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Escape from the ICC
A tale of distrust, abuses and uncertainty for victims

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Abstract:

The International Criminal Court has been the recipient of strong accusations of bias against Africa for years, but today those attacks are finally leading to actual withdrawal for the first time and the human rights consequences of such initiatives are rather unforeseeable. As the future of international criminal justice seems uncertain, it is crucial to understand this phenomenon in order to adress the roots of the problem and work towards a better relationship between the Court and its leery members. An analysis of the probability of a massive departure from the ICC is required to deduce an adequate response to this issue, whether reforms should be prioritized or preparation to replace the Court on the African continent should be quickly initiated. The prime aim of this research will thus be to assess the survivability of the ICC in Africa and the capacity of the continent to ensure justice and accountability in its absence.

Acronyms

- ACJHR: African Court of Justice and Human Rights
- AU: African Union
- CAR: Central African Republic
- DNR: Donetsk People's Republic
- DRC: Democratic Republic of Congo
- EU: European Union
- ICC: International Criminal Court
- LNR: Luhansk People's Republic
- LRA: Lord's Resistance Army
- NGO: Non-Governmental Organization
- OTP: Office of The Prosecutor
- UK: United Kingdom
- UN: United Nations
- UNSC: United Nations' Security Council
- USA: United States of America

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General Introduction:

The "International Caucasian Court"[1], to put it in the words of Gambia's Information Minister Sheriff Bojang, has been investigating and prosecuting individuals for war crimes, crimes against humanity and genocide for almost 20 years. It is a crucial tool against the impunity mostly of leaders committing atrocities against their citizens and is also a great last resort for victims of these heinous crimes when their own government is not on their side.

But, for the first time since its creation, the International Criminal Court is on the verge of experiencing the withdrawal of some of its members, which will have potential desastrous effects for the enforcement of international criminal law and will highly weaken the legitimacy of the institution. Indeed, South Africa, Gambia and Burundi recently announced their withdrawal from the ICC, denouncing a tendency of the Court to inapropriately target Africa, while ignoring other crimes commited by richer countries. While this criticisms have been brought forward for years, it is the first time the words will be followed by actions. The lower house of the parliament of Burundi has voted in support of the withdrawal on the 12th of october 2016, and the contested President Pierre Nkurunziza has already signed a decree to move forward with the withdrawal. Thus, Burundi which is the scene of a violent internal conflict since 2015, seems to be set to become the first country to ever leave the ICC and in so doing grant impunity for the recent events which torned the country appart. Beside this, a respite seems to have appeared for the ICC, as South Africa and Gambia both recently reversed their decisions to withdraw. Indeed, after the former president Yahyah Jammeh, who called for the withdrawal, finally stepped down for the newly elected Adama Barrow, this last one declared his will to remain in the ICC. Parallely, South Africa was the first to push for withdrawal a year following its refusal to arrest Sudan's President Omar al-Bashir and transfer him to the Hague, but a recent rulling from a High Court declared the withdrawal unconstitutional and invalid. Although it is unclear if the South African government will keep pushing for withdrawal, the approval of the Parliament will be needed. The fear of more countries leaving remains rampant today. Indeed, at the 28th African Union summit in january 2017, a strategy for the collective withdrawal from the ICC has been adopted, rendering its future uncertain. However, it would be relevant to point out, for the sake of optimism, that the decision is non-binding and both Senegal and Kenya voted against its adoption. But with the rise of this new

1. Gambia's Minister of Information and Communication Infrastructure, Sheriff Baba Bojang, 25th october 2016 on GRTS, Gambia's national television.

institutional crisis, it is crucial to ask if the criticisms are legitimate, considering currently 9 out of 10 of the ongoing investigations are concerning african countries, though 8 of them were referred by african countries with 6 referring their own cases to the ICC.

Being today at a turning point in the history of the ICC, it is of a critical importance to reflect and analyse with accuracy the criticisms the Court has been facing for quite some time now. Secondly, the future of the international criminal law is more than ever stained by doubt and maybe improvements need to be thought of. These criticisms are not new and the ICC has been coping with them for years, providing answers to its dissidents, but the recent events show a need to reflect on it and evaluate them duly. This research will probably not bring recommendations or reform ideas for the ICC, even if its yet not discarded, but more essentially show if change needs to be implemented and what consequences these withdrawal might bring.

To this end, the main questions to address would be: “Are the criticisms of ICC's bias against Africa fair? Is massive withdrawal the best response for African countries and individual accountability on the continent? Which alternatives can be found for international justice in a post-ICC African continent”

This thesis will focus first on a reminder of the functioning of the ICC and its jurisdiction, to bring a comprehensive idea of the institution and its challenges. Secondly, an analysis of its history is crucial, to understand if the prosecutions and convictions seem to reveal some legitimacy of the criticisms received. Also, international relations and the balance of power between various actors and the ICC should be analysed to deduce if some other considerations may have influenced some decisions of the ICC and if the tendency to prosecute regularly african leaders fall from widespread violations in the continent or is rooted in an unwillingness to investigate richer countries that have more power on the international scenery. Finally, the consequences of withdrawals should be duly examined through the analysis of the other existing systems in Africa that might replace it, as well as the meaning of the absence of the ICC for future victims and the loss of legitimacy of the institution on the international scenery.

Chapter 1: ICC's foundness for Africa.

Introduction:

The International Criminal Court is a permanent international tribunal aimed at prosecuting individuals for the most heinous of crimes, namely genocides, crimes against humanity and war crimes. This highly ambitious project started with the Rome Statute signed at the United Nation's Rome Conference in july 1998. This treaty, whose entry into force came on the 1st of july 2002 after the ratification by 60 countries, is the legal base for the establishment and functioning of the Court.

Although 124 out of 193 UN member States have ratified the treaty and recognize the jurisdiction of the ICC, many criticisms throughout the years have been raised on the impartiality and independence of the Court, leading today to a high risk of withdrawal by African States. Concerning the majority of African cases at the Court, those criticisms need to be thoroughly evaluated to understand the current phenomenon of widespread distrust towards the institution.

This first chapter will thus focus on the ICC's tendency to target the african continent, its functioning and history that reveals a pattern of condemning african leaders while ignoring the rest of the world.

In order to do so, the functioning of the Court as provisioned by the Rome Statute will be duly analysed (I). Following this, the extensive case-law concerning the African Continent has to be studied to understand this tendency (II). Finally, the attitude of the ICC towards non-African States needs to be researched through the case-law in order to adress both the historical lack of concerns for those states and the contemporary interest for such cases (III).

I. The Rome Statute: between insured independence and green light for double standards.

The ICC is composed of four organs, namely the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry. All those components and their competences are ruled by the Rome Statute, which also details the rules of jurisdiction, admissibility and procedure. This part will analyse the Rome Statute to give a clear idea of how the Court operates, and how a case is chosen and examined after allegations of violations are brought. The goal is to show which powers come into play to decide on the validity of a case. Being the organ that decides on the validity of a case, the Office of the Prosecutor will be the main interest of this part (1). The rules of jurisdiction and admissibility will be then studied to

understand the legal reasons leading to a prosecution (2). Finally, the particular relationship between the Court and the UN has to be evaluated to understand the criticisms targeting the independence of the Prosecutor and the controversiality surrounding the Security Council's influence on the ICC (3).

I.1. The Prosecutor, a feared independence.

Independent organ of the ICC, the Office of the Prosecutor's responsability is to examine, investigate and pursue individuals susceptible of being responsible for the alleged heinous crimes falling under the jurisdiction of the Court[2]. The Office of the Prosecutor regroups three main divisions and rely on the coordination of approximately 380 staff members from a wide range of professional background, including but not limited to lawyers, investigators, psycho-social experts and analysts that are crucial to uncovering the truth and bringing justice to the victims of war cimes, crimes against humanity and genocides.

The Chief Prosecutor is the main actor in this quest for international justice, managing the Office of the Prosecutor with one or more Deputy Prosecutors[3], and de facto acting as the prime public figure of the Court, often speaking out against violations of the Rome Statute and responding to the criticisms facing the ICC. Since 2012, this title is hold by lawyer and former Gambian Minister of Justice Fatou Bom Bensouda.

Similarly to the Judges and the Deputy Prosecutor(s), the Prosecutor is elected by the Assembly of State Parties for a non-renewable mandate of nine years[4], both to avoid favoritism towards one of the State Parties and to not jeopardize impartiality by having a Prosecutor chasing reelection at the expense of justice.

The provisions of the Rome Statute frame the powers and limitations of the Office of the Prosecutor. For the Court to exercise its jurisdiction, three ways are provided for the Prosecutor to examine a case. Article 13 of the Rome Statute details these referrals, the first being the referral by a State Party[5] providing sufficient proof a crime under the jurisdiction of the Court may have occur[6]. Referrals of alleged crimes can also be submitted by the Security Council of the United Nations[7], this is currently a provision surrounded by controversy that shall be examined later in this part. Finally, the Prosecutor itself can launch an investigation[8], providing relevant informations have been reported and duly examined[9],

2. Rome Statute. Art. 42.1.
3. Rome Statute. Art.42.2.
4. Rome Statute. Art. 42.4.
5. Rome Statute. Art. 13(a).
6. Rome Statute. Art. 14.1. and 2.
7. Rome Statue. Art. 13(b).
8. Rome Statute. Art 13(c).
9. Rome Statute. Art. 15.1. and 2.

authorization by the Pre-Trial Chamber is nonetheless required[10].

Moreover, the Rome Statute provides guarantees regarding both the independence and impartiality of the Prosecutor and its staff. As specifically detailed in article 42, "neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature"[11]. The Rome Statute is thus very clear in avoiding potential professional conflict of interest in the exercise of the Prosecutor's mandate. Furthering the limitations against conflicts of interest, the Rome Statute in its article 45 prohibits the Prosecutor from working on a case in which such a conflict might be foreseeable:"neither the Prosecutor or a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case [...] they have previously been involved in any capacity"[12]. Furthermore, despite its independence, the Prosecutor and Deputies are not untouchable by the Court, if such doubts arise, the Statute allows the Appeals Chamber to disqualify them upon request of the defendant, "the person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or Deputy Prosecutor on the grounds set out in this article"[13].

Despite those provisions made to ensure the independence and impartiality of the Office of the Prosecutor, some critics continue to target its large competences and broad authority. Justifying its distrust towards the Court, the USA in 2003 evoked an "insufficient checks and balances on the authority of the ICC prosecutor" as well as "insufficient protection against politicized prosecutions or other abuses"[14]. Former U.S Secretary of State Henry Kissinger also warned against fragile checks and balances, criticizing that the Prosecutor "has virtually unlimited discretion in practice"[15]. Although, it is relevant to point out the global perception of Henry Kissinger as a prominent actor in the government's dubious foreign affairs, fear of a strong international justice may have motivated his comments. Furthermore, considering the possibility of disqualification and the need for authorization for self-referral, such criticisms lack of legal basis to target the Office of the Prosecutor.

Notwithstanding such criticisms, the Prosecutor seems theoratically to be a strong independent asset for the Court, with fair limitations supposed to deter risks of partiality and abuses. Additionaly, the election of Fatou Bensouda in 2012 has received praise from Africa,

10. Rome Statute. Art. 15.4.
11. Rome Statute. Art 42.5.
12. Rome Statute. Art. 45.7.
13. Rome Statute.Art. 42.8(a).
14. U.S Department of State, "Frequently Asked Questions About the U.S Governments Policy Regarding the International Criminal Court", 30 July 2003.
15. H. Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, 2001, p.91.

revealing a will from the Court to call for a better relationship with the continent. Putting a Gambian lawyer in such a primordial position can deter criticisms by showing that the ICC is not an anti-africa court, after all the person charged with investigating and prosecuting crimes being from the continent. Nevertheless, criticisms have arise both targeting the Court for a desesperate attempt to tame criticisms and towards Prosecutor Bensouda for betraying her continent and selling-out to the neo-colonial institution.

The rules of jurisdiction and admissiblity now need to be adressed to understand which empirical factors lead to the investigation of a case.

I.2. Jurisdiction and Admissibility, the easiness of targeting Africa.

Despite being the first world's permanent international criminal court, the ICC's jurisdiction has its own limits and can only investigate crimes relating to State Parties[16], only those who have signed and ratified the Statute fall under the jurisdiction of the Court. However, non-State Parties can voluntarily accept the jurisdiction of the Court by filling a declaration with the Registar[17], as did the State of Palestine in 2009 and Ukraine in 2015. This raises its own issues as some countries are virtually untouchable when it comes to international justice, Russia and the USA don't recognize the jurisdiction of the Court although they have been heavily criticized when it comes to their foreign policies while 34 African Countries are parties to the Rome Statute and are being constantly checked by the Court. This is a strong catalyzer for Africa's frustration, many States ratified the Statute and accepted the jurisdiction of the ICC in an attempt to end impunity in their countries, thus it is understanbly outraging to witness other more powerful, and sometimes more dubious, countries refusing to play by the same rules and repeatedly commit unchecked abuses.

