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Chapter 3

STATE DEFIANCE, TREATY WITHDRAWALS AND THE RESURGENCE OF AFRICAN SOVEREIGN EQUALITY CLAIMS: HISTORICISING THE 2016 AU-ICC COLLECTIVE WITHDRAWAL STRATEGY

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Abstract

African states, sitting in college at the African Union (AU) have, since their first reactions to the arrest warrants issued against Sudanese President Omar Al Bashir in 2009, been threatening to withdraw from the Rome Statute. However, while individual African state-practice has consistently shown dissonance between what is declared in college and what obtains in individual state-practice, African states' discontent with the Rome Statute system, whatever the varied opinions on its validity, cannot be easily dismissed. At its January and July 2016 Assembly, the AU, continuing its long held call for African states to withdraw from the Rome Statute, adopted resolutions indicating its most operational intent to so withdraw. In October 2016, Burundi, South Africa and The Gambia made much publicised steps towards withdrawing from the Statute in quick succession.

It is not unusual for states to threaten or use withdrawal from international agreements to express discontent with the obligations of the legal regime created by such agreements.

This chapter attempts to historicise the AU collective withdrawal threats through a three part analysis. First, using a comprehensive review of relevant AU Assembly decisions between 2009 and 2016, we will consider how prominent collective withdrawal threats have been in the larger AU Assembly discourse on the three international criminal justice processes that have been the subject of Assembly attention, that is, the International Criminal Court (ICC), the abuse of the principle

of universal jurisdiction and the Hissène Habré case. The key finding here is that the larger AU discourse does not betray a focus on withdrawal. Rather, the main AU Assembly concern seems to be an effort to fight a perceived disregard by the United Nations Security Council (UNSC) for African sovereign equality.

Second, we will review the history of treaty withdrawals, dating from the League of Nations in the 1920s, in order to understand the pattern of state defiance of influential but politically inexpedient international obligations, before both international organisations and international jurisdictions. This will include a short review of state defiance that led, rather, to treaty amendments and court backlash.

Third, we will return to the perceived disregard for African sovereign equality and briefly review African state practice in this regard. Historicising the defiant acts of states should allow us to place the AU collective withdrawal threats in context and see that the current challenges to the jurisdictional authority of the ICC are not altogether unknown to international jurisdictions and may not constitute an existential crisis in international law, but rather, are part of the usual 'incoherent' development of international law.

DEFIANCE ETATIQUE, RETRAIT DU TRAITE ET RESURGENCE DES RECLAMATIONS POUR L'EGALITE SOUVERAINE DE L'AFRIQUE : HISTORIQUE DE LA STRATEGIE DE RETRAIT COMMUN DE LA CPI PAR L'UNION AFRICAINE

Résumé

Suite à l'émission du mandat d'arrêt en 2009 contre Omar Al-Bachir, le président soudanais, les pays africains, lors des réunions collégiales de l'Union africaine (UA), menacent de se retirer du Statut de Rome. Toutefois, bien que la pratique individuelle d'un pays africain montre systématiquement une dissonance entre ce qui est déclaré lors de la réunion collégiale et ce qui est obtenu dans la pratique individuelle de l'état, le mécontentement des pays africains vis-à-vis le Statut de Rome ne peut pas être facilement rejeté, même s'il y a des opinions variées sur sa validité. Lors de ses réunions en janvier et en juillet 2016, l'Union africaine a continué à faire appel aux pays africains de se retirer du Statut de Rome et a adopté des résolutions indiquant son intention plus opérationnelle de s'en retirer. En octobre 2016, le Burundi, l'Afrique du Sud et la Gambie se sont retirés l'un après l'autre du Statut de Rome.

Il n'est pas inhabituel que des Etats menacent de se retirer des accords internationaux pour exprimer leur mécontentement avec les obligations du régime juridique créées par de tels accords. La dénonciation d'un traité, est avant tout, la logique conclusion du droit souverain d'être tirée. Cette pratique varie du retrait des organisations internationales à la compétence des juridictions internationales.

