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Africa and ICC: an Alliance or a Collision?

Tamrentat Nassima
University of Algiers
dalinassima3@gmail.com

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Abstract:

This article aims to open up the debate about the relationship between Africa and ICC, which was established after intense efforts by the international community (Court of last resort), it contributes to the fight against impunity and ensuring that the most severe crimes do not go unpunished in accordance with the text of Article 04 of the Rome Statute, and to implement the individual criminal responsibility, but after more than ten years have passed, the Court's interest and focus on the situation in Africa appears to be something that has been strongly criticized by many African politicians, leaders, and even by academic researchers.

Key words: ICC, Africa, African Union, Immunity.

Introduction:

The ICC was established on 17 July 1998 by the Rome Statute in (Italy), it became operational after 60 countries ratified the Court's Statute on 1 July 2002[1]. African countries were involved in the negotiations of the treaty that created the ICC and today constitute the largest single block to ratify the Rome Statute[2] (Brendon, 2016, pp 6-7). state parties and UN SC and the Prosecutor can refer certain situations to the ICC according to the article 13 of the Rome Statute, in this regard the office of the Prosecutor has launched 13 official investigations, and with the exception of Georgia, Afghanistan, Myanmar, Palestine, Colombia, Ukraine all other investigations are in

Africa, in addition to that there are currently 27 cases indicted by the ICC have been against African leaders and heads of state.

The relationship between African states and ICC has been the focus of much attention in recent times, especially concerning the debate over the ICC's lopsided interest in the continent, prompting even the Washington Post to ask if the ICC was (Targeting black men?)[3] (Aidi, 2019, p 2), therefore and to address this complicated legal and political topic, we had to present the following problematic:

Is the ICC Really Targeting Africa?

We based on the analytical approach in this research paper, through the following two sections:

SECTION I: Is the ICC for Africa?

Section II: Deterioration the Relationship Between the African States and the ICC.

SECTION I: Is the ICC for Africa?

This section has been divided into two main issues to be addressed, we deal in the first part with the African States ratification of the Rome Statute as an initial support, while we deal in the second part with those States referral of their situations to the ICC.

First Requirement: Most African Countries Ratified the Rome Statute as a Precursor of Goodwill

The ICC is an organization that states willingly joined by ratifying the Rome Statute, as Senegalese scholar **Oumar Ba** has noted, African states were heavily present at the 1998 conference at the Italian capital where the statute was drafted[4] (Aidi, 2019, p 2) , while 34 African states[5] (Martini, 2021, p 2) (of the 123 states who signed)[6] (Aidi, 2019, p 3) initially decided to join the Rome Statute and considered the ICC as (a solution for their continent's injustices), the African acceptance of the ICC's jurisdiction has become controversial in the years thereafter[7] (Martini, 2021, p 2), those states played a pivotal role in bringing the ICC into being. The first country in the world to ratify the Rome Statute, which is the founding and governing document of the Court, was Senegal, an African state, in 1999. The DRC was the 60th state to ratify the Statute, in 2002, thereby allowing it to enter into force[8] (Souris, 2020, p 257).

Furthermore at the time of its founding, African countries generally supported the ICC, many viewing it as a potential venue they could utilize in solving many of the continent's intractable conflicts[9] (Brendon, 2016, p 7), and after it came into force in 2002, Botswana became the most prominent ICC supporter, with Zambia also providing significant support, South Africa and Kenya were also prominent entrepreneurs[10] (Mills, 2017, p 109). As a result, the creation of the ICC has benefited from the support of African states, and at the donor conference, Kenya pledged US$1 million towards the establishment of this Court, President **Kenyatta** urged AU states to ratify the Protocol so that (the resulting court is fully owned, financed and driven by Africa)[11] (Omorogbe, 2019, p 295).

Paragraph 1: Obstacles to the Ratification of the Rome Statute by the African Countries

1.a Constitutional Immunity

All African constitutions recognize the immunity of the head of state, as African Presidents and leaders have wide influence within their countries in view of the powers that they possess, which is reflected in the texts of the national constitutions of their states, they had a distinguished position since the periods following the independence of their countries, therefore the heads of state and leaders of the African state, (regardless of the nature of the regime in their countries), have wide powers, as required by the texts of many national constitutions, enjoying the majority of the texts of the constitutions with diplomatic immunity, (as stipulated in Article 57 of the Constitution of Ghana, 50 of the Constitution of Lesotho, 91 of the Constitution of Malawi, 308 of the Constitution of Nigeria[12]) (تريكي، 2017، ص 169-173).

1.b The Principle of "Non-Extradition" of Citizens

Article 89 of the Rome Statute stipulates that the court can direct a request for cooperation in the way of arrest and submission to a state party for which the accused person is present on its territory, so it is an obligation of the state parties to comply with all arrest requests and submissions issued by the ICC, even if they relate to those States

citizens, in Contradicting of the recognized principle of (non-extradition) of the state to its citizens because it is related to national sovereignty, some African constitutions also provide for it, for example, article 67 of the Constitution of Mozambique, which affirms the inability to extradite or expel of any Mozambican citizen, Article 25, paragraphs 2 and 3 of the Rwandan Constitution for the year 2003, so that all these texts constitute an important constitutional obstacle to the ratification of their countries to the Rome Statute, However the international jurisprudence tends to say that the provisions of the Rome Statute are not incompatible with the (non-extradition) of the state to its citizens, by pointing that Article 102 of the Rome Statute has explicitly distinguished between the terms (submission) and (extradition), the first term means the transfer of the state to a person before the ICC pursuant to the provisions of the Rome Statute, while the second term means the transfer of the state to a person to any other country[13] (تريكي، 2017، ص 174−175).