Indeed, in order to engage the jurisdiction of the Court, ratification or explicit recognition is necessary and additionally, either territorial or individual jurisdiction has to be invoked. In the framing of the Rome Statute, individual jurisdiction can only occur if the individual is a national of a State Party[18]. Independently of where the alleged crimes were perpetrated, the Court is able to investigate and prosecute providing that the person of interest is a national of a State Party or one that accepted its jurisdiction. Additionally, territorial jurisdiction arises when the alleged crimes have been committed within the territory of a State Party or a State that recognized the Court's jurisdiction[19]. An exception to that rule lies in the particular relationship between the ICC and the UN, allowing the Security Council to refer a situation

16. Rome Statute. Art. 12.1 and 2.
17. Rome Statute. Art. 12.3.
18. Rome Statute. Art. 12.2(b).
19. Rome Statute. Art. 12.2(a).

to the Prosecutor[20] independently from the Country's recognition of the Court's jurisdiction, thus extending the territorial jurisdiction of the ICC. This peculiar way of referral and the contoversy connected to it will be studied in the next part.

Alongside the jurisdiction of the Court, the admissibility of the case is of crucial matter to launch an investigation. The main issue surrounding the admissibility of a case is the nature of the ICC as a complementary court, meaning inadmissibility will be determined if the individual has been investigated but prosecution was found not needed by the State concerned[21], has already been tried for the crime[22] or is currently being prosecuted[23]. Hence, the Court is supposed to let national justice operate and will only step in if there appears to be unwillingness or inability to carry out justice[24] leading thusly to a need for international prosecution. The Rome Statute provides indicators to deduce if unwillingness from national justice occurs, such as proceedings seemingly conducted "for the purpose of shielding the person concerned from criminal responsability"[25]. Additionaly, "unjustified delay of the proceedings"[26] is also understood as implying unwillingness to seek justice as well as the issue of independence and impartiality of national jurisdiction[27]. Inability, on the other hand, can be determined in the case of "total or substantial collapse or unavaibility of its national justice system"[28]. Hence, corruption of the judiciary or failure of national jurisdiction are the main factors requiring the intervention of international justice. These factors tends to be more easily found when it comes to Africa, between the common beliefs of wide-spread corruption and inapt justice systems the countries on the continent often witness international justice being substituted to their own national systems. Additionaly, the recurring internal conflicts faced by some countries regularly undermine the impartiality and efficiency of national justice. Conflicts bring instability and insecurity, with often governmental organizations being targeted leading to a functioning of justice that can be highly impaired. Alongside the difficult exercise of justice in conflict, clashes between government forces and rebel groups can easily undermine the impartiality of national judges. Indeed, depending on the depth of seperation of powers, it may very likely be close to impossible for national judges to impartially prosecute the current leadership, while the fears of pressure from the government to disregard the rules of a fair trial towards the rebels are easily foreseeable. Hence could lead to the tendency to target sitting African leaders

20. Rome Statute. Art. 13(b).
21. Rome Statute. Art. 17.1(b).
22. Rome Statute. Art. 17.1(c).
23. Rome Statute. Art. 17.1(a).
24. Rome Statute. Art. 17.
25. Rome Statute. Art. 17.2(a).
26. Rome Statute. Art. 17.2(b).
27. Rome Statute. Art. 17.2(c).
28. Rome Statute. Art. 17.3.

regarding ongoing internal conflicts, such as the case of Burundi. Thus, legitimacy of national proceedings and impartiality of the national justice system being the main factors leading to prosecution by the ICC, an apparently tumultuous African continent can attract higher interest from the Prosecutor. However these considerations may explain some of the prosecutions of African countries, it doesn't excuse disregards for alleged crimes committed by western countries.

Most controversial element of the Rome Statute, the relationship between the ICC and the United Nations requires further examination.

I.3. Relationship with the UN: potential stain on ICC's independence.

Despite its independence, the ICC has a particular relationship with the United Nations and more specifically the Security Council. Indeed, the Rome Statute allows the UNSC to refer cases directly to the Prosecutor of the ICC[29], provision that has spark virulent criticisms towards the Court, highly undermining its status as an independent international institution. One of the most controversial facet of this relationship lies in the composition of the Security Council, out of the 5 permanent members, 3 are not State Parties to the Rome Statute, nor have accepted the jurisdiction of the ICC, these are the USA, Russia and China, the usual uspects. This possibility of referral by the UNSC leads to countries being able, to some extent, to push for an investigation by the Court while being themselves exempt from international justice. Although the help of the UN is valuable to the ICC, criticisms targeting their relationship are far from being unfair, and raise relevant doubts regarding independence and impartiality. Paired with the possibility for the Security Council to extend the ICC's jurisdiction to States having neither ratified the Rome Statute nor explicitly accepted the jurisdiction of the Court, fears from a double standard in international justice are well founded. Indeed, the power of veto granted to the permanent members make them virtually untouchable by the ICC, as only the resolutions from the Security Council, which they can block, could make them face international justice. Thus, while Russia, the USA and China are practically exempt from international jusitce, they have the power to direct the Prosecutor towards other countries that don't recognize the Court's authority as well, as it happened for the first time with the referral of the situation in Darfur with Resolution 1593 of the Security Council and more recently Resolution 1970 referring the situation in Libya and leading to an arrest warrant being issued againt Muammar Gadhafi. Thus, the risk of this type of referral being governed by the personal interests of permanent members is real.

29. Rome Statute. Art. 13(b).

As public law professor and french author Emmanuel Decaux explains, this reinforces "the discontent commonly heard against permanent members to practice 'double standards'- to implicate other States, without risking seeing themselves implicated"[30], he later continues warning against the risk of "reflex of clientelism", allowing to protect, through their veto, their commercial partners[31]. It also shows a great hypocrisy from the USA, China and Russia, as these outspoken defenders of State soveireignty are able to disregard the sovereignty of those States who refused the Courts authority. Furthermore, the Rome Statute authorizes the Security Council to force the Court to refrain from investigating a situation for 12 months renewable[32], granting those same countries the power to legally obstruct the exercise of the Courts prerogatives. With once more the possibility of veto from permanent members, this strengthens the risk of "double standards" as the action of the Security Council will be motivated by considerations of permanent members[33], possibly leading to permanent members and their allies benefiting from a special treatment compared to other States. Thus, the Rome Statute allows for a situation where States that have refused the Courts authority can both extend its jurisdiction and paralyse its work, considering the politicized nature of the Security Council, risk of abuses are real and dangerously poison the legitimacy of the ICC as an impartial and independent international actor.

II. Africa, the fuel of ICC's case-law.

The examination of the case-law will be at the core of this part. The aim is to show that Africa has been in the past the main target of ICC's prosecution. To this end, cases concerning Africa will be analyse in depth to understand where the accusations and reports came from, which cases came to conclusion and with what verdict. Thus, the ongoing cases will be examined (1), followed by the preliminary examinations concerning Africa (2), and finally the origin of the referrals will be analyzed (3).

II.1. Africa's VIP status in ICC prosecutions.

Since the creation of the ICC, all prosecutions have been concerning African countries,

30.Personal translation from: E, Decaux, "Actions au regard de la souverraineté des Etats et moyens d'investigation", Actes du Colloque Droit et Démocratie, *La Cour pénale internationale*, Paris, la Documentation française, 1999, p. 84-85.
31. Personal translation from: E. Decaux, "Actions au regard de la souverraineté des Etats et moyens d'investigation", Actes du Colloque Droit et Démocratie, *La Cour pénale internationale*, Paris, la Documentation française, 1999, p. 85.
32. Rome Statute. Art. 16.
33. Z. Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under fire?", E.J.I.L, 1999, p. 138.

fairly sparking criticisms of bias against the continent. Those 8 cases were nevertheless not benine and although critics might be angered by the exclusivity of african cases, dire situtations called for international prosecution. The first case of the ICC targeted the Democratic Republic of Congo for war crimes and crimes against humanity committed during the armed conflict since July 2002. Alleged mass murders, summary executions, rapes and use of child soldiers were the main arguments for investigation into the situation, and fairly legitimized the intervention of the Court[34]. Out of the 6 individual cases, 2 led to a guilty verdict, one as an accessory to crime against humanity for murders, and 4 counts of war crimes for murders, attacks on civilian population, destruction of property and pillaging, with a sentence of 12 years of imprisonment for the perpetrator. The other guilty verdict concerned the war crime of enlisting and conscripting children under the age of 15 and led to a 14 years imprisonment, confirmed in appeal. One of the accused was acquitted and released, confirmed in appeal, and another saw the charges being not confirmed by the Pre-Trial Chamber, also leading to his release. Among the two remaining, one case is in suspens while the suspect is still at large, and the last is currently on trial[34]. Prosecution of nationals of African countries obviously doesn't automatically leads to condemnation, if the Court is systematically targeting Africa it is still able to respect the rules of a fair trial and recognize innocence. It is also relevant to note that the Court doesn't move the trial forward if the accused is absent, all suspects still at large can't be tried if they cannot defend themselves, another respect of fair trial rules by the Court.

The Central African Republic case was the first time an investigation was opened concerning a situation where sexual crimes greatly outnumbered alleged killings. As hundreds of rape victims came forward, the situation in the country since july 2002 could not be ignored. Resulting from the trial, military commander of the Mouvement de Libération du Congo, Jean-Pierre Bemba, was found guilty in march 2016 for 2 counts of crimes against humanity, for murders and rapes, and 3 counts of war crimes, for murders, rapes and pillagings, resulting in a sentence of 18 years of imprisonment[35].

Ongoing case, the situation in Ivory Coast concerns the post-electoral violence in 2010-2011 following the results that sparked clashes between pro-Gbagbo and pro-Ouattara Ivorians. Wide-spread and systematic targeting of civilians paired with the displacement of about a million persons led to investigation of both sides of the clashes[36]. Although the country is not part of the Rome Statute, explicit acceptance of the ICC's jursdiction allowed

34. ICC-01/04, https://www.icc-cpi.int/drc
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35. ICC-01/05, https://www.icc-cpi.int/car
36. ICC-02/11, https://www.icc-cpi.int/cdi

this case to be prosecuted[37]. The trial of former President Laurent Gbagbo and former Minister of Youth, Employment and Professional Training Blé Goudé is ongoing since January 2016. As personnaly witnesses, the prosecution seemed to struggle to prove the abuse of lethal force by the national police during the demonstration in Abobo in 2011[38]. Facing similar charges, politician and infamously nicknamed "Blood Lady", Simone Gbagbo is still at large.

At the origin of many debates and criticisms, Darfur/Sudan case is nonethelles horrible and not many will argue against the need for prosecution of the ones involved. The conflict reportedly internally displaced 1.65 million persons in Darfur and led to 200 000 refugees in Chad. The investigation opened in 2005 and target members of the Sudanese government, militia leaders, and leaders of the Resistance Front. Out of the 5 accused, 4 are still at large, including President Omar al-Bashir, while charges were not confirmed by the Pre-Trial Chamber for the last one[39].

Following the post-election violence in Kenya in 2007/2008, investigation by the Prosecutor was seen crucially necessecary considering the number of people killed, over 1 000, the 900 documented rapes and sexual crimes, the displacement of more than 350 000 persons and the reports of beheading and burning alive of victims. Out of the six prosecuted, 3 are still at large and three others have seen the charges dropped, one due to insufficient evidences[40].

The well-known situation in Libya also attracted criticisms but let's focus on the elements for now. The case focuses on alleged crimes against humanity, for murders and persecution of civilians and peaceful demonstrators since February 2011. Four suspects were part of the investigation, Brotherly Leader Muammar Gaddafi, who was killed, leading to the withdrawal of the charges, while Abdullah Al-Senussi's case was declared inadmissible on July 2014. The two remaining, including Saif-al-Islam Gaddafi, are still at large[41].

More recently, the situation in Mali has led to an investigation into the alleged war crimes committed since January 2012, with reported executions of between 70 and 150 detainees, lootings, rapes, destruction of cultural monuments, tortures and enforced disapearrances.The trial ended with the sentencing of 9 years of imprisonment for Chief of Hisbah Ahmad Al

37. M. Bamba, "Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale", April 18 2003, https://www.icc-cpi.int/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf
38. Personal attendance of a few hours of the trial of Gbagbo and Goudé in february 2017 led to the witnessing of the Prosecution trying to prove the use of lethal grenades by police forces in the repression of anti-Gbagbo demonstration. The confusion surrounding the terms "offensive grenade" and "defensive grenade" led to a pointless debate that could have been avoided by focusing on the lethality of the grenade, was it crowd-control non-lethal projectiles or lethal grenades could have kept the witness from avoiding the real issue.
39. ICC-02/05, https://www.icc-cpi.int/darfur
40. ICC-01/09, https://www.icc-cpi.int/kenya
41 ICC-01/11, https://www.icc-cpi.int/libya

Mahdi for the destruction of the mausoleum of Tombouctou[42]. It is the first time the Court has tried someone for the destruction of cultural assets, additionally Al Mahdi was the first ICC suspect to recognize is culpability[43].

Finally, the situation in Uganda focuses on the conflict between government forces and the Lord's Resistance Army since July 2002 and the alleged crimes against humanity and war crimes that occured. The top members of the LRA being prosecuted are still at large except for one, Dominic Ongwen who surrendered in January 2015 and whose trial is still ongoing[44].

