for a (geo-) political agenda (great powers); iii) ideology (pro universalism lawyers and NGOs). It is in the name of this ideology that the ICC justice system is generally said to be equivalent to the efficient struggle against impunity, while regional initiatives are viewed as attempts to protect leaders from criminal accountability, particularly owing to the issue of immunity[241]. Likewise, regional claims or denouncements of the misuse of universal mechanisms are regarded as a threat to world common values[242] of which the ICC is one of the prominent protectors. Though, the problem is not about shared common values, to which Africa also adheres, but that of the manner in which justice should be regulated and distributed. Likewise, the problem of immunity is not particular to the AU Criminal Court. To some extent, it has already been raised at the global level by the Security Council resolutions excusing nationals of some third states from the ICC jurisdiction. The United States of America have even gone farther and used the strategy of the so-called "Bilateral Immunities Agreements (BIA)" concluded with

[236] Executive Council of the African Union, *supra* note 131, at 4.

[237] Executive Council of the African Union, 'Progress Report of the Commission on the Implementation of the Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court (ICC)', Ext/EX.CL/2 (XV), Addis-Ababa (Ethiopia), 11 October 2013, at 12.

[238] *Ibid*.

[239] Executive Council of the African Union, 'Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC held at the Hague, Netherlands from 16 to 26 November 2009', EX.CEL/568 (XVI), Addis-Ababa (Ethiopia), 29 January 2010, at 2.

[240] See also S. Moyn, 'Towards Instrumentalism at the International Criminal Court', 39 *The Yale Journal of International Law Online* (2014) 55-65, at 56-63.

[241] D. Tladi, 'The Immunity Provision of the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff', 13 *JICJ* (2015) 3-17, at 7-10; Abraham, *supra* note 201, at 14-15.

[242] D. Tladi, 'The African Union and the International Criminal Court: the Battle for the Soul of International Law', 34 *South African Yearbook of International Law (SAYIL)* (2009) 57-69, at 65-66.

other states (parties and not parties) in order to defeat the ICC jurisdiction towards American citizens[243].

Therefore, in the place of a concrete legal reform, the Assembly of States Parties has forwarded two principal responses to criticisms against the (world) Court. *Primo*, there is the allocation of more personnel within the ICC's staff for the African sides. It is obvious that this kind of response is beside the point, since it does not match with the merits of African criticisms against the ICC's work. At least, it serves a certain professionalism, as stated above, with expectation to smoothen the attitude of those who have presented the ICC as the "Europe's Court for Africa"[244]. *Secundo*, some amendments to its Rules of Procedure and Evidence have been adopted by the Assembly of States Parties on 27 November 2013. Among other innovations, "an accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused (*from presence at trial*) and to be represented by counsel only (...)"[245]. However, the most important African proposals to amend the Rome Statute remained unsolved, including those further submitted by Kenya in March 2014[246], concerning notably complementarity between the ICC and regional courts, the immunity regime for serving heads of state and the deferral power to be conferred to the United Nations General Assembly where the Security Council fails to discharge its responsibility[247]. They continue to be under discussion within the Working Group on Amendments, established by the Assembly of States Parties during its eighth session, held from 18 to 28 November 2009[248]. In any case, resistance to legal reforms seems to be to date the most important threat to the maintenance of a well-balanced ICC, accepted by all states and regions, efficient and useful for ending impunity around the world.

5. Conclusion

The ICC has been, with respect to its desirability (to end impunity for the most egregious crimes) and as regards the negotiations of its founding treaty (in which states from all the regions participated), a common global enterprise. However, the Rome Statute bears an institution that would not have been probably accepted by many African states were it not for outside pressure and a strategy of enticement to join the kind of ICC they did not want. This Court is not institutionally and legally well-balanced. It reflects a concentration of powers at the universal level and gives an important role to the Security Council, which means a serious inequality of the states concerned by its criminal justice system. Those African states not sufficiently represented at the universal level, and especially in the Security Council, give the impression to have been dragged into a judicial institution which falls under the control and influence of great powers, prior to (geo-) political manipulations. The strategy of the Prosecutor, which fails to find an equilibrium between

[243] See Jeu, *supra* note 54, at 431-441.

[244] McNamee, *supra* note 215, at 6; Hoile, *supra* note 25, at 35.

[245] ASP Res. ICC-ASP/12/Res.7 (27 November 2013), Rule 134 quarter, para.1. The italics are mine.

[246] United Nations Depositary Notification C.N.1026.2013.TREATIES-XVIII.10 (proposal of amendments by Kenya to the Statute), <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf> accessed 29 September 2015.

[247] See Secretariat of the Assembly of the States Parties, 'Informal Compilation of Proposals to Amend the Rome Statute' (23 January 2015), <http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf > accessed 29 September 2015.

[248] Assembly of the States Parties, 'Report of the Working Group on Amendments', Thirteenth Session (New-York, 8-17 December 2014), ICC-ASP/13/31, 7 December 2014, at 2.

the interests of justice, the struggle against impunity, on the one hand, and the promotion of peace and the interests of sovereign states, on the other hand, has contributed to create a gap between the ICC and Africa: negative perceptions by the AU and African states parties or not to the Rome Statute. Hence, the systematic refusal of the Security Council to comply with AU requests to defer investigations or prosecutions in a number of African situations pending before the ICC has added fuel to the fire.

The fundamental problem behind the controversy proves to be the distribution of powers within the international legal system and the threat against global legal diversity in international criminal justice. This explains all the contradictory legal and political languages on the ICC: tool for imperialism; contestations of applicable rules like the immunity regime; disapproval of indictments against sitting heads of state and other senior states officials; need to frame differently the exercise of powers granted by the Rome Statute to the Prosecutor and the Security Council; development of a parallel regional criminal justice system, etc. There is no legal solution to this matter. A political and diplomatic compromise should be found to redefine the whole system. It is important to develop “new geographies of criminal justice” in a well-regionalized international (criminal) legal system. This reform would preserve the ICC from potential future collapse, inspire confidence in the international criminal justice system around the world and make efficient the struggle against impunity.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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