1.c State Judicial Sovereignty

Article 4, paragraph 2 of the Rome Statute stipulates the ability of the court to exercise its functions and powers in the territory of any state party, provisions of Articles 54, 59, 87 and 99 stipulate a set of recognized powers of the prosecutor of the public prosecutors of the ICC, in the area of issuing investigation orders, they shall be directed to the competent national authorities of the states parties for the purpose of their implementation, in addition to the possibility of the Prosecutor to move himself to the territories of the states parties to conduct field investigations without the presence or approval of the competent authorities of the state party concerned, where those provisions contradict the content of many national constitutions that provide for the judicial sovereignty of the state, which means the exclusive and absolute jurisdiction of the national judicial bodies in the field of lawsuits deposition which requires the jurisdiction of the national judicial authorities exclusively for all investigations on crimes committed in the national territory, even if that was within the framework of judicial assistance and on the basis of a request submitted by foreign competent authorities, (such as Article 125 of the Benin Constitution, Article 124 and 126 of the Constitution of

Burkina Faso, 81 of the Constitution of Mali, 80 of the Senegalese Constitution)[14] (تريكي، 2017، ص 176−177).

Paragraph 2: Integration of the Rome Statute into the legal Systems of African Countries

Some of African states have fully integrated these texts while, some have partially integrated them.

2. a Full Integration

We deal with some examples as follows:

- Republic of South Africa Model

South Africa was the first African country to pass full implementing legislation, the ICC Act, to create a domestic framework for cooperation with the Court, which has served as a model law for other African countries[15] (Navak, 2015, p 102), as it signed it on July 17, 1998, and ratified it on November 27, 2000[16] (201 ص ،2017 ،**تريكي**).

- Burkina Faso Model

The state of Burkina Faso signed the Rome Statute on 30 November 1998, and ratified it on April 16, 2004, it also ratified the Agreement on immunities and privileges of the ICC on 10 October 10, 2005, it adopted a Law No. 52-2009, on (Defining the jurisdiction and integration the statute of the ICC) on December 31[17] (**تريكي**، 2017، ص 201).

2.b Partial Integration

Some African countries have integrated only a part of the Rome Statute into their national legal systems, we deal with some examples as follows:

- Mali Model

The Republic of Mali signed the Rome Statute on July 17, 1998 and ratified it on August 16, 2000, it also ratified the immunities agreement on July 8, 2004, and it has harmonized its national law with the provisions of the Rome Statute by adopting the Penal Code under Law No. 079-01, and the Code of Criminal Procedures according to the Law No. 01-080, dated August 20, 2001[18] (**تريكي**، 2017، ص 216).

- Niger Model

The State of Niger signed the Rome Statute on July 17, 1998 and ratified it on April 11, 2002, it also adopted the Law No. 2003-025 on June 13, 2003 amending the Penal Code, and the Law No. 2003-026 amending the Criminal Procedures Law in order to align its penal system with the provisions of the Rome Statute (**تريكي**، 2017، ص 222)[19].

Second Requirement: African Countries Refer their Situations to the ICC as an Initial Support

Many African countries referred their situations to the ICC as a form of support, we deal with some examples as follows:

Paragraph 1: Uganda

The Government of Uganda made a referral to the ICC in respect of some heinous crimes allegedly committed by members of the Lord's Resistance Army (LRA) in Northern Uganda, the ICC Trial Chamber had since issued warrants of arrest against the defendant, in Prosecutor v. **Joseph Kony** and Ors (**Otti Vincent**, **Odhiambo Okot**, **Dominic Ongwen**, and **Lukwaya Raska**), [20] (**تريكي**، 2017، ص ص 236−237) **Dominic Ongwen** was charged with 70 counts of core crimes committed as a Lord's Resistance Army soldier in northern Uganda and surrounds. However, **Ongwen** was abducted by the rebel group and forced to become a child soldier[21] (**Maxine**, 2020, p 406) .

Their alleged crimes include crimes against humanity, and war crimes, the suspects are still at large, but proceedings against one of them Mr. **Lukwiya** have been terminated, following the confirmation of his death[22] (Nsongurua, 2019, p 14) on October 27, 2013, then **Dominic Ongwen**, surrendered himself to the ICC on January 16, 2015, the ICC began his trial procedures on December 6, 2016[23] (تريكي، 2017، ص 236−237.), and resumed on 16 January 2017 with the presentation of evidence of the Prosecution, On 12 December 2019, the presiding judge declared the closure of the submission of evidence in the case the total case record, the closing briefs in this case were filed on 24 February 2020[24], there are also unconfirmed stories that **Joseph Kony** has executed **Vincent Oti**[25] (Nsongurua, 2019, p 14) .

Paragraph 2: Democratic Republic of the Congo

There are sex cases concerning DRC (**Lubanga**, **Ntaganda Bosco, Germain Ktanga**, **Mbarushimana**, **Mudacumura Sylvestre**, **Mathieu Ngudjolo Chui**), one ongoing trials, 7 warrants of arrest, 3 accused in custody, one suspects at large, one ongoing appeals, one suspects in custody[26].