Although all those cases are exclusive to Africa, it is impossible to deny the gravity of the events that required the involvement of the Court. Furthermore, many of them concerned internal conflicts between government forces and rebel armed groups or civilians, reinforcing the idea that national justice was inapt to fairly and duly operate.

In the last 3 years, two new investigations have opened, one relating to Africa, the Central African Republic was shook once more by new violences in 2012 including rapes, torture, murders, forced displacement, use of child soldiers and targeting of humanitarian missions[45]. Another dire situation but also another African country case, thus strengthening the current criticisms.

The ongoing preliminary examinations need now to be researched to determine if the Court seems to prolong it's interest towards Africa.

II.2. Africa, still favorite in recent examinations.

Out of the ten situations still under preliminary examination at the ICC, 4 of them are still related to African countries. Although less than half of those situations occured in Africa, the continent remains the most represented in this group which only reinforces criticisms of harrasment.

Many reports of murders, rapes and forced disapearrances led to the opening of preliminary examination into the Conakry Stadium massacre in Guinea on the 28 of September 2009 when soldiers massacred 157 peaceful demonstrators. Eight years later, the case is still at the stage of admissibility[46].

Still in the stage of admissibility 7 years later, the preliminary examination of Nigeria

42. ICC-O1/12, https://www.icc-cpi.int/mali
43. "CPI : le Malien Ahmad al-Mahdi condamné à 9 ans de prison pour la destruction de mausolées à Tombouctou", *Jeune Afrique*, 27 September 2016, http://www.jeuneafrique.com/360603/societe/cpi-malien-ahmad-al-mahdi-juge-coupable-de-destruction-de-mausolees-a-tombouctou/ , (accessed 28 June 2017).

44. ICC-02/04, https://www.icc-cpi.int/uganda
45. ICC-01/14, https://www.icc-cpi.int/carII
46. https://www.icc-cpi.int/guinea

opened in November 2010 and focuses on the conflict between Boko Haram and Nigerian security forces and the alleged crimes against humanity for murder and persecution, as well as the war crimes committed[47].

Preliminary examination into the situation in Burundi started in April 2016 following the reports of 430 killings, at least 3 400 arrests and more than 230 000 Burundians displaced in neighbouring countries. Still examining the subject-matter jurisdiction, the focus remains on the torture, rapes, forced disapearrances and killings that have been committed during the political violences that followed the contested reelection of President Pierre Nkurunziza in April 2015[48].

A preliminary examination was also opened in september 2016 regarding the situation in Gabon since May 2016 following the reelection of President Ali Bongo which sparked violences and pillagings including the burning down of the National Assembly. The subject-matter jurisdiction is today still being examined[49].

Although the ICC continues to show a particular interest into the African continent, the origins of the referrals of these situations need to be examined for it can shed light on the perceived legitimacy of the Court and the cooperation of States.

II.3. Origin of referrals: from voluntary cooperation to boarderline UN ambush.

Out of the 9 prosecutions and investigations into African States, 5 of them were referred by the concerned countries themselves, 2 were opened at the initiative of the Prosecutor under article 13(c) of the Rome Statute, and 2 were referred by a Resolution from the UN Security Council. Furthermore, out of the 4 ongoing preliminary examination, 3 of them were initiated by the Prosecutor and one referred by the country's own government. There is thus a majority of African govermnent voluntarily referring their cases to the Prosecutor of the ICC, implying a faith in the legitimacy and the authority of the Court. This constitute one of the most used reasons for the majority of African cases at the Court, most of those cases weren't seemingly motivated by a colonial will to harass Africa either by the UN or the Prosecutor but more probably by countries seeking independent international justice to investigate atrocities happening on their territories. It is therefore necessary to study those cases to understand the contexts that pushed those governments to seek the Prosecutor's help.

The Democratic Republic of Congo case was the first to be investigated by the ICC and started upon the referral to the Court by the DRC's government itself in 2004. Concerning an

47. https://www.icc-cpi.int/nigeria
48. https://www.icc-cpi.int/burundi
49. https://www.icc-cpi.int/gabon

internal conflict between governmental forces and a rebel uprising, this referral was the best way to ensure impartiality in the prosecuting of the accused rebels as national prosecution could have been seen biased and give further legitimacy to the rebels. Indeed, it is almost impossible to ensure and prove the impartiality of national proceedings when pursuing individuals outspoken about their goal to dismantle the government. First, the trial would have been a great platform for the rebels to spread their message, and furthermore accusations of corruption and bias in the national justice system would have been easy to rumor mostly in the case of condemnation which would have facilitate the rebel discourse of the existence of governmental opression while also providing potential martyrs to their cause. Seeking the ICC's jurisdiction was the best way for the DRC's government to both show impartiality and ensure the absence of criticisms towards them. It also can be seen as a way to move ahead of potentials scandals by showing both the international community and the country their will to resolve the conflict in the most peaceful and legally honest way. Anyway, confidence in the Court is easily implied by this referral.

A month later was opened the investigation into the Uganda situation, also referred to the Prosecutor by the government itself, it concerned once more an internal conflict opposing the national authorities and a rebel armed group called the Lord's Resistance Army. Similar reasons for seeking international justice could exist there, avoiding criticisms of bias, corruption and refraining from giving legitimacy to the rebels, showing the government is "the bigger person", going high when the rebels go low by letting independent justice resolve the highly sensitive issue dividing the country. Although, despite trying to show impartiality, the government side was, and still is, undermined by the abolition of the limitation of presidential terms in 2005 when President Museveni had been in power for almost 20 years already. Today, his title of President remains while the last two elections have been heavily contested both by his citizens and the international community. This referral still implies trust in the Court and faith in an independent international justice system capable of operating when national systems are undermined by a conflict, nevertheless such a move from a politician with a strong grasp on power can be seen as a way to eliminate the dissidents using the ICC while keeping a "good guy" statute in the eyes of both his country and the international community. However, the motivations of Yoweri Museveni are impossible to speculate, the facts of this case can at least be used to prove some confidence in the ICC.

Later, the Central African Republic case was brought to the Prosecutor in 2007 once more by the government itself, reinforcing the idea that Africa use to have faith in the Court and that it doesn't only chase african cases on its own. This time, it was the alleged crimes

committed by outsider that was the core of the case, the atrocities committed by the military forces led by Jean-Pierre Bemba Gombo from the DRC were the target of the investigation even though the intervention of Congolese forces were requested by CAR's government to help takle the rebellion. In this situation, showing impartiality wasn't necessarily the reason of the referral, but more a need for international justice to prosecute individuals from an allied country that committed crimes on CAR's territorry. The Central African Republic couldn't on its own prosecute Bemba both for legal and diplomatic reasons, thus the intervention of the Court was crucial to achieve justice without impairing bilateral doplomatic relations.

More recently the situation in Mali was brought to the Court in 2012 by the Malian government, once more concerning an internal conflict and involving the rebel group Hisbah. This time, the religious and ideological dimension of the uprising paired with a global climate of terrorism made the referral to the ICC necessary, the government indeed couldn't risk to prosecute the rebels itself and further elevate the violence. Once again, seeking the help of the Court was the best option for this African country divided by an internal conflict. It is however highly relevant to note that it is the first time an individual has been condemned for the crime of "intentionnally directing attacks against protected objects", and also the first an accused recognized its culpability.

In 2014, the Court opened a new investigation into the situation in the Central African Republic, this time not concerning acts perpetrated by foreign soldiers but for new alleged crimes committed in the context of an internal conflict. This very recent case was brought again by the CAR's government, in the context of the very wide-spread criticisms this research is about, it both show a satisfaction for the previous rulling of the ICC and a remaining faith in the exercise of the Court's jurisdiction.

A preliminary examination was opened in 2016 for the violences in Gabon following the reelection of President Ali Bongo, the case was referred to the Prosecutor by the government. These last two cases show the ICC hasn't lost all it's support within the African continent.

Examining the self-referral from the Prosecutor's initiative can now teach more about the Court's relationship with Africa.

Two ongoing prosecutions and three preliminary examinations were opened at the initiative of the Prosecutor, concerning the situations in Ivory Coast, Kenya, Burundi, Nigeria and Guinea. This initiative allowed by article 13(c) of the Rome Statute suffers from criticisms mainly targeting the broad competences of the Prosecutor and the lack of checks and balances. Although those cases can spark anger among critics, it is important to note that

such self-referrals are always backed by extensive reports from international organizations, States and non-governmental organizations and it would be difficult to discard the good faith of the latter. Additionaly, the two ongoing prosecutions concerning Kenya and Ivory Coast were both backed by their own governments. Although not signatory to the Rome Statute, Ivory Coast voluntarily accepted the Court's jurisdiction and cooperated with the Prosecutor during the investigation. In Kenya, both the President and Prime Minister expressed support to the Prosecutor's will to investigate. In light of this support, it is difficult to see the Prosecutor as an abusive, all powerful entity interfering in national affairs against the will of the government.

Finally, the two cases referred by the Security Council are the ones bringing the most legitimacy to the criticisms. Indeed, both the cases about Libya and Darfur/Sudan were opened following the very controversial type of referral that has been examined earlier, through article 13(b) of the Rome Statute. Criticisms of international intrusion through the UN are fair, mostly considering the previously discussed issue of the permanent members of the Security Council. Additionaly, those two countries are not parties to the Rome Statute neither did they recognize the Court's authority, meaning the ICC's jurisdiction was only rendered possible through it's extension provided by the Security Council's Resolution 1593 in 2005, for the situation and Darfur, and Resolution 1970 in 2011 for Libya. In both Resolutions, countries that don't recognize the Courts jurisdiction extended it to target others that refuse its authority, the hypocrisy is obvious remembering the status of the USA, Russia and China as outspoken advocates for State's sovereignty. In these cases the criticisms of the ICC being a neo-colonialist tool for the permanent members of the UNSC to exercise control over less powerful countries are understandable, mostly considering the ultimate goal of the intervention in Libya being solely to get rid of Muammar Gaddafi. Although it would be foolish to disregard the atrocities committed in Darfur and Libya, one could very fairly see the referral of Libya to the ICC as only a way to obtain an arrest warrant for the Gaddafis and justify the military intervention. Nonetheless, African States weren't strong defenders against ICC's harassment in both those situation, the Democratic Republic of Congo, Benin and Tanzania all voted in favor of the Resolution concerning Darfur, and South Africa, Gabon and Nigeria voted for the referral of the Libya situation to the ICC in 2011. Thus, criticisms concerning those cases loose some legitimacy as the ones allegedly opressed by the Court facilitated the Court's opression of other African States.

Although there doesn't seem to be an apparent proof of any ICC wrongdoing in its investigations of Africa, the lack of interest towards non-african situations remains a stain in its case-law and needs to be examined.

III. ICC's approach to non-african cases, blindness towards the West.

Here will be studied the cases concerning other countries, to understand the Court's behavior towards non-african cases. A keen examination of recent cases brought to the ICC will be carried out to establish in which circumstances where they chosen, where the accusations came from and mostly to determine if such cases were brought in response to critisisms or by pure humanitarian concerns. Also, a study of alleged violatons not investigated by the ICC has to be executed. Indeed, a copious amount of accusations, towards western powers for example, usually follow the criticisms of bias and the reasons of non-prosecution of such cases has to be analysed. For this part, the tendency to not investigate non-african countries will be studied (1), followed by an examination of the non-african situations currently being processed by the Court (2).

III.1. A constant disregard for non-african countries.

Indeed, during the first 14 years of the exercise of the Court's jurisdiction, no investigations were opened concerning situations outside of the African continent, additionaly all the preliminary examinations that didn't resulted in an investigation were related to non-african countries. The ICC case-law here speaks for itself and it is fair to wonder the reasons keeping the Court to investigate other alleged crimes committed by non-african states. And such situtations are not hard to find, as the USA, Russia and China's foreign policy have been linked to many allegations of war crimes. The problem here, and the reason such investigations cannot occur, is the absence of jurisdiction for those three countries, Russia has even withdrawn its signature of the Rome Statute last year, symbolic but bold move responding to the international community's criticisms of the annexation of Crimea. But State Parties to the Court have repeateadly been accused of war crimes, crimes against humanity and genocide with no prosecution being opened. On the 25th of October 2016, in its TV speech anouncing the withdrawal of Gambia from the ICC, Information Minister Sherriff Bojang heavily criticized the blindness of the Court towards western abuses, he expressly cites the refusal to prosecute Tony Blair for the UK military occupation of Irak. Furthermore, he disses the ICC for not having investigated the European Union for the deaths recurringly occurring on its shores, declaring "the Gambia took the EU to the ICC about a year ago, for the mass murder, the genocide of thousands of young Africans on the European coastal waters and since nothing has been heard from the ICC".[50] Additionally,

50. Gambia's Minister of Information and Communication Infrastructure, Sheriff Baba Bojang, 25th october 2016 on GRTS, Gambia's national television.

pressures have been rumored from Western countries and mostly the USA to not investigate Israeli alleged crimes in Gaza, specifically that former ICC Prosecutor Luis Moreno Ocampo has been the target of lobbying both from the USA and Israël to not investigate, for the best interest of the Court. According to international politics academic David Bosco, they went as far as suggesting to him that such an investigation "might be too much political weight for the institution to bear. They made clear that proceeding with the case would be a major blow to the institution"[51]. Western interference, amongst other, in the ICC's exercise of its jurisdiction thus seems to be a real issue highly undermining its independence, mostly when the pressure comes from States that rejected the Court's jurisdiction, in this case the USA and Israël.