Dans ce chapitre, nous allons retracer historiquement les menaces de retrait collectif de l'UA par une analyse en trois parties. Tout d'abord, à l'aide d'un examen exhaustif des décisions pertinentes de l'Assemblée de l'UA entre 2009 et 2016, nous examinerons les principales menaces de retrait collectif qui se sont manifestées dans le discours de l'Assemblée de l'UA sur les trois processus internationaux de justice pénale qui ont fait l'objet de l'attention de l'Assemblée, cet-a-dire, la Cour pénale

internationale (CPI), l'abus du principe de la compétence universelle et l'affaire Hissène Habré. La conclusion clé ici est que le discours de l'UA ne montre pas un accent sur le retrait. Au contraire, la principale préoccupation de l'Assemblée de l'UA semble être un effort pour lutter contre un mépris perçu par le Conseil de sécurité des Nations unies (CSNU) pour l'égalité souveraine africaine.

Deuxièmement, nous examinerons l'historique des retraits de traités, datant de la Société des Nations dans les années 1920, afin de comprendre d'un modèle de méprise étatique de ses obligations internationales influentes mais impolitiques, devant les organisations internationales et les juridictions internationales. Cela comprendra une brève revue de la défiance de l'État qui a conduit, plutôt, aux amendements aux traités et à la réaction des tribunaux.

Troisièmement, nous reviendrons sur le mépris perçu de l'égalité souveraine africaine et examinerons brièvement la pratique des États africains à cet égard. L'historisation de tels actes provocateurs devrait nous permettre de voir que les défis actuels à l'autorité juridictionnelle de la CPI ne sont pas tout à fait inconnus des compétences internationales et ne peuvent constituer de crise existentielle du droit international, mais plutôt, une partie du développement «incohérent » en matière du droit international.

1 Introduction

[US Chief Justice] John Marshall has made his decision. Now let him enforce it.[1]

Since 2008, African states, under the collegial umbrella of the African Union (AU), have expressed disaffection with the institutions and models of international criminal justice. Beginning with a spirited protest against the exercise of universal jurisdiction by European states and later directed at the International Criminal Court (ICC), African states have made clear their willingness to defy the system of

[1] Statement attributed to US President Andrew Jackson (1832). Although considered apocryphal, it represents a classic example of executive defiance of court decisions that are deemed to be politically inexpedient.<http://www.pbs.org/wnet/supremecourt/antebellum/history2.html> on 21 February 2016. Here, Jackson was reacting to US Supreme Court decision, *Worcester v Georgia*, 31 US (6 Pet.) 515 (1832), affirming Native American limited sovereignty. It is noteworthy that it is the same 'Marshall court' that handed down the famous *Marbury v Madison*, 5 US 137 (1803) appropriating powers of judicial review of courts over Acts of Congress.

accountability for international crimes. 2016 was a year of tumultuous events on this front. In January and July 2016, the AU Assembly decided to reinvigorate its long considered mass withdrawal from the Rome Statute,[2] albeit with some resistance from certain states.

With the AU not being party to the Rome Statute,[3] AU Assembly threats of Rome Statute withdrawal could have been dismissed as legally immaterial. Yet, in October 2016 alone, Burundi, South Africa and The Gambia made important steps towards withdrawal from the Statute, with similar indications from Kenya, Uganda and Namibia. Botswana, Burkina Faso, the Democratic Republic of Congo (DRC), Nigeria, Senegal, and Tanzania, on the other hand, publicly asserted their commitment to the Rome Statute. These events have caused much public and scholarly debate, with fears of a Rome Statute collapse in Africa.[4] Yet, it is opined here that much of this debate has been had without requisite historical reflection. What, if anything, can we learn from the history of treaty withdrawals and state defiance of international obligations, and of AU objections to the current practice model of international criminal justice?