2.a Dyilo Case: **Lubanga** was arrested in the DRC, prosecuted and convicted of war crimes[27] (Gissel, 2018, p 6), on July 10, 2012, he was sentenced by the ICC to 14 years imprisonment for conscripting and enlisting child soldiers under the age of 15 into his armed group, **Dyilo** became the first person the Court convicted since it was set up in 2002[28] (Ogunnoiki, 2019, p 10).

2.b Ntaganda Case: in the year 2013, **Bosco Ntaganda** a.k.a (the terminator) voluntarily gave himself up at the U.S Embassy in Kigali, Rwanda. At the Hague, **Ntaganda** is being tried for the central role he played in planning the operations of his Patriotic Forces for the Liberation of Congo, he faces a 13-count charge of war crimes and a 5-count charge of crimes against humanity in the Ituri region between 2002 and 2003[29] (Ogunnoiki, 2019, p 10).

2.c Katanga Case: On the 23rd of May, 2014, the leader of the (FRPI), **Germain Katanga**, was sentenced to 12 years imprisonment for war crimes and crimes against humanity that were committed in 2003 in Bogoro, Ituri region, having spent six years during his trial, he would only serve half the sentence years[30] (Ogunnoiki, 2019, p 10-11).

2.d Bemba Case: **Jean-Pierre Bemba** was arrested in Belgium by Belgian authorities, and was transferred to the ICC, The Court on March 21, 2016, convicted him for war crimes[31] (Ogunnoiki, 2019, p 11-12), and crime against humanity committed by elements of his militia in the CAR[32], (Ngueko, 2018, p 12) which included murder, rape and pillage between October 26, 2002 and March 15, 2003[33] (Ngueko, 2018, p 11-12), this was significant because it was the court's first conviction for crimes of sexual and gender-based violence and on the basis of command responsibility, and because **Bemba** was among the most senior-ranking officials to appear for trial at the court[34] (Evenson, 2020, p 433). But on June 08, 2018, the Appeals Chamber of the ICC overturned his 18 years sentence, though he was acquitted of the charges same year, Bemba was not completely off the

hook of the ICC, he was also convicted on the lesser charge of witness tampering, the Court fined Bemba €300,000 (i.e. $350,000) and sentenced him to 12 months behind bars. He however did not serve the prison sentence because of the time he had already spent in jail[35] (Ngueko, 2018, p 11-12).

Paragraph 3: Central African Republic

The government of the Central African Republic referred the case to the ICC on December 22, 2004, the Public Prosecutor launched the investigation on May 22, 2007, with a focus on crimes committed between 2002 and 2003 And later on the crimes committed since the end of 2005, by Appointing a working team to go to the designated country to conduct field work related to investigate, collect evidences and hear witnesses, as well as analyze the documents provided by the designated government, by international NGOs and other reliable sources, only one year after the start of the investigation the ICC issued the first arrest warrant against **Jean-Pierre Bemba Gombo**[36] (ولد يوسف، 2017، ص 324).

Paragraph 4: Mali

The transitional authorities of Mali referred the situation in Mali since January 2012 to the ICC on 13 July 2012, and that the Prosecutor of the Court opened, on 16 January 2013, an investigation into alleged crimes committed on the territory of Mali since January 2012[37] (Wierczynska, 2017, p 699).

4. a Ahmad Al Faqi Al Mahdi Case: On 26 September 2015, **Al Mahdi**, a head of (Hesbah), was surrendered to the ICC by the government of Niger, his trial began on 22 August 2016 and he pleaded guilty to a charge of intentional attacks against historic monuments of the city, on 27 September 2016 he was sentenced to nine years of imprisonment, additionally in August 2017 the Court issued the Reparations order which imposed individual and collective reparations for the community of Timbuktu and assessed **Al Mahdi**'s liability for those reparations at 2,7 Million Euros[38] (Wierczynska, 2017, p 699).

4.b Al Hassan Ag Abdoul Aziz Ag Mohamed: The warrant of arrest for **Al Hassan** was issued on 27 March 2018, he was surrendered to the ICC on 31 March 2018, he is in the Court's custody, the

confirmation of charges hearing took place from 8 to 17 July 2019, on 30 September 2019, Pre-Trial Chamber I issued a confidential decision confirming the charges of war crimes and crimes against humanity brought by the Prosecutor against Mr. **Al Hassan**, and committed him to trial, the redacted version of the decision was published on 13 November 2019, on 21 November 2019, trial Chamber X was constituted and will be responsible for conducting the trial in the **Al Hassan** case, the opening of the trial is scheduled for 14 July 2020 and the beginning of the prosecution's presentation of evidence for 25 August 2020[39].

Paragraph 5: Comoros

On 22 September 2000, Comoros has signed the Rome Statute subsequently, and ratified it on 18 August 2006[40], on May 14, 2013 referral this referral along with its particulars are submitted to the Madame Prosecutor of the ICC by Union of the Comoros, a State Party to the ICC, as well as the registered State of MV Mavi Marmara vessel, one of the passenger vessels of the humanitarian aid flotilla bound for Gaza on 31 May 2010, in which nine victims were killed on board and more than dozens were seriously injured, as a consequence of the attacks of the Israel defence forces in international waters[41].