Additionally, since the creation of the ICC, only three preliminary examinations didn't concluded in the opening of an investigation from the OTP, all concerning non-african countries, namely Venezuela, Honduras and the Republic of Korea, commonly know as South Korea. The first one concerned alleged crimes against humanity against political opponents of the Venezuelan Government since July 2002, but preliminary examination was closed with no investigation in February 2006[52]. Later, a preliminary examination was opened for the events that followed the Coup of the 28 June 2010 in Honduras and the alleged crimes against humanity, mainly for murders, torture, deportations and rapes, but was closed for insufficient evidence[53]. Finally, the case of the sinking of the Republic of Korea's warship in March 2010 and the shelling of its island of Yeonpyeong in November 2010 led to the preliminary examination in December 2010, but once againg no investigation followed[54]. It is unclear why Africa hasn't still witnessed an african preliminary examination closing with no investigation lurking behind the next door.

Fortunately, a new tendency emerges in the ICC, recently finding interest into non-african countries, thus undermining to some extent the virulent criticisms it faces.

III.2. A newly found interest for the previously ignored.

Currently, 6 preliminary examinations and 1 investigation are concerning non-African countries, the chronology of these cases can help deduce if such an interest is motivated by a need to deter the recurring criticisms of Africa's harassment.

The oldest of these situations is concerning Colombia and targets crimes against humanity allegedly orchestred during the conflict between paramilitary groups, rebel groups and

51. D. Bosco, "Rough Justice: The International Criminal Court in a World of Power Politics", 2013, p.159-164.
52. https://www.icc-cpi.int/venezuela
53. https://www.icc-cpi.int/honduras
54. https://www.icc-cpi.int/korea

government forces since November 2002 and war crimes committed in the same conflict since November 2009[55]. The reason for the latter date is the declaration communicated with Colombia's accession to the ICC to exclude war crimes from the Court's jurisdiction for 7 years[56]. The preliminary examination, opened at the initiative of the Prosecutor[57], started on June 2004, and even though it remains at the admissibilty stage after 13 years, it shows the interest into non-African cases is far from being a new trend.

Ten years after the Prosecutor independently opened a preliminary examination in 2007, the Afghanistan situation remains at the stage of admissibility as well. Focusing on alleged war crimes and crimes against humanity committed during the armed conflict between pro and anti-government forces since May 2003[58], this focus constitutes another example of the universal interest for impunity exercised by the Court. However, to efficiently prove critics wrong opening an investigation into those two situations might be required, otherwise it will reinforce the idea that only non-african cases are closed without investigation.

The UK/Iraq situtation is of far greater interest as it concerns the alleged war crimes committed by UK nationals during the Iraq conflict and the occupation from 2003 to 2008[59]. The case is unprecedented as it targets a highly influential western country and could be a great deterrence for criticisms. However, the preliminary examination was terminated in 2006 and fueled criticisms seeing a bias ICC refusing to investigate one of the most powerful actors on the international scenery. Fortunately, it was later re-opened in 2014 following new informations on the situation, but now backing up criticisms arguing that the ICC is merely trying to impede its detractors arguments. Nevertheless, this will hopefully conclude in a powerfull western State and former colonial power finally facing international justice for it's alleged abuses in an underpriviliged country.

After years of controversy and rumored pressures, the Palestine situation finally led to the opening of a preliminary examination in January 2015, upon request and declaration by the Government of Palestine. Targeting alleged crimes committed "in the occupied Palestinian territory including East Jerusalem, since June 13, 2014"[60], this case could very well lead to prosecution of Israeli officials thus targeting a State that has been heavily criticized for continuously dodging the consequences of its actions. This bold move, if it leads to an investigation, could fairly deter criticisms as it would target a very powerful non-african State, virtually untouchable and which has allegedly been strongly lobbying to avoid

55. https://www.icc-cpi.int/colombia
56. Rome Statute. Art. 124.
57. Rome Statute. Art. 13(c).
58. https://www.icc-cpi.int/afghanistan
59. https://www.icc-cpi.int/iraq
60. M. Abbas, President of the State of Palestine, "Declaration accepting the jurisdiction of the International Criminal Court", 31 December 2014.

intervention of international justice. This could very well return some of the Court's legitimacy as an impartial and independent slayer of impunity.

Also concerning Israël, the situation related to the registered vessels of Comoros, Greece and Cambodia for "the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip"[61] and the alleged crimes that occurred, lead to the opening of an investigation in May 2014[62]. Once again, the State of Israël could be facing investigation for its controversial actions regarding the Gaza Strip.

In April 2014, was opened a preliminary examination concerning the situation in Ukraine and later extended to include alleged crimes committed since November 2013 with no end date. This decision followed the receipt of a declaration of jurisdiction by the Ukraine government in 2014 and another one in 2015[63]. Ukraine thus gave jurisdiction to the Court over "crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations 'DNR' and 'LNR', which led to [...] mass murder of Ukrainian nationals"[64]. With those declarations, the ICC could finally investigate the highy criticized involvement of Russia in Ukraine and Crimea, thus bringing another international giant to justice, that is if investigation actually occurs.

Finally, the only situation concerning a non-African country ever being investigated came into being in October 2015, when the preliminary examination into the 2008 international armed conflict in Georgia led to the opening of an ICC investigation.[65] Although waiting for 13 years was necessary to witness this event, which might back up claims that this case was only opened to calm critics, it is relevant to note that the preliminary examination started in 2008 and that the potential outcomes of this investigation could lead to condemnation of Russian offcicials, finally checking the suspiciously invasive State.

Hence, four of those cases originally opened within the first 6 years of the ICC's operations thus providing some ground to the idea it hasn't always ignored non-African situations. However, it is important to point out that in all those years only one case has led to an actual investigation, the Georgia case, and this in the recent years of the Court, which could let critics argue that the ICC waited for criticisms to explode before actively targeting non-african countries. Additionally, the UK/Irak preliminary examination was closed before being re-opened only recently, thus providing debate leverage to those who believe this trend being a mere ripost to criticisms. The three most recent preliminary examinations, while unable to back up a scenario of historically universal interest from the Court, are

61. Referral of the "Union of Comoros", May 13, 2014.
62. ICC Prosecutor' Statement, May 13, 2014.
63. https://www.icc-cpi.int/ukraine
64. Resolution of the Verkhovna Rada of Ukraine, February 4, 2015.
65. ICC-01/15, https://www.icc-cpi.int/georgia

concerning powerful countries that have managed to escape both international justice and interference in their dubious foreign affairs. Hence, even if some may see this as a shield against ICC dissidents, it is difficult to not applaude such a daring unprecedented initiative.

Although criticisms of ICC's bias against Africa appear to be factually legitimized, the overall issue seems to be of a much more complicated nature. The limitations to ICC's jurisdiction makes it virtually impossible for the Court to investigate some of the most influential and suspicious States. Additionally, African Countries have been historically strong supporters of the Court's operations and open collaborators of its mandate, bringing legitimacy to its actions. Furthermore, numerous attempts to target non-African countries, though usually unsuccessful, show a commitment to impartialy and universally halt impunity for the most heinous crimes. Nevertheless, the particular relationship between the Court and the UN, whilst considerably helpfull to its mandate, continues to undermine its independence and legitimacy as well as rightfully fuel criticisms. Despite the many facets constituting this highly dividing issue, some African countries seem determined to end their relationship with the Court, judging it an abusive one, and thus the path to withdrawal needs to be duly examined.

Chapter 2: Massive withdrawal, a nightmare coming true?

Introduction:

This chapter will focus on the recent events leading to withdrawal for some countries as well as the concretisation of the fear of massive african withdrawal from the ICC. Starting with the countries actually on the brink of leaving (I) and then studying the concording african opinion of withdrawing from the ICC, which led to the African Union resolution in january 2017 (II).

I. The actual deserters.

A look at the countries actually leaving and those firmly trying is necessary, such as the Burundi (1), South Africa whose judiciary is blocking the process (2), as well as Gambia even if the new president decided to remain within the Court opposing the exiting president's will (3). The reasons of this withdrawals will be examined in each case to determine if it translates a will to leave a bias international court or an attempt to avoid prosecution for crimes committed.

I.1. Burundi: international justice or presidence? Getting rid of one to keep the other.

In October 2016, Burundi became the first country to follow threats of ICC withdrawal with actions. Indeed, a press release from the reunion of Burundi's Council of Ministers on October the 6th anounced the adoption of a draft legislation to withdraw from the Rome Statute. Using the criticisms of ICC bias as main argument, the press release denounced that "the opening of investigations against african leaders are done under the influence of great powers, which calls into question the independence of the Prosecutor of the International Criminal Court and the Court itself", and continues the criticisms by denouncing "manifestations of insurgency's appearance that have been financed and supported by some western countries" and "fake reports produced by the same destabilizing actors under the cover of purported independent experts from the UN"[66]. On the 12 October, Burundi's National Assembly voted on the legislation, with 94 out of 110 votes in favor, the legislation was passed. Later, on the 18 October, President Nkurunziza signed a decree to move

66. personal translation, "Communiqué de presse de la reunion du Conseil des Ministres du Jeudi 6 octobre 2016", http://www.burundi.gov.bi/spip.php?article1534

forward with the withdrawal.

Although the official reasons of Burundi's withdrawal are based on the usual criticisms of bias targeting the ICC, the chronollogy of the events seems to narrate a different tale, a tale of power hunger and quest for impunity. Indeed, since April 2015, Burundi has been the theater of wide-spread violence and reported human rights abuses surrounding the reelection of President Pierre Nkurunziza.

In 2015, Nkurunziza decided to seek a third presidential term in contradiction with Burundi's 2005 Constitution. This stubborn commitment to keep power crystallized political tensions in a context of economic disarray, thus leading to an explosion of violence. The controversy surrounding this third term lies in the 2000 Arusha Accords and the 2005 Constitution's clear stipulations that Presidents are elected for a 5 years term renewable only once, while Nkurunziza's supporters advocate that the 1st term doesn't count as Nkurunziza was elected by the National Assembly and the Senate and note by the people, thus making the controversial term the second one. Although Burundi's Constitutional Court validated the candidacy, the decision was surrounded by great controversy as the Vice President of the Court fled the country, reporting that heavy pressures and death threats pushed for this decision to be adopted[67]. Additionaly, the President of the Commission of the African Union, Nkosazana Dlamini-Zuma, declared two days following the decision that Burundi's Constitution didn't allow for a third presidential term to be sought, declaring "Other than the Burundi court, all interpretation that we get about the constitution is that... really there shouldn't be a third term" [68]. Pierre Nkurunziza was nevertheless reelected and political clashes spread around the country.

Despite international and african attemps to negociate peace and calm tensions, the situtation seemed unsolvable while government investigations failed to identify abuses perpetrated by state agents, fueling the criticisms of the corruption of Burundi's justice system and needs for international investigation[69].

These terrible events, paired with an apparent unwillingness from the national system to impartialy investigate government abuses in the current crisis led to the opening of a preliminary examination by ICC Prosecutor Bensouda in April 2016. Justifying her decision, Prosecutor Bensouda cited the "reports detailing acts of killing, imprisonment, torture, rape

67. P. Lepidi, "Violences politiques : des milliers de Burundais se précipitent au Rwanda", *Le Monde*, 6 May 2015, http://www.lemonde.fr/afrique/article/2015/05/06/violences-politiques-des-milliers-de-burundais-se-precipitent-au-rwanda_4628525_3212.html#a3FsArIWHy40rT6G.99

68. "Burundi protests continue despite Pierre Nkuru nziza pledge", *BBC*, 7 May 2015, http://www.bbc.com/news/world-africa-32626807

69. "Burundi: Government Investigations Ignores State Abuses", *Human Rights Watch*, 13 April 2016, https://www.hrw.org/news/2016/04/13/burundi-government-investigations-ignore-state-abuses

and other forms of sexual violence, as well as cases of enforced disappearances" as well as the reported count of victims that required her internvention, declaring that "more than 430 persons were reportedly killed, at least 3,400 people have been arrested and over 230,000 Burundians forced to seek refuge in neighbouring countries"[70]. Later, on the 30 September 2016, the UN Human Rights Council, upon adoption of Resolution 33/24, created a commission to investigate the alleged human rights abuses committed in Burundi since April 2015 and to identify the perpetrators[71] which probably led to Burundi's decision to withdraw from the ICC, as the anouncement occured a week later.