In this chapter, we will attempt to historicise state defiance and withdrawals from international agreements and organisations. This attempt aims to place such defiant acts as part of the general incoherent development of international law.[5]

The scope of this reflection excludes the merits and demerits of collective or individual withdrawals. Rather, we will limit ourselves to placing in historical context, the relevant AU Assembly discourse, the threat or actual withdrawal from international conventions or organisations as the preferred tool of the defiant state and its relation to international rule of law, and a resurgent assertion of Africa's right to effective sovereign equality.

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2 Adopted 17 July 1998, 2187 UNTS 3.

3 By contrast, the AU has acceded to the 1992 United Nations Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107, and its 1997 Kyoto Protocol, 2303 UNTS 148 and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD). See Thirteenth Ordinary Session of the Assembly of the Union (13AUA), July 2009, Assembly/AU/Dec.248(XIII), *Decision on the accession of the African Union to the United Nations Framework Convention on Climate Change (UNFCCC) and The Kyoto Protocol;* 13AUA, Assembly/AU/Dec.255(XIII), *Decision on the African Union accession to the United Nations Convention to Combat Desertification (UNCCD).*

4 Barrie S, 'ICC turmoil as African nations withdraw' *Australian Institute of International Affairs,* 16 November 2016.

5 '… complete unity has never existed in international law; and its development has always been uneven.' Schwebel S, 'The proliferation of international tribunals: Threat or promise?" in Andemas M and Fairgrieve D (eds) *Judicial review in international perspective: Liber amicorum Lord Slynn of Hadley*, Kluwer Law, 2000, 5.

To be clear, the AU does not consider its opposition to the existing structures of international criminal justice as contrary to its commitment to justice. The relevant AU Assembly decisions on the question have almost consistently avowed the AU's 'commitment to fight impunity in conformity with the provisions of Article 4(h) and 4(o) of the Constitutive Act of the African Union[6] and; underscore [d] the importance of putting the interests of victims at the centre of all actions in sustaining the fight against impunity.'[7] The AU Assembly has also, in the same breath, repeatedly called on member states to ratify the Protocol on Amendments to the Protocol of the African Court of Justice and Human Rights adopted in Malabo

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6 Adopted 11 July 2000, 2158 UNTS 3.

7 12AUA, *Decision on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of the Sudan,* Assembly/AU/Dec.221(XII), 1-3 February 2009, paras.6-8. See also, 11AUA, *Decision on the report of the Commission on the abuse of the principle of universal jurisdiction,* Assembly/AU/Dec.199(XI), para.3; 12AUA, Assembly/AU/Dec.213(XII), *Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction,* para.3; 13AUA, *Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC),* Assembly/AU/Dec.245(XIII)Rev.1, July 2009, para.4; 14AUA, *Decision on the report of the second meeting of States Parties to the Rome Statute on the International Criminal Court (ICC),* Assembly/AU/Dec.270(XIV), 2 February 2010, para.3; 14AUA, *Decision on the abuse of the principle of universal jurisdiction,* Assembly/AU/Dec.271(XIV), para.4; 14AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.272(XIV), para.2; 15AUA, *Decision on the abuse of the principle of universal jurisdiction,* Assembly/AU/Dec.292(XV), 25-27 July 2010, para.2; 15AUA, *Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC),* Assembly/AU/Dec.296(XV), para.2; 15AUA, *Decision on the Hissène Habré case,* Assembly/AU/Dec.297(XV), para.2; 16AUA, *Decision on the implementation of the decisions on the International Criminal Court,* Assembly/AU/Dec.334(XVI), 30-31 January 2011, para.2; 16AUA, *Decision on the abuse of the principle of universal jurisdiction,* Assembly/AU/Dec.335(XVI), para.2; 16AUA, *Decision on the Hissène Habré case*, Assembly/AU/Dec.340(XVI), para.4; 17AUA, *Decision on the implementation of the Assembly decisions on the International Criminal Court,* Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, para.2; 17AUA, *Decision on the Hissène Habré Case,* Assembly/AU/Dec.371(XVII), para. 2; 18AUA, *Decision on the progress report of the Commission on the implementation of the Assembly decisions on the International Criminal Court (ICC),* Assembly/AU/Dec.397(XVIII), 29-30 January 2012, para.2; 18AUA, *Decision on the Hissène Habré case,* Assembly/AU/Dec.401(XVIII), para.3; 19AUA, *Decision on the implementation of the decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.419(XIX), 15-16 July 2012, para. 2; 21AUA, *Decision on international jurisdiction, justice and the International Criminal Court (ICC),* Assembly/AU/Dec.482(XXI), 26-27 May 2013, para.2 [NB: Botswana entered a reservation on this Decision]; Extraordinary AUA, *Decision on Africa's relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1(Oct.2013), 12 October 2013, para.2; 22AUA, *Decision on the progress report of the Commission on the implementation of the decisions on the International Criminal Court,* Assembly/AU/Dec.493(XXII), 30-31 January 2014, para.2; 24AUA, *Decision on the Hissène Habré case,* Assembly/AU/Dec.546(XXIV), 30-31 January 2015, para.2; 24AUA, *Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.547(XXIV), para.2; In 25AUA, Assembly/AU/Dec.586(XXV), no commitment to fighting impunity was mentioned; 26AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.590(XXVI), 30-31 January 2016, para. 2(i); 27AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.616(XXVII), 17-18 July 2016, para. 2(i).