Section II: Deterioration the Relationship Between the African States and the ICC

This section has been divided into two main issues to be addressed, we deal in the first part with the deterioration's reasons of the relationship between the African Countries and the ICC, while, we tried to provide some answers to the criticisms that were directed to the ICC in the second part.

First Requirement: Reasons for the Deterioration of the Relationship between the African Countries and the ICC

Paragraph 1: The ICC is Biased Against Africans Narrative

There are 27 cases before the ICC, we note that all of them concerning African heads and leaders[42], and among 13 situations under investigation all concerning African States except (Georgia,

Bangladesh, Afghanistan), so do these numbers raise questions about the ICC really focus and attention about the black continent?.

The ICC has come under heavy fire from the AU for indicting and prosecuting a sitting president, the backlash started in March 2009 when the ICC issued an arrest warrant for **Omar al-Bashir**, the President of Sudan for orchestrating the atrocities committed in Darfur in 2003, in March 08, 2011[43] (Bachmann, 2020, p 262), the second action that ushered in criticism from Africa is when former Prosecutor **Ocampo** initiated an investigation in 2010 into Kenyan politicians, **Uhuru Kenyatta** and **William Ruto**, for violence that erupted in Kenya after the Presidential Election of December 27, 2007, which caused 1200 deaths and 300,000 displaced persons. **Kenyatta** at first demonstrated a willingness to cooperate with the ICC's investigation into the post-election violence for which he was allegedly responsible, but he soon became uncooperative[44] (Souris, 2020, p 258), **Uhuru Kenyatta** and **William Ruto** (who later became the President and Vice-President of Kenya respectively in 2013), were among the six that were summoned to appear in the ICC on the 8th of April same year, these and other cases of the ICC issuance of an arrest warrant and summons, indictment, prosecution and conviction of Africans have not only given rise to the allegation that the Court has an African bias but the name-calling of the Court as a (Neo-colonial institution), and for pursuing a racist agenda against Africans and possessing an investigative system that is flawed and that also suffers from undue delays[45] (Bachmann, 2020, p 262), therefore many African leaders[46] (Randriamihanta, 2019, p 704), (who view the ICC as a Western political machination designed to disproportionately punish African)[47] (Randriamihanta, 2019, p 704).

Scholars, Commentators[48] (Aidi, 2019, p 2), Senior officials of the AU[49] (Omorogbe, 2019, p 295), and Some African politician[50] (Werle, 2014, p 3), criticizing the Court's way of intervening because only Africans have been judged by this Court during the first decade of its entry into force[51] (Randriamihanta, 2019, p 704), and in that it has ignored atrocities committed by major world powers such as the United States and China[52] (Brendon, 2016, p 7), and for playing double standards by focusing on African defendants and largely

ignoring atrocities committed outside the African continent[53] (Brendon, 2016, p 10), **Muammar Gaddafi**, who was the acting Chairperson of the AU at the time, as well as the President of Libya, criticized the ICC's action, calling it (an attempt by the West to re-colonise their former colonies)[54] (Souris, 2020, p 258).

AU even labelled that the ICC was using Africa as a (test laboratory) for international criminal justice[55] (Bachmann, 2020, p 249), in this regard African scholar **Mahmood Mamdani** has called the ICC an (International Court for trying Africans)[56] (Brendon, 2016, p 10), he pointed to the Court's silence over conflicts in the Middle East, observing that, (the ICC is rapidly turning into a Western court to try African crimes against humanity)[57] (Aidi, 2019, p 2), for his part **Kenyatta** called for mass withdrawal of African states from the ICC, asserting that ICC investigations are nothing but (race hunting) in Africa, a similar view was expressed by a former Gambian information Minister, who asserted that the acronym ICC stands for the International Caucasian Court, and who accused the Court with persecuting and humiliating people of color[58] (Souris, 2020, p 259).

Paragraph 2: Selective Referral of the Security Council

The relationship between Africa and the ICC began to suffer with the indictment of the Sudanese President, **Omar al-Bashir**[59] (Chidimma, 2020, p 25), and the Libyan head of the State **Muammar Gaddafi**, under Resolution 1970 (2011)[60] (Omorogbe, 2019, p 287), in 2011 for crimes against humanity[61] (Omorogbe, 2019, p 288), in 2005, the UNSC, acting under Chapter VII of the UN Charter[62] (Nsongurua, 2019, p 13-14), under Resolution 1593[63] (Omorogbe, 2019, p 287), and (determining that the situation in Sudan continues to constitute a threat to international peace and security), referred the situation in Darfur since July 1, 2002 to the OTP, by making the referral, the SC acted on the Report of the International Commission of Inquiry on Darfur, on 14 July 2008, the OTP presented evidence to the Pre-Trial Chamber and sought for an arrest warrant against President **Omar Al-Bashir**, on 4 March 2009, the Pre-Trial Chamber issued the first warrant for the arrest against him, listing ten counts on the basis of his individual criminal responsibility as an indirect co-perpetrator of crimes in Darfur, western Sudan, including war crimes

and crimes against humanity, a second warrant of arrest was issued on 12 July 2010[64] (Nsongurua, 2019, p 13-14).