The chronology appears to support a scenario depicting a power hungry politician using every possible means to avoid international scrutiny. Hence, it seems fair to believe Burundi's withdrawal is more a move to secure power and escape justice than a purely honest attempt to distance itself from the imperialist abuses of a western controlled ICC. As explained by Africa Director at Human Rights Watch Daniel Bekele, "Burundi has failed to hold people responsible for brutal crimes to account and has sunk to a new low by attempting to deny victims justice before the ICC", from her point of view, " This latest move only confirms Burundi's continuing disregard for human rights and the rule of law"[72].

However, ICC withdrawal becomes only effective one year after the official declaration has been issued, and doesn't halt the ongoing investigations[73]. Thus, despite the apparent will to escape justice and the inevitability of Burundi divorce with the Court, the ICC will continue examinign the alleged crimes committed. The main issue then could be the refusal from the Government to cooperate with the Court, which is highly foreseeable as the Attorney General reportedly asked the citizens to refrain from submitting evidences to ICC and UN investigations. Additionally, Burundi's Foreign Ministry reportedly barred 3 investigators from the UN from entering the country and the Government ended all collaboration with the UN Office of the High Commissionner for Human Rights[74]. But such a drastic attempt to stop ICC's inquiry will likely accelerate the process and might lead to an actual investigation sooner than expected. Pierre Nkurunziza's actions reeking of malicious intents thus greatly undermine the "withdrawal movement" rhetoric that leaving the Court is merely a way to escape western imperialism.

70. "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi", 25 April 2016, https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016

71. http://www.ohchr.org/EN/HRBodies/HRC/CoIBurundi/Pages/CoIBurundi.aspx
72. "Burundi ICC Withdrawal: Major Loss to Victims", *Human Rights Watch*, 26 October 2017, https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims
73. Rome Statute. Art. 127. 1 and 2.
74. B. Duerr, "Burundi's ICC Withdrawal a Major Blow for Accountability", *International Peace Institute Global Observatory*, 12 October 2016, https://theglobalobservatory.org/2016/10/burundi-icc-rome-statute-nkurunziza/

As the second african country to express its will to leave the Court, South Africa's tensions with the ICC needs to be examined.

I.2. South Africa: when balance of powers protects the ICC.

On the 21 October 2016, South Africa became the second country to officially announce its decision to withdraw from the Court, followed by a notification to the Security General of the UN on the 25 October to legally start the process of withdrawal[75].

As a country with apparent respect of human rights, as well as an african example of liberal democracy and international influence, South Africa's decision to withdraw can seem surprising. Indeed, despite recent scandals of corruption under Jacob Zuma's presidency and reported generalisation of police brutality, South Africa has historically been a strong supporter of justice and the Court's mandate, being one of the ten first to sign the Rome Statute in July 1998 during Nelson Mandela's presidency. Nelson Mandela himself was an outspoken advocate for the establishment of a strong and independent ICC, declaring in a speech prior to signing the Rome Statute: "We have sought to ensure that the ICC is guaranteed independence and bestowed with adequate power. Our own continent has suffered enough horrors emanating from the inhumanity of human beings. Who knows, many of these may not have occured, or at least been minimised, had there been an effectively functioning ICC"[76].

However, South Africa seems determined to leave the ICC, relating in its notification of withdrawal the usual criticisms of the double standard allowed by the relationship between the Court and the UN, "Questions on the credibility of the ICC will persist so long as three of the five permanent members of the Security Council are not State Parties to the Statute"[77]. In the same document, South Africa, like many others before, also criticizes ICC recurrent targeting of African countries, "there is also perceptions of inequality and unfairness in the practice of the ICC that does not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African Statess, notwihstanding clear evidence of violations by others"[78], and raises doubts on the legitimacy of the Court as a beacon for justice and accountability, "The credibility and acceptability of the ICC to become the universally accepted institution for justice that will ensure the ideal

75. Rome Statute. Art. 127.
76. N. Mandela, "Opening Adress by Nelson Mandela", *2nd Conference of African National Institutions for the Promotion and Protection of Human Rights*, Durban, 1 July 1998.
77. "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court", 25 October 2016, https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf
78. "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court", 25 October 2016, https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf

of universality and equality before the law has not been realised and is under threat"[79].

Despite the recounting of the classic criticisms targeting the Court, South Africa's moves appears to also find its roots in recent events that fostered tensions with the ICC, events that need to be recounted here. Indeed, in June 2015, South Africa, who was hosting an African Union Summit, granted immunity to the delegates at the conference, including Sudanese President Omar Al-Bashir, and thus refused to arrest the leader, challenging ICC's arrest warrants against him. The decision was met by criticisms both internationally and internally, with South African judge Dunstan Mlambo declaring that "the conduct of the respondents to the extent that they have failed to take steps to arrest and detain the President of Sudan, Omar Al-Bashir, is inconsistent with the constitution of the Republic of South Africa"[80]. After al-Bashir freely left the country, South Africa's high court, which was examining potential arrest, ruled that the Sudanese President should have been detained. The ICC and NGOs heavily criticized the government's conduct, as explained by ICC's Deputy Prosecutor James Stewart, "in our view, it was very clear that South Africa should have detained Bashir so he could have been brought to trial in The Hague"[81], while Human Rights Watch Director denounced that "South Africa has shamefully flouted ICC and domestic court to free man wanted for mass murder of Africans"[82].

This brought tensions between the Court and South Africa, and this conflict of jurisdiction was later used as one of the reasons leading to South Africa's withdrawal, "South Africa was faced with the conflicting obligation to arrest President al-Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement, and the General Convention on the Privileges and Immunities of the Organization of African Unity of 1965 as well as the obligation under customary international law which recognises the immunity of sitting heads of state"[83], additionally justifying its decision to not arrest Al-Bashir, "Arrest of such a person by a State Party pursuant to its Rome Statute obligations, may therefore result in a violation of its customary law obligations"[84].

Nevertheless, the Court was far from being satisfied with South Africa's excuses, as it ruled on the 6 of July 2017 that South Africa failed its duty as a State Party by refusing to comply

79. "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court", 25 October 2016, https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf
80. K. Roth, "Sudan President Omar al-Bashir leaves South Africa as court considers arrest", *The Guardian*, 15 June 2015, https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan
81. K. Roth, "Sudan President Omar al-Bashir leaves South Africa as court considers arrest", *The Guardian*, 15 June 2015, https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan
82. K. Roth, "Sudan President Omar al-Bashir leaves South Africa as court considers arrest", *The Guardian*, 15 June 2015, https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan
83. "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court", 25 October 2016, https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf
84. "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court", 25 October 2016, https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf

with the arrest warrants targeting Omar al-Bashir[85], but refused to refer South Africa to the Security Council for sanctions[86]. Thus, both international and national justice seem to agree on the fact that South Africa's government should have favored the ICC's arrest warrants over the disputed leader's immunity.

South Africa's national courts appears to try to operate efficient checks and balances despite disregard from the government. Indeed, on 22 February 2017, South Africa's high court ruled the withdrawal inconstitutional, as approval by the Parliament was first necessary to move forward with such a decision. South Africa thus sent a letter to the UN to revoke its decision of withdrawal in accordance with the High Court's ruling, potentially to follow the correct legal path to withdrawal, though it is unclear what the government will do next[87]. This is nevertheless a win for the ICC and a proof that efficient national checks and balances are still insuring the proper conducting of executive's moves.

I.3. Gambia: from pressing withdrawal to enthusiasm to remain.

On the 25th October 2016, Gambia officially anounced its decision to withdraw from the Rome Statute and leave the ICC in a speech from the Minister of Information and Communication Structure Sherriff Baba Bojang. In this short speech aired on Gambian national television, the usual criticisms were raised but with a far more accusing tone, going as far as implying not only an imperialist agenda but also a racist pattern in the Court's exercise, "ICC, despite being called the International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of color, especially Africans"[88], Sherriff Bojang hereby portrays an institution led by white people to continue the oppression of black people in Africa. He continues his accusations of racist bias, declaring that "thousands of young Africans in search of greater path choice have been dying on European coasts on a weekly basis, for what crime? Because they are black and Africans who want to migrate to Europe in search of a better life?"[89].

Although criticisms of ICC being a tool for neo-colonialism and oppression of poor African

85. ICC-02/05-01/09-302, "Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir", 6 July 2017, https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF

86. "Al-Bashir case: ICC Pre-Trial Chamber II decides not to refer South Africa's non-cooperation to the ASP or the UNSC", *Press Release*, 6 July 2017, https://www.icc-cpi.int/Pages/item.aspx?name=pr1320

87. N. Onishi, "South Africa Reverses Withdrawal From International Criminal Court", *The New York Times*, 8 March 2017, https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html

88. Gambia's Minister of Information and Communication Infrastructure, Sheriff Baba Bojang, 25th october 2016 on GRTS, Gambia's national television.

89. Gambia's Minister of Information and Communication Infrastructure, Sheriff Baba Bojang, 25th october 2016 on GRTS, Gambia's national television.

countries are not new, the accusations of racism are not so wide-spread, but the racist agenda of the Court seems unequivocal to the Gambian Minister. His speech also recounts the lack of investigation into alleged western crimes, stating that "there are many western countries, at least 30, that have committed heinous war crimes against independent sovereign States and their citizens since the creation of the ICC and not a single western war criminal has been indicted"[90], he specifically points out the UK in Iraq and Tony Blair. Following those hostile criticisms and virulent accusations, Sherriff Bojang concludes the speech by officially announcing the withdrawal of Gambia from the Court, "As of today, tuesday the 25th of October 2016, we are no longer a member of the ICC and have started to complete the process as stipulated in the Statute creating the ICC"[91].

Third african country to announce its withdrawal, Gambia in its severe denunciation of the abuses of the ICC affirms itself as a main dissident of the Court, however the honesty of these reasons, and the proclaimed aim to escape western racist oppression, are undermined by the Government at the origin of the speech and the human rights record attached to it.

Indeed, at the time of the speech, Yahya Jammeh, the President at the origin of the withdrawal decision, had ruled the country with an iron fist for 22 years since the 1994 coup while reports of "State-sanctioned torture, enforced disappearances and arbitrary executions"[92] deeply stained its presidential record. Additionaly, the announcement of Gambia's withdrawal emerged only a few months before the scheduled presidential election in December 2016 in which President Jammeh was running for a fifth-term. And while the opposition grew stronger last year, government crackdown on dissident political parties deeply threatened the conducting of a fair election.

Indeed, reports were released accusing Jammeh's government of using state media for political advantage, as well as arbitrary arrests, threats and tortures of members of opposition parties, with 90 activists arrested for peaceful protests, including two who died in custody[93]. Hence, considering the reports of human rights abuses and the fear of loosing power, the decision to withdraw from the Court could very well be interpreted as a way to avoid international scrutiny, both in case of dubious reelection and in the eventuality of failure leaving Jammeh unprotected.

Fortunately, on the 1st of December 2016, the opposition candidate Adama Barrow wins the

90. Gambia's Minister of Information and Communication Infrastructure, Sheriff Baba Bojang, 25th october 2016 on GRTS, Gambia's national television.
91. Gambia's Minister of Information and Communication Infrastructure, Sheriff Baba Bojang, 25th october 2016 on GRTS, Gambia's national television.
92. J. Smith, "The Worst Dictatorship You've Never Heard Of", *Foreign Policy*, 21 April 2016, https://www.hrw.org/news/2016/11/02/gambia-crackdown-threatens-presidential-election
93. J. Wormington, "More Fear Than Fair, Gambia's 2016 Presidential Election", *Human Rights Watch*, 2 November 2016, https://www.hrw.org/report/2016/11/02/more-fear-fair/gambias-2016-presidential-election

presidential election and Jammeh admits its defeat the next day. However, as it is of custom for carreer dictators to grab on to power, Yahya Jammeh contests, a week later on the 9th, the results of the election, denouncing counting errors[94]. Later, on the 20th December, he strengthens is position and announces on state television his intention to remain in power, declaring "I am not a coward. My right cannot be intimidated and violated. This is my position. Nobody can deprive me of that victory except the Almighty Allah"[95]. This declaration raises concerns for human rights in the country, specifically the safety of opposition members, while doubts are raised about the withdrawal from the ICC, as Adama Barrow expressed his will to remain.

Uncertainty reigns in Gambie as on the 17th of January 2017, two days before elected president Barrow is meant to be invested as President, exiting president Jammeh declares state of emergency in Gambia, probably to secure power and block the investiture[96]. Jammeh finally steps down on the 20th of January 2017 and exiles in Equatorial Guinea, Adama Barrow is finally invested as President but rumors spread that Jammeh fled with approximately 11 millions of dollars of State money[97]. With the newly elected President finally in office, Gambia reverses its decision of withdrawal from the ICC declaring its goal for a new Gambia more respective of the rule of law and human rights, pleasing both the Court and the international community.

It is important to point out that this chain of events has further undermined the legitimacy of the advocates for withdrawal. Indeed, when a democratically elected president sides with remaining, challenging the decision of a dictator with 22 years of uninterrupted power and an eagerness to leave the ICC, it becomes easy to see the "remaining" side as a movement for accountability and justice and the "leaving" side as a supporter of impunity. Although relevant questions were raised during the withdrawal campaign of Gambia, the reversal of this decision grants high hopes for the ICC and its legitimacy.