on 27 June 2014.[8] In fact, the AU's drive to vest the African Court of Justice and Human Rights (Merged Court or ACJHR) with criminal jurisdiction originates from its opposition to the abuse of the principle of universal jurisdiction.[9]

The chapter is divided into three parts. The first part recalls the history of African states' collegial protests against the current model of international criminal justice from 2008 to 2016. In particular, it also traces the development of the discourse concerning objections and withdrawal threats during this period. The second part traces the history of state-practice on treaty withdrawals. Some attention is given to withdrawals from treaties establishing international organisations of a certain centrality to harmonious international life. The third part discusses the international rule of law and the resurgence of African sovereign equality discourse.

2 African Rome Statute withdrawal threats and other protests (2008-2016)

International criminal justice and its attendant law have always been highly contested. The earliest suggestions of international criminal prosecutions arose in the negotiations for the post-war Treaty of Versailles.[10] Actual attempts to create an international criminal court date back to when the League of Nations adopted the 1938 Convention for the Creation of an International Criminal Court[11] as part of efforts to reconcile states over the prosecution of suspects of *high profile political assassinations*. While the United Nations (UN) was created after the 1939-45 war with the resolve to 'save succeeding generations from the scourge of war',[12] the post-war Nuremberg and Tokyo prosecutions were not without their critics – they

8 24AUA, *Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC)*, Assembly/AU/Dec.547(XXIV), para.15, 17(b); 26AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.590(XXVI), para. 2(i); 27AUA, *Decision on the International Criminal Court*, Assembly/AU/Dec.616 (XXVII), para.2(v).

9 12AUA, *Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.213(XII), para.9; 15AUA, *Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.292(XV), para.5.

10 Schabas W, 'The United Nations War Crimes Commission's proposal for an international criminal court,' 1-<https://openaccess.leidenuniv.nl/bitstream/handle/1887/37246/Schabas_The%20United%20Nations%20War%20Crimes%20Commissions%20Proposal%20for%20an%20International%20Criminal%20Court.pdf?sequence=1> on 5 February 2017 (also published in 25(1) *Criminal Law Forum*, June 2014, 171-189).

11 Drafted as complementary to the 1937 Convention for the Prevention and Punishment of Terrorism. See Saul B, 'Defining terrorism: A conceptual minefield' Sydney Law School Legal Studies Research Paper No. 15/84, September 2015, 3.3; Schabas, 'The UNWCC proposal', 2.