The SC has been criticised for being (selective in the recognition and waiver of immunities for international crimes in favour of the interests of its permanent members)[65] (Nsongurua, 2019, p 27), an example of that selective referrals is the United Kingdom's alliance with the United States to go to war with Iraq. It was only a question of time until African leaders, politicians and academics would point to this example of Western hypocrisies, questions could be asked whether the Western powers that engage in such crimes were above the law, some critics went even so far to view this as an example of the Court's use of selective justice and enforcement of the law in a rather (tyrannical) fashion, understandable as such criticism might be, it lacks the legal basis as stated above, but Western denial and lack of legitimacy regarding the justification for the war in Iraq continues to tarnish the ICC's overall legitimacy and future potential[66] (Bachmann, 2020, p 279), in a way, African countries have reason to worry that the UNSC countries that have veto-wielding powers can make referrals which may compromise judicial authorities[67] (Brendon, 2016, p 22).

Paragraph 3: Failure to Respect the Heads of State Immunity and States Sovereignty

The ICC-African relation was further strained when the ICC went after Kenyan President, **Uhuru Kenyatta**, although the charge was later withdrawn for insufficient evidence, according to some critics, (the ICC was now no more than a Trojan horse for European Neocolonial designs), which neither had regard for the sovereignty of these African States nor the immunity of their heads of State, consequently, these actions led to many African States threatening to withdraw from the ICC[68] (Chidimma, 2020, p 25), the seemingly goodwill relationship between Africa and the ICC began to turn sour when the ICC turned its focus on Africa's political leaders and government officials, who under customary international law were considered to possess some form of immunity[69] (Bachmann, 2020, p 258-259), the AU rejects these warrants, the AU's legal position is that incumbent heads of non-party states are entitled to immunity from arrest in third states under customary international law, it argues that

the immunity subsists irrespective of the nature of the crimes and that was established, a priori, by the ICJ in the arrest warrants case (2002) and the Rome Statute has not afected that immunity[70] (Omorogbe, 2019, p 288).

In its ruling on Malawi and Chad in 2011, the Court held that customary international law gives no exception for heads-of-state immunity in relation to international courts' jurisdiction[71] (Bachmann, 2020, p 266), **Kenyatta** did not mince words in this regard, saying the Court's (interventions go beyond interference in the internal affairs of a sovereign state, they constitute a fetid insult to Kenya and Africa, African sovereignty means nothing to the ICC and its patrons), the African Union's position is that sitting heads of state should be immune from the court's prosecution while in office[72] (Aidi, 2019, p 3).

Second Requirement: Effects of the Deterioration of the Relationship Between the African States and the ICC

Paragraph 1: Refuse to Cooperate with the ICC

The ICC under Article 103 of the Rome Statute relies on state parties to exercise its enforcement powers, as well as prosecutorial and investigative powers under Article 86 of the Statute, it therefore becomes (a challenge when an institution is dependent on the co-operation of a government to fulfill its mandate as most times it is the same government that stands to be investigated), much criticism followed the collapse of **Kenyatta**'s case, according to **Archangel** and **Jon**, faced with an unwillingness to cooperate by a state, the ICC, which has none of the resources available to a domestic prosecutor, such as subpoenas, surveillance and policing is at a severe disadvantage, in **Kenyatta**'s case, requests for information from the Kenyan authorities went unanswered and the attorney general refused to hand over telephone, land and asset record, articles 86 and 87 of the Rome Statute provides for the general obligation of state parties to cooperate fully with the court in its investigation and prosecution of crimes[73] (Chidimma, 2020, p 27).

The challenge to the conventional powers recognized concurrently with the prosecutor and the Security Council by the African states grouped together within the regional organization called the AU, led

to the refusal of cooperation of the said states with the court for the arrest of criminals located on the African continent. Nowadays, this has resulted in the withdrawal of certain African states from the Rome status[74] (Ngueko, 2018, p 17), it's not surprising that this provision is not being followed, (with no enforcement agency at its disposal, the ICC can't execute arrest warrants, compel witnesses to give testimony, collect evidence or visit the scenes where the crimes were perpetrated, without the acquiescence of national state authorities), this cooperation by States will inevitably be lacking, especially when the sitting heads of State are the presumed perpetrators as was the case for **Kenyatta**, thereby making the prospects of a successful prosecution very slim[75] (Chidimma, 2020, p 27), in 2009, the AU declared that it would not cooperate with the ICC citing the (publicity seeking approach of the ICC Prosecutor)[76] (Omorogbe, 2019, p 2).

Paragraph 2: Submit Proposals to Amend the Rome Statute

Before the ASP meeting in November 2009, 26 African ICC members and 15 non-members met in Addis Ababa, four main positions essentially, demands for reform emerged:

- The interests of peace be considered alongside the interests of justice in Prosecutorial guidelines for when to investigate, or not.
- The power of the UNSC to refer cases should remain.
- The UN General Assembly should be empowered to defer ICC proceedings when the UNSC fails to make a decision, there should be a discussion regarding whether or not the leaders of non-parties had their immunity removed by the Rome Statute[77] (Mills, 2017, p 112).

Paragraph 3: African Mass Withdrawal from the ICC

Almost simultaneously, at the Addis Ababa Summit in January 2016, the Assembly of the AU entrusted a Ministerial Committee with the task to seek for a withdrawal strategy from the ICC, which was adopted in 2018[78] (Martini, 2021, p 3-4). On October 12, 2016, the members of Burundi's parliament voted in favour of that withdrawal, Burundi thus became the first African country to withdraw from the ICC[79] (Ogunnoiki, 2019, p 7-8), Burundi's withdrawal became effective in October 2017, whereas South Africa's and the Gambia's attempts failed because of internal policy matters. It is noteworthy, though, that some States have maintained their support of the ICC[80]

(Martini, 2021, p 3-4), the possibility of a collective withdrawal, which has been in the works for some time, symbolizes the high-water mark of African Union opposition to the ICC[81] (Bachmann, 2020, p 277-278).