Despite a consensus on using the usual ICC criticisms to justify their withdrawal, those three countries appear to all have some disagreement or tensions with the Court or at least a human rights record susceptible to attract international scrutiny, the opening of preliminary

94. "Gambie: après avoir reconnu sa défaite, le dictateur Jammeh conteste les résultats", *Le Monde*, 10 December 2016, http://www.lemonde.fr/afrique/article/2016/12/10/apres-avoir-accepte-sa-defaite-yahya-jammeh-rejette-les-resultats-de-la-presidentielle-gambienne_5046678_3212.html
95. "Gambian president Yahya Jammeh says he will not step down", *The Guardian*, 21 December 2016, https://www.theguardian.com/world/2016/dec/21/gambia-president-yahya-jammeh-will-not-step-down
96. "Gambie: à la veille de la fin de son mandat, Jammeh declare l'état d'urgence", *RFI*, 17 January 2017, http://www.rfi.fr/afrique/20170117-gambie-veille-fin-mandat-jammeh-decrete-etat-urgence-barrow
97. "Yahya Jammeh soupçonné d'avoir vidé les caisses de l'Etat gGambien", *Le Monde*, 23 January 2017, http://www.lemonde.fr/afrique/article/2017/01/23/yahya-jammeh-soupconne-d-avoir-vide-les-caisses-de-l-etat-gambien_5067183_3212.html

examination into post-election violence in Burundi and the actions of contested President Pierre Nkurunziza, the legal and political battle over the decision not to arrest Omar al-Bashir in South Africa, and the political oppression in Gambia. Thus, it is difficult to see those pioneers of ICC departure as anti-imperialist heroes leading an exodus outside of the oppressive biased institution that is the ICC, and more easy to picture power hungry abusive leaders trying to escape international justice and perpetrate atrocities in total impunity, although South Africa's withdrawal seems to find grounds in purely legal and political disagreements.

Although Gambia and South Africa raised hope for the future of the ICC, the adoption of a strategy for withdrawal at the African Union Summit in January brings fear and has to be analysed.

II. The African Union's resolution, inoffensive agreement or real path towards massive withdrawal.

An analysis in depth of this resolution is necessary, the idea is to understand how such an agreement was put forward and decided. Which actors pushed for massive withdrawal and which ones were against. This will also allow to map the opinions on the issue across the continent. The first part will thus focus on the opposing opinions in Africa concerning ICC withdrawal (1), while the second part will examined in details the African Union's resolution (2).

II.1. Maping Africa's remaining support: verbal riposts to withdrawals.

During the 28th African Union Summit in Addis Ababa, Ethiopia, in January 2017, was adopted a Withdrawal Strategy for Member States to leave the ICC. Met with wide-spread criticisms and panic about a potential massive african withdrawal, the decision constitute the conclusion of years of accusation of ICC's bias towards the continent and need to be examined in details. But first, opinions and statements from both governmental and non-governmental actors need to be examined. Indeed, despite the adoption of the withdrawal strategy, the question of ICC withdrawal was originally met with calls to remain across the continent in reaction to the first annoucements of withdrawal by Burundi, South Africa and Gambia. While those countries expressed their distrust in the institutions and renounced its mandate, many reaffirmed their support and will to remain in a call for international justice and accountability.

On the 1st of November 2016, exiting a meeting in Abidjan with Manuel Valls, Prime

Minister of France at the time, Ivory Coast's President Alasane Ouattara declared on the issue of ICC withdrawal, "these are sovereign decisions, Ivory Coast has no intention to go in this direction"[98], thus answering the question of Freddy Mulongo from the radio Réveil FM International on his opinion about the tendency of some african States to withdraw from the Court[99].

In a statement dated from the 30 October 2016, Dr. Tiwatope Ade Elias-Fatile, Minister-Counsellor for the permanent mission of Nigeria to the UN, reaffirmed Nigeria's support to the Court and its will to remain and cooperate with it, stating "my delegation wishes to reiterate Nigeria's continuous commitment to support and cooperate with the Court. Nigeria believes that impunity must be adressed resolutely wherever it occurred in the world. For this reason, we are faithfully committed to the fundamental values of the Rome Statute and the ideals of the ICC". The statement also shows a will from Nigeria to help with the criticisms targeting the Court, "Nigeria is prepared to also continue to work in concert with Member States to adress the concerns that have been raised against the Court"[100] thus showing a great faith in the Court and a will to move forward towards a better relationship between the ICC and Africa.

A similar statement from the Permanent Mission of the Republic of Senegal to the UN, from 31 October 2016, revealed the unaltered support of Senegal to the Court and called for mass support, "Senegal invites all States, to give all necessary assistance and cooperation to the Court so it can continue to exercise its mandate optimally"[101]. The statement also points out the criticisms facing the Court and calls to put them aside to focus on justice and the reparations of victims of atrocities, thus putting the responsability towards victims before the disapointment felt by some countries. In the statement, Senegal also expressed the need to remain and to expend the number of State Parties in order to insure efficient justice all over the world, "i hope to see all State Parties remain active members of the Statute, and that others join. Once more, universal ratification of the Rome Statute and the integration of these norms in the national laws of States need to be a reality if we wish for all victims in the world, wherever they may be, an equal and fair chance to obtain justice"[102], universality of the Court is indeed crucial both to its legitimacy and its efficacity.

98. Personal translation from french.
99. F. Mulongo, "La Côte d'ivoire n'envisage pas de quitter le CPI répond Alasane Ouattara à Réveil FM", *Médiapart*, 1 November 2016, https://blogs.mediapart.fr/freddy-mulongo/blog/011116/la-cote-divoire-nenvisage-pas-de-quitter-le-cpi-repond-alasane-ouattara-reveil-fm

100. Dr. Tiwatope Ade Elias-Fatile, "Statement on the Report on the International Criminal Court", *Permanent Mission of Nigeria to the United Nations*, 30 October 2016, https://papersmart.unmeetings.org/media2/7663460/nigeria.pdf
101. Personal translation from French.
102. Personal translation from French, "Presentation of the report of the Presidence of the International Criminal Court to the General Assembly of the United Nations", *Declaration of the Senegalese Delegation*, 31 October 2016, https://papersmart.unmeetings.org/media2/7663458/senegal-f-.pdf

Sierra Leone also reaffirmed its commitment to the ICC on the 28 October 2016, in a Unique News interview with the Government Spokesperson, Ajibu Tejan Jalloh who declared "we will not leave the ICC because we are committed to peace and justice in our country" and adds, "we are respectful to international treaties and the ICC is good to stay on"[103].

On the same day, Malawi expressed its will to remain through its Minister of Foreign Affairs and International Cooperation, Francis Kasaila who declared that Malawi had not made a decision to leave the ICC and it will not be pressured to do so by its neighbours[104].

A statement from Tanzania to the UN General Assembly on 28 October 2016 also praised the Court, declaring that it "became an inspiration against impunity and justice", and while acknowledging the "tumultuous relationship with Africa", the statement declared that massive withdrawal from African countries "need not to be the case". While reitering its support to the Court, Tanzania also affirmed itself as an advocate for compromise, calling for better cooperation as well as expressing concerns for some criticisms. Indeed, Tanzania called for "confidence building measures" to strengthens trust in the ICC and ensure its credibility. Additionally, the statement reminded the status of the Court as a complementary institution and that the efficiency of national justice is primordial, "the primary task of the Court must also be to encourage and enable Member States to perform their own programmes of justice and accountability". But the most interesting part of the statement might be the criticisms targeting the power of the UN Security Council over the Court and the potential abuses it allows, this concerns the most agressive criticism towards the ICC that are hard to argue with and Tanzania warns the UN against it, admitting the benefit for accountability, the statement accuses that "it remains a matter of great concern to us that some permanent members can use their position in the Security Council while are themselves not parties to the Court's Statute. The political nature of the Security Council can also undercut the legitimacy of the process"[105]. Hence, Tanzania, despite strongly supporting the ICC, doesn't hesitate to relate the most controversial issues concerning the Court and the loss of credibility attached to them.

Zambia also affirmed its will to remain in the Court, adressing Zambia's Parliament on 28 October 2016, Vice President Inonge Wina declared that the status of Zambia's membership

103. B. Bangura, "Is Sierra Leone Set To Quit International Criminal Court? READ What Government Spokesman Has To Say", *Sierra Loaded,* 29 October 2016, http://www.sierraloaded.com/sierra-leone-will-not-quit-icc-government-spokesman/

104. J. Chauluka, "Malawi sticks to International Criminal Court", *The Times Group*, 28 October 2016, http://www.times.mw/malawi-sticks-to-international-criminal-court/

105. Mr. Tuvako N. Manongi, Permanent Representative of the United Republic of Tanzania to the UN, "Remarks on the Report of the International Criminal Court", *UN General Assembly*, 31 October 2016, https://papersmart.unmeetings.org/media2/7663471/tanzania.pdf

to the ICC has not changed[106].

Also responding to South Africa's announcement of withdrawal, Botswana released a statement supporting the Court on the 25th of October 2016, and declaring "ICC is an important and unique institution in the international criminal justice system. Botswana therefore wishes to reaffirm its membership of the Rome Statute and reiterate its support for a strong international criminal justice system through the ICC". Botswana also called in the statement for States remain and work for better cooperation, while distancing itself from the deserters, "The Government of Botswana does not, therefore, associate itself with calls for States Parties to withdraw from the Rome Statute. Botswana believes that such a move betrays the rights of the victims of atrocious crimes to justice and also undermines the progress made to date in the global efforts to fight impunity.", denouncing the great loss for victims a withdrawal could cause.[107]

More expressed their support and affirmed their decision to remain, such as the Democratic Republic of Congo, Tunisia, Ghana, Mali, Burkina Faso, Lesotho and Uganda, often making the argument that it is better to try to change the Court from inside with reforms than withdrawing from it, while only Namibia expressly stated that withdrawal was still an option[108].

At the AU Summit in January, support for the ICC was also heard, while Burundi and South Africa jusitfied through criticisms their decision to withdraw, the Nigerian Foreign Minister Geoffrey Onyeama defended the Court, in a statement pronounced at Abuja, for its "important role to play in holding leaders accountable"[109]. Onyeama also recounted the various countries who opposed the Withdrawing Strategy, declaring "Nigeria is not the only voice agitating against it, in fact Senegal is very strongly speaking against it, Cape Verde and other countries are also against it" and continued by detailing the negociations on the issue at the Summit "after, Senegal took the floor, Nigeria took the floor, Cape Verde and some other countries made it clear that they were not going to subscribe to that decision". According to him, Zambia, Liberia, Botswana, Tanzania and others reitared there October's statements that they will not leave, and he concluded by advocating against collective

106. "Zambia is still a member of the ICC", *Lusakatimes.com*, 28 October 2016, https://www.lusakatimes.com/2016/10/28/zambia-still-member-icc/
107. "STATEMENT ON THE WITHDRAWAL OF SOUTH AFRICA FROM THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT", 25 October 2016, http://botswana-brussels.com/wp-content/uploads/2017/03/Press-Release-Statement-on-the-Withdrawal-of-South-Africa-from-the-Rom....pdf
108. E. Keppler, "African Members Reaffirm Support at International Criminal Court Meeting", *Human Rights Watch*, 17 November 2016, https://www.hrw.org/news/2016/11/17/african-members-reaffirm-support-international-criminal-court-meeting
109. E. Keppler, "AU's 'ICC Withdrawal Strategy' Less than Meets the Eye", *Human Rights Watch*, 1 Ferbruary 2017, https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye

withdrawal, "each country, if they want to withdraw, has the right to do that individually"[110]. Although some countries eager to remain might be indifferent to the Strategy adopted at the AU Summit, Nigeria's position is clearly that each Member State must decided sovereignly on the issue and that if withdrawal occurs, it shouldn't be collectively.

After, the negociation, only two countries voted against the strategy, namely Nigeria and Senegal.

Besides governments, African organizations spoke against withdrawals, including the African Group for Justice and Accountability, composed of former national and regional judges, lawyers, and former politicians from Africa advocating for a better relationship with the ICC and warning against withdrawal, called states seduced by the idea of leaving the Court to "reconsider and recommit themselves to the Rome Statute"[111]. Additionaly, t**he Elders**, an independent group of global leaders fighting for peace and human rights, including amongst others by Kofi Annan, the former UN Secretary General and important actor in the establishment of the ICC, spoke against withdrawal advising the potential deserters "to change course and instead fight for much-needed reform from within, as members"[112].

With 34 African countries parties to the Rome Statute, almost half of them, 15 exactly, publicly announced their will to remain, the Court thus still benefits from wide-spread support across the continent despite the panic born from the adoption of the AU Withdrawal Strategy, strategy that will now be duly analyzed.

II.2. Political statement or actual separation? What the resolution really contains.