12 Preamble 1, *Charter of the United Nations*, adopted 26 June 1945, 1 UNTS XVI.

faced accusations of 'victor's justice'.[13] Understandably, post 1945 efforts to create a permanent international criminal court suffered the vagaries of the Cold War until the 1990s, when in the wake of the Yugoslavian and Rwandan genocides, the UN Security Council (UNSC) set up the international tribunals for the Former Yugoslavia and Rwanda.[14] By then, renewed interest in the criminal suppression of mass atrocity and war crimes led to the adoption of the Rome Statute in 1998.[15]

African states initially took particular interest in the creation of the ICC. They participated actively in the Rome Statute negotiations, and Senegal was the first state to ratify the new Treaty. Even African states not represented at the Rome Conference initially embraced the Rome Statute.[16] African states were also the first to refer the situations in their countries to the ICC: Uganda (29 January 2004),[17] Democratic Republic of Congo (19 April 2004),[18] Central African Republic (CAR) (7 January 2005)[19]. Earlier on 18 April 2003, Cote d'Ivoire had made a declaration recognising the jurisdiction of the ICC, which it later confirmed on 14 December 2010.[20]

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13 Lock T and Riem J, 'Judging Nuremberg: The laws, the rallies, the trials' 6(12)*German Law Journal,* 2005, 1821. The authors report on a conference to commemorate the 60 anniversary of the International Military Tribunal trials. The authors relate conference debates that present both for and against arguments on the question.

14 See also, Cassese A, 'International criminal courts' in *Cassese's international criminal law,* 3ed, Oxford University Press, Oxford, 253-270; Crawford J, *Brownlie's principles of public international law,* Oxford University Press, Oxford, 2012, 672-687.

15 For a discussion on how accusations of victor's justice, entailing a breach of the principle *nulla crimen sin lege praevia*, have dogged international criminal tribunals including the ICTY and ICTR, see Wasinski J, 'Distant sound of thunder: International criminal jurisdiction of the African Court' in Stormes J et al (eds) *Transitional justice in post-conflict societies in Africa,* Paulines Publications Africa, Nairobi, 2016, 182-198. See also, Frulli M, 'Jurisdiction *ratione personae'* in Cassese A, Gaeta P and Jones W (eds) *The Rome Statute of the International Criminal Court: A commentary,* Oxford University Press, Oxford, 527-528. Cassese is quick to remind us that 'whether or not [the addition of new offences in the London Agreement] was done in breach of the principle of *nullum crimen sine lege*, it is a fact that since 1945 those crimes gradually became proscribed by customary international law.' Cassese, 'International criminal courts', 258. Crawford argues that 'the promise that the [Nuremberg Charter principles] would be treated as international law' aimed at '[redeeming] the apparent selectivity and retrospectivity of Nuremberg.' Crawford, *Brownlie's principles of public international law,* 671.

16 Nyawo cites The Gambia, Equatorial Guinea, Seychelles and Somalia. Nyawo J, 'Through Antonio Gramsci's lens: Understanding the dynamic relationship between the AU and the ICC' in Stormes J et al (eds) *Transitional justice in post-conflict societies in Africa,* Paulines Publications Africa, Nairobi, 2016, 223.

17 ICC, 'Situation in Uganda: ICC-02/04'-<https://www.icc-cpi.int/uganda> on 20 February 2017.

18 ICC, 'Situation in the Democratic Republic of Congo: ICC-01/04'-<https://www.icc-cpi.int/drc> on 20 February 2017.

19 ICC, 'Situation in the Central African Republic: ICC-01/05'-<https://www.icc-cpi.int/car> on 20 February 2017.

20 ICC, 'Situation in the Republic of Cote d'Ivoire: IC-02/11'-<https://www.icc-cpi.int/cdi> on 20 February 2017.

Mali conducted a self-referral to the ICC on 13 July 2012,[21] while Comoros referred the situation resulting from the attack on 31 May 2010 by Israeli Defence Forces on its flag-bearing ship that was among the 'Gaza Flotilla' on 14 May 2013.[22] On 30 May 2014, the CAR made a further referral to the Court for events from May 2012.[23] Gabon, which had ratified the Rome Statute on 20 September 2000, referred the situation in that country to the ICC on 21 September 2016 for events since May 2016.[24]