The threats of a mass withdrawal due to these challenges would not augur well for both the AU and the ICC and various legal experts have asserted that such a move would definitely be the (death) of the ICC and in international criminal justice, this would also be detrimental to international criminal law because to some it is (better to have an imperfect court than none at all. It's like saying because we don't catch all the criminals, we shouldn't hold trials), former ICC Chief Prosecutor, **Luis Moreno Ocampo**, has also described the move as a dangerous one and described the action of the African Leaders as (hypocritical)[82] (Bachmann, 2020, p 280).

We note here that the Rome Statute was signed by 34 of 55 African states, yet only two called for withdrawal (the third, Gambia, would reverse positions after **Adama Barrow** came to power in early 2017), formal reservations were entered against the resolution by Nigeria, Senegal and Cape Verde, while Malawi, Tanzania, Tunisia and Zambia requested more time to study it, as legal analyst **Mark Kersten** has observed, looking at the fine print, the AU's so-called (withdrawal strategy) is a deliberately weak, non-binding document that outlines five (objectives) regarding ICC reform listed below verbatim[83] (Aidi, 2019, p 4).

The withdrawal document is more about reform than withdrawal calling for amendments to the Rome Statute, reform at the SC, broader representation at the ICC, and the strengthening of national criminal justice systems, to that end, the AU's Open-Ended Committee of Ministers of Foreign Affairs continues to engage with various stakeholders, especially the Assembly of States Parties to the Rome Statute, the ICC's Office of the Prosecutor, the SC (the permanent five members, plus Russia and China), in entering Nigeria's reservation, the Nigerian foreign minister was candid, stating that (the ICC has an important role to play in holding leaders accountable), and that Nigeria is not the only voice agitating against withdrawal, in fact

Senegal is very strongly against it, Cape Verde and other countries are also against it[84] (Aidi, 2019, p 5).

Third Requirement: Responding to Critics of the ICC

Paragraph 1: Africa Wants this Court, **African Needs this Court**

Contrary to the criticisms that the ICC is targeting only African nations, the empirical reality is that (Africa has seen an inordinate number of conflicts in which violations of IHL have occurred), According to the Report of the (Uppsala Conflict Data Programme), a mapping of major armed conflicts in the world, established that (between 2001 and 2015, Africa accounted for most conflicts in the world)[85] (Chidimma, 2020, p 25-26), and there are 14 accused, all of them are Africans. There are more than 5 million African victims displaced, more than 40,000 African victims killed, thousands of African victims raped. Hundreds of thousands of African children transformed into killers and rapists. 100 % of victims are Africans. 100 of the accused are African[86] (Gevers, 2020, p 190), and that victims of these atrocities would continue to suffer under the leadership of those who perpetrate these crimes if they are not held accountable for their actions[87] (Bachmann, 2020, p 280).

Furthermore as **Kofi Anan** famously states:

(Africa wants this court, African needs this court), yet the liberal-humanitarian discourse ignores the contingent alignment of interests driving the ICC's focus on Africa[88] (Aidi, 2019, p 3), one of the points legally justifying the intervention of the Court is the judicial weakness of national courts in Africa, because some judicial systems are marked by corruption, partiality, and lack of a mechanism for the protection of witnesses and so on, but the AU in its decisions of non-cooperation and collective withdrawal from the Rome Statute does not take these elements into cognizance, whereas it is precisely this aspect of national justice that must be resolved to allow effective repression of perpetrators of serious violations of international crimes, nevertheless, shortcomings in the judicial systems and its ultimate justification have served the ICC to intervene when the situation in Africa applies a variable application of the rule of complementarity, it is relevant to mention that this variability in the principle of complementarity is not neutral in conflicts with African states. Thus, it would be necessary

for the AU to seek ways to strengthen the capacity of African judicial institutions to improve cooperation with the ICC[89] (Randriamihanta, 2019, p 709).

Forethermore African States parties have themselves failed to implement effective measures to prosecute the atrocity crimes within their national courts, first, they have failed to create credible judiciaries that could adjudicate gross violations of human rights and diminish the relevance of an external court like the ICC, second, they have lacked strategic vision and foresight and signed treaties or international agreements sometimes against their national interests, in other words they have lacked sophistication in conceptualizing and articulating sovereignty in ways that help them advance their national interests in an international order that is already stacked against them, African countries criticism of the ICC for not focusing on human rights violations in other regions also reflects such lack of vision and strategic thinking, Such sentiment does not shed further light on how the continent can advance accountability for egregious violations of human rights where many local judiciaries are either weak or have limited expertise, it is therefore disingenuous for African elites and the AU to blame the ICC for prosecuting African defendants for serious violations of international human rights that they are either unable or unwilling to handle within their countries, unless there is evidence demonstrating that the ICC is prosecuting innocent people, or violating African defendants' due process rights, it is irrelevant that most of them happen to be of African origin, in essence, many of Africa's grievances against the ICC seem more political than legal and sometimes at odds with the preferences of their own people[90] (Brendon, 2016, p 15-16), in this regard **Renée Nicole Souris** noted that in response to withdrawal threats from other African states, Zambian President **Edgar Lungu**, polled his people to ask whether they wanted Zambia to withdrawal from the ICC. An overwhelming 93.3% of Zambians who participated voted in favor of Zambia remaining in the ICC[91] (Souris, 2020, p 262), this indicates the awareness of the peoples of African countries and that they themselves do not believe in the leaders of their countries and their

legitimacy. And withdrawing from the court only serves the political interests of these African leaders.