Adopted at the 28th African Union Summit in January 2017, the Withdrawal Strategy has raised fears of massive African withdrawal from the ICC and details of the Strategy has to be examined. A second draft of the Withdrawal Strategy document, dating from 12 January 2017, details the content of the adopted strategy. In the document, the AU first recounts criticisms of ICC bias against Africa, specifically that "the predominance of African subjects of international criminal justice has created suspicion about prosecutorial justice", as well as denuncing "patterns of only pursuing African cases being reflective of selectivity and inequality", and recognizes these factors as "progressively worsening relationships between

110. M. Mommoh, "Africa: Nigeria opposes mass ICC withdrawal", *allAfrica*, 27 January 2017, http://allafrica.com/stories/201701270605.html

111. S. Rayzl Lansky, "Africans Speak Out Against ICC Withdrawal", 2 November 2016, https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal

112. S. Rayzl Lansky, "Africans Speak Out Against ICC Withdrawal", 2 November 2016, https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal

the ICC and the AU"[113]. The AU thus recognizes the historical exclusivity of african cases as being one of the main causes of of tensions with the Court and motivation of withdrawals.

The document also acknowledges the controversiality of the relationship between the Court and the UN Security Council and the loss of credibility of the ICC it brings, accusing that "the decisions of the United Nations Security Council are made on the basis of the interests of its Permanent Members rather than the legal and justice requirements", and thus agrees with the recurrent and hardly disputable criticism targeting the Court's lack of independence, stating that "questions about which states are under the ICC's jurisdiction and the processes of selectivity of a case as well as the role of the UNSC and its referral and deferral mechanism under article 16 of the Rome Statute raise questions about perceived fairness of the international justice system as a whole"[114]. The AU thus rejects the idea that a few powerful countries exempt from international justice could direct the ICC's scrutiny, also towards countries similarly disconnected from the Court, arguing that "the effect of being legally bounded by a decision of UNSC to a Statute that a country have not even ratified is not acceptable"[115], the double standard allowed by articles 13(2) and 16 of the Rome Statute is clearly a strong concern for African states, as it should be for most countries.

However, the document doesn't give a framework for collective withdrawal, although it supports it, but rather discusses and analyses the procedural ways for individual withdrawal as provisionned in the Rome Statute, under articles 127 and 121. The latter is recognized to be unlikely to occur as it concerns withdrawal in case of a newly adopted amendment not accepted by the State Party[116]. Hence it is the first one that is considered here, withdrawal through notification to the UN Secretary General, with one year delay before taking effect[117] and without halting ongoing cooperations and procedures at the ICC[118], meaning Burundi will still be under preliminary examination. The intent of the Rome Statute is obviously to avoid what Burundi is apparently seeking to achieve, withdrawing in reaction to scrutiny from the Court to avoid potential prosecution, the African Union seems to respect this provision[119].

The document also acknowledges and welcomes the anouncements of withdrawal by Burundi, Gambia and South Africa and their reasons, analysed in the previous part of this

113. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.1. §2, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf
114. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.1. §3, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf
115. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.1. §3, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf
116. Rome Statute. Art. 121. 6.
117. Rome Statute. Art. 127. 1.
118. Rome Statute. Art. 127. 2.
119. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.3-6, §10-18, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf

chapter, but also notes the support pledged to the Court by numerous African states in response to this phenomenon[120]. The African Union thus reports the polarisation of opinions on the issue and recognises the absence of uniformality in Africa's perception of the ICC.

One of the issue regularly coming up in the document is the situation surrounding Omar Al-Bashir and the warrants of arrest targeting him. Indeed, the Sudanese President is cited 8 times in the document and the African Union puts a lot of emphasis on the controversiality of the Darfur referral by the Security Council and the need for immunity for sitting Heads of States.

But the most relevant aspect of this document is the recommendations for AU's Member States from the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court which was established in 2015 to develop strategies relating to the ICC[121]. The Committee played a major role in the draft of the strategy as "the Assembly called on the Open ended Ministerial Committee to develop a withdrawal strategy to be considered by member states [...], as a sovereign exercise"[122], these last two words also emphasize the individual character of the withdrawal decision, it is not a collective move, each state is set to decide whether or not to implement the recommendations. Those recommendations mainly concerns the strengthening of both national and regional justice systems to allow efficient international criminal justice without the need of the ICC, negociating with the UNSC to prohibit it from referring African cases without consent from the Assembly of the AU, promote the ratification of the Malabo Protocol to include international crimes in the jurisdiction of the future African Court of Justice and Human and People's Rights, adopting conditions and a timeline for ICC withdrawal[123]. The recommendations of the AU are thus clear, pushing for ICC and UNSC reforms to avoid the double standard allowed, and if unsuccesful, reform national and regional systems to be able to withdraw while still providing fair and adequate international justice and also replacing the ICC in Africa by the African Court by expending its jurisdiction. While the AU doesn't specifically push for withdrawal, it promotes reforming the ICC and the UNSC and provides a way to ensure accountability for international crimes on the continent, basically drafting a back up plan for international justice in Africa in case of further deterioration of its relationship with the Court that could potentially lead to a massive withdrawal.

120. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.6-7, §19-26, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf
121. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.2, §5, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf
122. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.2, §8, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf
123. African Union, "Withdrawal Strategy Document, Draft 2", Version 12.01.2017, p.7-8, §27, https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf

Today, the situation surrounding the ICC and Africa is not as dire as it seemed at the end of 2016, with Gambia reversing its decision and South Africa facing set backs, Burundi is the only country whose withdrawal seems inevitable, giving hope for the future of the Court. Additionally, despite the wide-spread panics it generated, the adopted Withdrawal Strategy is not as dangerous as the name implies. Indeed, no legally-binding provision pushes for collective withdrawal, the strategy only explains and details the provional ways for individual withdrawal as set in the Rome Statute. Furthermore, in the light of the pledged support expressed by many african countries since October 2016, the probability of an "African Exodus"[124] seems rather low. The only concerns should be the message sent by the African Union in supporting withdrawals which could give a green light to undecided countries and facilitate future withdrawals if their calls for ICC reforms remains unanswered. Mainly, the future of international criminal justice on the continent, particularly in the countries set to withdraw, is the biggest concern and has to be examined.

124. P. Wintour, "African exodus from ICC must be stopped, says Kofi Annan", *The Guardian*, 18 November 2016, https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan

Chapter 3: A post ICC Africa, the challenges of accountability and victim reparation.

Introduction:

This chapter will focus on the future for international criminal justice in Africa, in the unlikely event of massive withdrawal, but mostly for the countries actually on the brink of withdrawing from the ICC and those who refuse to join the Court. One of the major benefits of ICC prosecutions are ensuring accountability for the perpetrators, even if it means prosecuting sitting Heads of States, and meeting the needs of the victims of crimes, both this areas will probably be lacking in the absence of the Court. Indeed, African countries often suffer from the perceptions of economic disarray and wide-spread corruption, thus undermining the efficiency of national courts and the impartiality and independence of proceedings. Alternatives to ensure accountability and victim consideration will be crucial to a post-ICC Africa and need to be examined. To this end, the first part will focus on restorative justice through alternative justice mechanims (I). The second part will examine the Malabo Protocol and the benefits and down-sides of the establishment of the African Court for Justice and Human Rights to replace the ICC in ensuring accountability (II).

I. Traditional justice: a blue-print for healing justice at the national level.

Restorative justice can be defined as "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have inflicted the harm must be central to the process"[125]. Classical systems usually focus on retributive justice which emphasizes the law violated and how to punish the perpetrator, which is important to deter future crimes but is often seen insufficient when it comes to the most heinous crimes, like the ones targeted by the ICC, as it puts aside the needs of the victims and their future, prioritizing revenge over recovery. Thus, restorative justice is highly important in the cases of international crimes such as genocides, war crimes and crimes against humanity as it focuses on truth and the needs of the victims, usually with the goal to promote reconciliation and help victims recover from the atrocities they experienced. The ICC, while mostly focusing on punishment and deterrence of future crimes, also affirms itself as a defender of victims and its actions in

125. J. Braithwaite, "Restorative Justice and De-Professionalization", *The Good Society*, 2004, pp. 28–31

the area need to be analysed to understand the void created by withdrawals from the Rome Statute (1). A study of the potential benefits of traditional justice in some african countries will be at the core of the second part to determine if such alternative justice mechanisms can meet victims needs in the absence of the ICC (2).

I.1. The high victim's involvement at the ICC.

The ICC affirms itself as a Court of both retributive and restorative justice, as expressed by former ICC's President, Sang-Hyun Song, in 2012, the"ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes."[126] Indeed, the Rome Statute clearly stipulates, "where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered"[127]. This article translates itself in the exercise of the Court's mandate as a possibility for victim's participation, with victims using a lawyer to send communications to the Office of the Prosecutor and thus share their truth. Additionally, the victims can be informed of the progress of the case and their lawyers are allowed to attend hearings, which is crucial considering the length of ICC's proceedings that could easily lead to victims waiting years in the dark, ignoring if progresses are made in the prosecution of the perpetrators. But the victim participation doesn't only allows victims to witness the proceedings as the victim's lawyer can also be allowed to question witnesses. This is incredibly helpful as it both allows victims to seek the truth about their particular experience and helps the prosecution to get another perspective on the crimes, one that might have not been reported by the investigations.

The Office of Public Counsel for the Victims was also created within the ICC, this independent office is meant to both freely represent victims for their participation and provide assistance to the victims lawyers if they have one, money is thus not an issue regarding victims participation, all victims concerned by a case will be able to participate if they want to.

The ICC also allows victim's reparation to help them move forward from their horrible experiences and recover if physical or psychological harm has been endured. As set in the Rome Statute, "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its

126. M. Laxaminarayan, "The International Criminal Court and Victim Well-being: A Restorative Approach?", *The Hague Institute for Global Justice*, 17 March 2017, http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/commentary/the-international-criminal-court-and-victim-well-being-a-restorative-approach/

127. Rome Statute. Art. 68. 3.

decision the Court may, [...], determine the scope and extent of any damage, loss and injury"[128]. Thus the Court is allowed to pair the condemnation of an accused with compensation for victims, "the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation"[129]. The ICC thus disposes of a wide range of ways for victims reparation, restitution indeed concerns the return of stolen goods for example, compensation a sum of money and rehabilitation can be both physical or psychological to recover from the various forms of sufferings endured.

For the purpose of victim reparation, the ICC instaured a Trust Fund for Victims to gather the money, from the fines of convicted perpetrators of crimes for example, "A Trust Fund shall be established by decision of the Assembly of State Parties for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims"[130]. This Trust Fund for victims has allowed the ICC to alter, to some extent, the loss suffered from conflict and human rights abuses in some countries. 34 projects were approved in 2008 regarding the situtation in northern Uganda and the Democratic Republic of Congo which suffered from the atrocities of conflict. According to the Trust Fund for Victims, support to over 110 000 victims as been provided since 2008, with programmes of physical and psychological rehabilitation and also material support, rebuilding of infrastructure and compensation, for both individuals and communities who sufferred from the crimes committed. Over 5 000 victims of sexual and gender-based violence also received help form the Trust Fund for Victims, including girls abducted and sexually enslaved by armed groups[131].

The ICC is nonetheless majoritarily focused on retributive justice as the arrest and imprisonment of the perpetrators are the main goal, but even as a subsidiary goal, the participation and reparation of victims is of great benefits in Africa for the post-conflict years and the withdrawal from the Court will leave a void as victims are disregarded in most national justice system, financial support being lacking at the government level the responsability to help victims often falls on the lap of NGOs.

Fortunately, some alternative justice mechanisms could be use to fill that void and ensure that the needs of victims in the future are met on the African continent.

I. 2. Emphasizing victim's needs through alternative justice mechanisms.

Alternative justice mechanisms usually focus on restorative justice, emphasizing truth, the

128. Rome Statute. Art. 75. 1.
129. Rome Statute. Art. 75. 2.
130. Rome Statute. Art. 79. 1.
131. http://www.trustfundforvictims.org/programmes

needs of victims and reconciliation, the main goal is to help the society move forward from the atrocities of conflict and avoid their recurrence, adressing the roots of the problem and the recovery of victims to deter tensions. To this end, some African countries have resolved to use them with often great benefits for the society and advancements for justice.

After the 1994 Rwandan genocide, the pursuit of justice was met by tremendous obstacles as 130 000 alleged perpetrators of the genocide were incarcerated in Rwandan prisons by the year 2000, the government estimated that 200 years will be needed to prosecute all of them which would highly endanger the economy with such a large number of the population stuck in prison[132]. The Rwandan governemnent thus decided to prosecute the alleged perpetrators by adapting the Gacacas, a form of community justice that tranlates by ""justice amongst the grass", historically used in villages to solve local or family disputes. Thus, approximately 12 000 Gacaca courts were established across the country to try the accused, the prisoners who confessed to their crimes were released and sent back to their home communities to confront their victims and be judged by elected local judges, thus guaranteeing proximity and a form of specific knowledge and empathy that only neighbours can provide. The final goals of this massive enterprise were to shed light on the truth of the genocide, speed up the legal proceedings, end impunity and reconciliate communities to avoid another similar event in the future.

The Gacacas led to some success in the country, although they were reports of victims being threaten after speaking against suspects, many victims praised the initiatives as they accessed closure, often by learning from the perpetrators where they loved ones were burried, learn the truth about disapearances, confessions and remorse expressed by perpetrators also helped with forgiveness and thus moving forward to reconciliation, more than 1.2 million cases were tried in a record time with at least some psychological benefits to the Rwandan society[133].