Individual African state-practice has shown *dissonance* between what is declared in college and what obtains in practice. In fact, subsequent to the first threat of mass withdrawal in 2013,[25] CAR and Gabon referred themselves without entering reservations to AU Assembly decisions. James Nyawo attributes this continuing ratification of the Rome Statute and referral of cases by African states (citing Tunisia, Cote d'Ivoire, Mali and the Comoros), despite AU protestations, to the Gramscian understanding of hegemony. Here, both consent and coercion are deployed by the dominant force to sustain its preferred order.[26]

2.1 Antecedents of the AU-ICC-UNSC[27] clash

The stage for a protracted controversy between the AU and the international structures related to international criminal justice was set on 31 March 2005 when the UNSC referred the situation in Darfur to the ICC, Sudan being a non-state party

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21 ICC, 'Situation in the Republic of Mali: ICC-01/12'-<https://www.icc-cpi.int/mali> on 20 February 2017.

22 ICC, 'Preliminary examination: Registered vessels of Comoros, Greece and Cambodia'-<https://www.icc-cpi.int/comoros> on 20 February 2017.

23 ICC, 'Situation in the ICC, 'Situation in the Central African Republic II: ICC-01/14'-<https://www.icc-cpi.int/carII> on 20 February 2017.

24 ICC-OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic' 29 September 2016 -<https://www.icc-cpi.int/Pages/item.aspx?name=160929-otp-stat-gabon> on 15 November 2016.

25 Patel K, 'Kenya's threat to withdraw from the ICC: What will SA do?' *Daily Maverick*, 8 October 2013; 'African Union summit on ICC pullout over Ruto trial' *BBC News*, 20 September 2013. Although publicly discussed, the mass withdrawal threat is not mentioned in the formal AU Assembly decisions of May and October 2013, an indication of the divisive nature of the proposal.

26 See generally, Nyawo, 'Through Antonio Gramsci's lens', 216-233. Nyawo's reflection on why states would bind themselves to restrictive international obligations recall those of Andrew Moravcsik in 'The origins of human rights regimes: Democratic delegation in post-war Europe' 54(2) *International Organization*, Spring 2000, 217-252.

27 As we shall later discuss from our analysis of the official AU discourse, perceptions of UNSC fairness are at the very centre of this clash.

to the Rome Statute.[28] This action did not seem to elicit any reaction from the AU Assembly.

Spirited protests in the AU against international criminal justice structures rather began with objections[29] to the action by European states to institute criminal proceedings against high-ranking African state officials using universal jurisdiction[30].[31] In fact, the AU Assembly requested the Commission of the African Union

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[28] It is instructive that Sudan has consistently been opposed to the Rome Statute system, and joined the US, Israel, Libya, Iraq, China and Syria in voting against the adoption of the Statute at the Rome Conference. Cassese A, 'International criminal courts', 263.

[29] 11AUA, Assembly/AU/Dec.199(XI); 12AUA, Assembly/AU/Dec.213(XII). This included urging active African participation in discussions on the scope and application of the principle of universal jurisdiction of the Sixth Committee during the sixty-seventh session of the United Nations General Assembly (UNGA) pursuant to UNGA Res. A/Res/64/L117 on the scope and application of the principle of universal jurisdiction, adopted 16 December 2009, (19AUA, Assembly/AU/Dec.420(XIX), para.2), the elaboration of the Report of the AU-EU Technical Ad-hoc Expert Group on the Principle of Universal Jurisdiction, 2009, a call for the vesting of the African Court with jurisdiction over international crimes 'such as genocide, crimes against humanity and war crimes' (12AUA, Assembly/AU/Dec.213(XII), para.9) and the elaboration of the AU Model Law on Universal Jurisdiction, May 2012.