Presently on the African continent, most African countries judicial system is not only weak but slow, however, the indictment, prosecution and conviction of former Chadian President, **Hissène Habré** by Senegal in collaboration with the AU, tells us that African countries judicial system can actually function effectively, the Chadian dictator, **Hissène Habré**, who came to power in 1982, fled to Senegal in 1990 after his was ousted by the incumbent President of Chad, **Idriss Déby**, he was first indicted in the year 2000 for war crimes, crimes against humanity and rape (the latter charge was later dropped), in 2013, the Extraordinary African Chambers, a special court in Dakar, Senegal, was set up by Senegal and the AU, his trial began in July 2015 and on May 30, 2016, he was sentenced to life imprisonment by the EAC, on April 27, 2017, EAC Appeal Court upheld the life sentence of **Habré**, he is to pay the 7,396 named victims $153 million as compensation, the former Chadian dictator became the first former President of a country to be convicted for crimes against humanity by a court in another country[92] (Ogunnoiki, 2019, p 9-10).

Paragraph 2: Most Cases are Referred from African States Themselves

Defenders of the ICC believe that the African states themselves have referred the situation to the court according to Article 13/a of the Rome statute, as is the case for Uganda, the DRC, the CAR[93] (دريدي 2016، ص 326), the two cases that came to the ICC via the Prosecutor's propio motu powers of self initiation Kenyan and Mali were done so with the authority of the respective governments. In Sudan and Libya the two cases referred to the ICC via SC vote all three African states on the Council (which has a total of 15 members) voted in favor of referring a fellow African state. Specifically, the DRC, Benin, and Tanzania voted to refer Sudan, and South Africa, Gabon, and Nigeria voted to refer Libya[94] (Souris, 2020, p 262), and by their respective governments[95] (Chidimma, 2020, p 26), so the argument that the ICC is anti-Africa is weak[96] (Chidimma, 2020, p 26).

The ICC self-referrals according to **Bathram** are (an expression of state consent for which the ICC cannot, in all fairness be held responsible), he further argued that the criminal cases brought within the Kenyan situation can hardly be proof of anti-African bias sufficient to justify a majority withdrawal of African States from the ICC, he however admitted that the ICC had other real problems bedeviling it, which needed to be addressed, discussing the issue as an Africa versus ICC dispute, (glosses over the real problem that cuts deep into the court's credibility, which is the hypocrisy and hostility of big powers towards the court), **Martin Ngogo**, a onetime Rwanda Prosecutor stated that (there is not a single case at the ICC that does not deserve to be there, but there are many cases that belong there, that are not there), these attacks against the ICC merely portray the fact that African leaders are against the attainment of international justice in their region, as they prioritise their welfare over human rights accountabil[97] (Chidimma, 2020, p 26), despite this both **Murithi** and **Clark** are critical of the ICC's close relationship with the governments in the self-referral cases. **Clark** cites examples from the DRC, Uganda, Côte d'Ivoire, the CAR and Mali to show that there is a pattern of the ICC focusing on non state combatants and overlooking crimes committed by government forces. His findings suggest that the ICC has illegitimately begun proceedings in states, such as the DRC, which have the capacity to conduct such court cases domestically. Consequently, **Clark** argues, the ICC hasn't been substantively practicing its core principle of complementarity[98] (Maxine, 2020, p 405).

Overall, in respect of all the above, the ICC's focus has been on lower-level defendants and non-state actors in African states, finally, six African states ratifed the Rome Statute after the first warrant of arrest was issued for **Bashir** on 4 March 2005, (Kenya ratifed on 15 March 2005, Chad on 1 November 2006, the Seychelles on 10 August 2010, Tunisia on 24 June 2011, Cape Verde on 10 October 2011, and the Ivory Coast on 15 February 2013)[99] (Omorogbe, 2019, p 296), the large number of African countries may also be a reason for focusing the court's attention on the situation in Africa.

Paragraph 3: The Response to the Problem of Immunity

In the Court's response to the argument that the court can't drop immunity from officials whose countries have not signed the Rome statute in accordance with international law, it considers that this jurisdiction was granted to it by the SC in accordance with Article 13/b in line with Article 4 of the Charter of the United Nations that gives The court the necessary powers to pursue those involved in the four international crimes listed in Article 5 of the Statute[100] (دريدي، 2016، ص 326).

The Rome Statute has shown no regard for diplomatic immunity as recognised under international law, it provides that, (immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person), using the Kenya and Sudan situations as case studies where heads of states were tried, this provision though commendable in a way that it portrays equality before the law, however, has shown to threaten the sovereignty of states, causing a situation of great unrest, intimidation and fear, particularly were sitting heads of State are tried by the Court[101] (Chidimma, 2020, p 28).