However, criticisms were raised against this practice, mostly on the issue of fair trial as the defendants didn't have access to lawyers, and on the legitimacy of the accusations, as approximately a fifth of the accused were acquitted, thus implying some false accusations occurred[134]. Reports of false testimonies, bias inside the communities, and fear from witnesses to speak in favor of defendants also undermined the credibility and impartiality of the Gacacas[135]. Daniel Bekele, African Director at Human Rights Watch also denounced

132. "Les tribunaux gacaca, une jusice populaire pour punir, mais aussi pardonner", *France 24*, 22 January 2010, http://observers.france24.com/fr/20100122-tribunaux-gacaca-justice-populaire-punir-pardonner-rwanda-kigali
133. "Background Information on the Justice and Reconciliation Process in Rwanda", *The United Nations,* https://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml
134. J. Vasagar, "Grassroots Justice", *The Guardian,* 17 March 2005, https://www.theguardian.com/world/2005/mar/17/worlddispatch.rwanda
135. "Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts", *Human Rights Watch Report*,

some failures of the Gacacas, declaring "The courts have helped Rwandans better understand what happened in 1994, but in many cases flawed trials have led to miscarriages of justice"[136]. Despite the mixed success, the Gacacas have done an incredible job for truth seeking and reconciliation, and the high emphasis put on victims participation could be an example for justice in the future, the process can be ameliored but the core idea of putting victims, truth and reconciliation first could be used in future prosecutions of similarly atrocious crimes on the African continent.

Other similar traditional justice system in Africa could also be helpful for the future of restorative justice on the continent, such as Sierra Leone and Mozambique, or the mato oput in Uganda, or even the bashingantahe in Burundi, as its withdrawal from the ICC is inevitable the adaption of traditional justice could be a good idea. The Truth and Reconciliation Commission instaured in 1995 in South Africa after the end of the apartheid is also a good example for rehabilitaion and victim reparation.

However, those alternative justice mechanisms usually lack the benefits of retributive justice systems, punishment and deterrence against the commission of future crimes is highly important for the international crimes investigated by the ICC, and while the Gacacas and similar systems can help meet the needs of victims and uncover the truth, a supranational court might be needed, specifically when the government is involved and impunity is easily foreseeable. Hence where the establishment of an African court specializing in international crimes comes into play.

II. The Malabo Protocol: a promise of a regional African war crimes court.

On the 24th of July 2014, the African Union member states adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, commonly named Malabo Protocol, after the Equitorial Guinea's capital where it was adopted, and set, after entry into force, to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into the African Court of Justice and Human Rights and grant it jurisdiction to prosecute international crimes. This ambitious initiative could very well help the African Union replace the ICC by a regional court and give an optimistic future for justice and accountability on the continent, even in the event of ICC withdrawal. This part will thus focus on the capacity of the future African

May 2011, https://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf

136. "Rwanda: Mixed Legacy for Community-Based Genocide Courts", *Human Rights Watch*, 31 May 2011, https://www.hrw.org/news/2011/05/31/rwanda-mixed-legacy-community-based-genocide-courts

Court to replace the ICC in prosecuting international crimes (1) before examining the more controversial aspects of the Protocol (2).

II.1. A Court of extended jurisdiction, the large competences and its benefits.

The future Court to be established possesses similar qualities to the ICC and could easily replace it, even adding some promising provisions. For example, the judges at the African Court will be of a similar number to the ones of the ICC, 16 judges for the future ACJHR[137] against 18 for the ICC, also both are elected for a unique and non-renewable term of nine years[138] in order to ensure independence and prevent judges to be bias to seek reelection. A highly promising measure concerning the election of judges is that they have to be chosen from different legal background, namely international law[139], international human rights and humantitarian law[140], and international criminal law[141], thus securing a diversity of legal expertise in the judges to implement decisions based on a wide range of legal considerations relevant to international crimes.

The Protocol also establishes an Office of the Prosecutor fairly similar to the one from the ICC, despite the Prosecutor being elected for a non-renewable term of only 7 years[142], against 9 years for the ICC Prosecutor. Indeed, an emphasis on indepence and separation from the Court is put in the Malabo Protocol[143] to avoid collusion and member states' pressures. Much like the ICC's Prosecutor, the ACJHR's Prosecutor has the power to open an investigation on its own initiative[144], but the controversial ICC provisions allowing UNSC's referrals and deferrals has fortunately not inspired the African Union.

Another ambitious part of the future African Court, is the establishment of a Defense Office aimed at "ensuring rights of suspects and accused and any other person entitled to legal assistance"[145]. Also independent from the other organs of the Court to ensure unbias assistance to defendants and their lawyers, the Defense Office could provide public

137. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 4.3.
138. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 5.1.
139. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 4.1.i.
140. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 4.1.ii.
141. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 4.1.iii.
142. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 22A.3.
143. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 22A.6.
144. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 46G.
145. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 22C.1.

defenders to the suspects or advices to their lawyers[146], thus respecting the rights of fair trials and of the accused.

One of the most couragous initiatives of the Protocol is giving jurisdiction for 14 crimes for the new international criminal section of the Court[147] and the possibility in the future to add new crimes under the Court's jurisdiction, with the goal to "reflect developments of international law"[148] as new heinous types of crimes could arise in the future.

In an optic of potential replacement of the ICC, the three crimes under the ICC's jurisdiction are defined in the Malobo Protocol and will be investigated by the future African Court, namely genocides[149], crimes against humanity[150] and war crimes[151]. The crime of agression, still currently debated at the ICC, will also be targeted by the furure court[152]. The Protocol also gives jurisdiction over crimes that Africa is regularly looked down upon for, such as the crime of corruption[153] and money laundering[154], piracy[155] and mercenarism[156], trafficking in persons[157] and drugs[158], and the crime of unconstitutional change of government[159]. The latter could be very helpful in the near future, indeed it could help the future Court prosecute the contested President of Burundi, Pierre Nkurunziza, as the country's withdrawal from the ICC seems inevitable and the AU denounced the unconstitutionnality of his reelection[160]. Additionally, the future ACJHR will have jurisdiction over crimes of terrorism[161] as well as two very ambitious environment related

146. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 22C.2.
147. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28A.1.
148. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28A.2.
149. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28B.
150. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28C.
151. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28D.
152. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28M.
153.Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28I.
154.Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28I Bis.
155. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28F.
156. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28H.
157. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28J.
158. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28K.
159. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28E.
160. "Burundi protests continue despite Pierre Nkuru nziza pledge", *BBC*, 7 May 2015, http://www.bbc.com/news/world-africa-32626807

161. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art.

crimes, trafficking in hazardous wates[162] and illicit exploitation of natural resources[163]. Finally, the Malabo Protocol also stipulates the possibility of compensation and reparations to victims, inspired almost exactly from the Rome Statute and could potentially ensure the same help for victims that the ICC provides[164].

The creation of such a court could easily replace the ICC in its mandate and ensure accountability and justice in Africa for the countries withdrawing from it, unfortunately the establishment of the Court doesn't seem to be foreseeable in the near future. Indeed, 15 ratifications by AU member states are necessary for the Protocol to enter into force[165], while only 9 have signed it to this day and none have ratified it. Nevertheless, the crystallization of tensions between the AU and the ICC, paired with the adoption of the Withdrawal Strategy, could very likely push more countries to withdrawal and promote the necessity of ratification of the Malabo Protocol as a crucial way to avoid impunity on the continent. However, some provisions within the Protocol raise controversy for the future African Court and its credibility.

II.2. Limited access and immunity, the controversy of the Protocol.

Despite the incredible promises for justice and accountability in the Malabo Protocol and its potential as an ICC replacement, the Protocol might need some amendments to ensure the above. Indeed, Human Rights organisations have denounced some controversial issues within the Protocol.

First, a limited access to the Court by individuals and NGOs has been heavily criticized[166]. Indeed, while African individuals and NGOs could directly access the Court, such a referral is restricted exclussively to "a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly"[167], thus it is up to each country to decides if individuals and NGOs could directly request the Court's scrutiny and so greatly limits potential prosecutions.

Additionally, criticisms have been raised on the broadness of the definitions of some crimes,

28G.

162. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28L.

163. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28A.1.

164. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 45.

165. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 11.1.

166. "AFRICA: MALABO PROTOCOL: LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED AND EXPANDED AFRICAN COURT", *Amnesty International*, 22 January 2016, https://www.amnesty.org/fr/documents/afr01/3063/2016/en/

167. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 30 (f).

namely terrorism and the crime of unconstitutional change of government, which could allow abuses and the criminalization of some forms of protests[168]. Indeed, their definition seems broad enough to emcompass some protest, and while the definition of terrorism makes an exception for "the struggle waged by people [...] for their liberation or self-determination, including armed struggle against colonialism, occupation, agression and domination by foreign forces"[169], it doesn't mention stuggles or uprisings against abusive government violating human rights.

But the most controversial provision of the Protocol concerns the existence of a clause of immunity, "no charges shall be commenced or continued before the Court against any serving AU Head of State, or anybody acting or entitled to act in such capacity, or other senior officials based on their functions, during their tenure of office"[170]. The existence of such a clause is not surprising considering the African Union's foundness for Head of State's immunity and its outspoken support for sitting Sudanese President Omar Al-Bashir, targeted by warrants of arrest from the ICC, but it raises doubts on accountability in the future African Court. While immunity can be understanble against the prosecution from foreign States, immunity from international justice is highly problematic for an institution supposed to ensure accountability for the most atrocious crimes, and this clause incredibly undermines the credibility of the ACJHR. Having competence to prosecute and arrest sitting Heads of State violating international criminal law is one of the most powerful provisions of the Rome Statute and really supports the legitimacy of the ICC as a slayer of impunity, denying the African Court such power would be a serious blow to both its universality and impartiality, in case of conflict between non-governmental and governmental forces the rebels will have a legal disadvantage as the leaders of the government would be untouchable.

Nonetheless, the Malobo Protocol should definetely be ratified by AU member states that intend to leave the ICC as well as those who are not under its jurisdiction as the entry into force of this Protocol will alow tremendous progress in international justice on the continent and ensure some level of accountability and deterrence in the absence of the ICC. However the provisions of the Protocol mentionned above should be amended to avoid abuses, facilitate the Court's access by the civil society, and mostly to secure the highest level of accountability possible.

168. "AFRICA: MALABO PROTOCOL: LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED AND EXPANDED AFRICAN COURT", *Amnesty International*, 22 January 2016, https://www.amnesty.org/fr/documents/afr01/3063/2016/en/

169. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 28G. C.

170. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Art. 46A Bis.

General Conclusion:

In the light of this research, it appears that the criticisms targeting the ICC benefit from different levels of credibility. Indeed, the accusations of the Court harassing African countries are historically well-founded, as the ICC's case-law is rooted in an uncomparable majority of African situations. Nevertheless, this particular accusation is undermined by the majority of African self-referrals, the support expressed in other investigations, and the recent tendency to target non-African countries which, despite potentially being a mere shield against criticisms of bias, shows the capacity of the Court to target the most influencial countries.

However, criticisms targeting the close relationship between the Court and the UN Security Council are highly valuable and the possibility for the UNSC to both refer and defer cases to the Prosecutor greatly undermines the Court's legitimacy as an independent and universal defender of international justice. This relationship should be rethought to avoid double standards in international criminal prosecutions. Removing non-State-Parties UNSC's members from this process or giving this prerogative to a UN council exclusively composed of State Parties to the Rome Statute could halt this issue and keep States not recognizing the Court's jurisdiction from influencing its work.

Additionally, the recent events following the anouncements of withdrawal bring hope for the future of the ICC, out of the three African countries that expressed their intent to withdraw last year, only Burundi's withdrawal seems inevitable. The expressions of support from many African States to the Court also adds to its hopeful future, as the African Union Withdrawal Strategy is merely a framework for withdrawal upon sovereign individual decisions by member states, the risk of a massive “African Exodus” seems rather low.

Finally, even in the absence of the ICC, the future for international criminal justice in Africa is rather bright, existing alternative justice mechanisms in some countries could ensure satisfaction for victims of the atrocities of conflicts. Furthermore, if the ACJHR is finally established, accountability could be secured in the continent, pending revision of some aspects of the Malabo Protocol, particularly the removal of the immunity clause which cannot exist wihtout undermining the future Court's credibility as a protector against impunity and human rights abuses on the African continent.

Leaving the ICC is certainly not the adequate response to the Court's political problems, as it would be best to remain and push for reforms from within using constructive dialogue, but those who wish to withdraw should turn to the African Union to fill the void, and also strengthen the efficacity and independence of their national justice systems to prove to the world their will to fight

for justice and accountability on their territory. The 15 years of marriage between the ICC and Africa is jeopardized by a cruel lack of mutual trust, seeking council to adress issues and strengthen the union is the best option, but if divorce should occur the needs of the children has to be the priority for the future, i.e. ensuring strong deterrence against crimes to protect the African population and establishing adequate measures for potential future victims.

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