Paragraph 4: The ICC Only Attacks African States: Just Excuses and Political Manipulations

It can be argued that the attack by African leaders on the ICC is a mere excuse for circumventing accountability and transparency over the responsibility for human rights[102] (Randriamihanta, 2019, p 705), as Vilmer suggests that African leaders who challenge the Court exploit the anticolonial concerns of African people in order to protect themselves from the Court's reach[103] (Souris, 2020, p 262), in other words, by wishing to withdraw from the ICC, African leaders consider their political interests to be superior to international justice. That is, the decision to leave the ICC could lead not only to a mass exodus of African states, but also to commit heinous atrocities with impunity in Africa, subsequently, it should be mentioned that African leaders tend to unleash violence on their opponents simply to keep governing the state, and when they are accused of human rights violations, they invoke sovereignty or reject efforts to have their conduct investigated and sponsored by Western states, this explains the attacks of Kenya,

Burundi and the Gambia against the ICC[104] (Randriamihanta, 2019, p 705), so **Renée Nicole Souris** considred the African challenges to the ICC as examples of populism[105] (Souris, 2020, p 257), **Clarke**'s engagement with the neoimperialism theme in Affective Justice is considerably different. She focuses on African leaders' ability to draw upon emotional affects associated with colonialism to discredit the ICC. Using the Kenyan case, she demonstrates how **Uhuru Kenyatta** and the Jubilee Alliance election campaign used emotional appeals to the anti-colonial struggle and pan-Africanism to analogize resistance to the ICC investigations with the political struggle for independence in Africa[106] (Maxine, 2020, p 406).

It must be acknowledged also that the ICC has already opened several preliminary investigations of countries outside the African continent, these include the situation in Afghanistan in 2007 on crimes against humanity allegedly committed since 1 May 2003, the situation in Colombia in 2004 until now on a crime against humanity allegedly committed since 1 November 2002, and on war crimes allegedly committed since 1 November 2009, the situation in Iraq on 9 February 2006 on war crimes allegedly committed by United Kingdom nationals in connection with the conflict in Iraq and the occupation from 2003 to 2008, the situation in Ukraine on 25 April 2014 on crimes against humanity allegedly committed as part of the Maidan Square protests in Kiev and other Ukrainian regions between 21 November, 2013 and 22 February, 2014, the situation in Palestine on the 16th of January, 2015[107] (Randriamihanta, 2019, p 707), and the situation in Myanmar/Bangladesh recently.

The ICC announced also a preliminary examination of the situation in Venezuela over alleged crimes allegedly committed since April 2017 in the context of demonstrations and related political unrest, and February 8, 2018 announced a preliminary examination of the situationin Philippines for the crimes alleged to have taken place since July 1, 2016, in the context of the (war on drugs) campaign Concerning the opening of these preliminary investigations, some African leaders say that a preliminary examination is not an investigation, but just a process of examining the available information in order to determine whether there is a basis for initiating

an investigation against the criteria set by the Rome Statute, in particular, the prosecutor will analyze issues related to jurisdiction, admissibility and the interests of justice when making his decision, as provided for in Article 53 (1) of the Rome Statute, however, it was noted that the Prosecutor opened an investigation into the situation in Georgia on 27 January, 2016[108] (Randriamihanta, 2019, p 707-708), this opening of an investigation marks a considerable step forward to contradict the claim of exclusivity in the exercise of its jurisdiction in Africa, so we should stop saying that the ICC is only interested in Africa[109] (Randriamihanta, 2019, p 707).

Conclusion:

As a conclusion to this topic, we able to answer the problem that we raised in the introduction by noting that the ICC's relationship with African countries that were the first supporters is not fixed and tense, (from support to attack, criticism and withdrawal), some of its causes are founder and persuasive, while others are just a political manipulations.

Through this research paper, we find that:

- The reason behind the recent decisions to withdraw from the ICC is the accusations by the African States that they are targeting by the that Court (wich seems very true to some extent), however, it's worth noting that all prosecutions against Africans have been referred to the court by the African governments themselves or by the UN Security Council, (with the exception of Kenya).
- Anyway the absent from criticisms and calls for an exit from the Court is the fact that the cases before the ICC do not end just because African countries quit the Court[110] (Brendon, 2016, p 24).

Finally we have to leave the following recommendations:

- Immunity to sitting heads of State and trials by the ICC only after they have left office, provision for an independent enforcement system by the Court which would place little or no reliance on State parties, stricter penalties for States unwilling to cooperate with the Court in its investigation and prosecution of crimes and exclusion of members of the UNSC who are not State parties to the ICC from exercising the referral powers under the Statute, states should be willing to prosecute

perpetrators of most serious crimes within their respective national and regional jurisdictions[111] (Chidimma, 2020, p 28).

- The Court must be commended for its recent effort towards investigating situations outside Africa in countries such as Georgia, Bangladesh and for its ongoing preliminary investigations in Palestine, Ukraine, Afghanistan, Colombia, Iraq/United Kingdom, Philippines and Venezuela, the ICC should improve its fact-finding and evidence sourcing through collaborating with existing institutions[112] (Chidimma, 2020, p 28-29).
- The ICC must work to find some legal solutions to the mass withdrawal of the African countries with the aim of re-establishing cooperation between them.
- African State parties to the Rome Statute should assiduously work on their judicial mechanisms, only when they have a functional and effective judicial system will their national court take precedence thus making the ICC a court of last resort[113] (Ogunnoiki, 2019, p 13).

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