[30] Universal jurisdiction is the principle of law by which a state can claim exercise of jurisdiction over crimes that were committed neither in its territory nor by its national, and therefore lacking any traditional jurisdictional link. Having been established centuries ago for the quite sensible aim of combating piracy, it has since evolved to cover the crimes of 'international concern', namely; genocide, war crimes and crimes against humanity. However, when crimes are tried by an international court, such prosecutions of 'international jurisdiction' are considered distinct from universal jurisdiction. It is noteworthy, however, that at the Rome Conference, the majority of states supported the proposal that the ICC be vested with universal jurisdiction, only for strong US, Chinese and Russian resistance to needlessly scuttle it – these have not ratified the Statute anyways. See Wasinski, 'Distant sound of thunder', 209, citing Zwanenburg M, 'The Statute for an International Criminal Court and the US: Peacekeepers under fire?' 10(1) *European Journal on International Law*, 136 and Schabas W, *An introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2004, 75.

[31] Wasinski lists the following: Spain, *Obiang Nguema et al*, Audencia Nacional, Central Examining Magistrate No. 5 (23 December 1998); France, *SOS Attentas et Beatrice Castelnau d'Esnault c Gadafy* Court of Cassation (13 March 2001); Belgium, *Public Prosecutor v Ndombasi*, Court of Appeal of Brussels (16 April 2002); United Kingdom, *Re. Mugabe*, Bow Street Magistrate's Court (14 January 2004); the Netherlands, a criminal complaint lodged against Paul Kagame on 4 April 2014. See Wasinski, 'Distant sound of thunder', 180, note 2. See also, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports 2008, 177; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16 November 2010, ICJ Reports 2010, 635; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, 422; and most recently, ICJ Press Release, 'The Republic of Equatorial Guinea institutes proceedings against France with regard to "the immunity from criminal jurisdiction of [its] Second Vice-President in charge of Defence and State Security, and the legal status of the building which houses [its] Embassy in France"' 14 June 2016, No.2016/18. It is arguable that the ire of the AU, via Rwanda, was however attracted by the arrest of a Rwandese state official enjoying diplomatic immunity, Rose Kabuye, on 10 November 2008 in Frankfurt while on official visit and transferred to France to answer charges of complicity in the Rwandan Genocide. This followed warrants of arrest issued by then French investigating judge Jean-Louis Bruguière in October 2006 against nine senior Rwandan officials

(AU Commission) and the African Commission on Human and Peoples' Rights (African Commission) to study and report back on the implications of vesting the then recently proposed 'Merged Court',[32] with criminal jurisdiction over international crimes in February 2009.[33] This was a month before the first arrest warrant against a sitting African head of state was issued.[34] While it can be argued that African states presumably knew of the coming warrant against Sudanese President Omar Al Bashir[35] prior to their formal issuance, it is the perceived abuse of universal jurisdiction that took centre stage in AU protests against international criminal justice in 2008.

2.2 AU-ICC-UNSC clash (2009-2016)

In February 2009, the 12th AU Assembly pronounced itself on its objections to the ICC for the first time. Prior to this, and despite the 2005 UNSC referral, the AU Assembly had addressed only the Hissène Habré case and the perceived abuse of the principle of universal jurisdiction.[36] By the February 2009 Assembly, the ICC Pre-Trial Chamber was considering Sudan situation indictments, including against sitting President Omar Al Bashir. The warrants of arrest against President Bashir came on 4 March 2009 and 12 July 2010 respectively.

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including President Paul Kagame. A subsequent inquiry by his successor, Marc Trévidic, reversing the earlier conclusions was published in 10 January 2012. These French-Rwandese clashes led to the first in a series of formal protests by the African Union (AU) in the Decision on Abuse of the Principle of Universal Jurisdiction in 2008, and the establishment of a joint AU-EU panel. See Council of the European Union, *The AU-EU expert report on the principle of universal jurisdiction*, Brussels, 2009, 8672/1/09.

32 The AU Assembly had only adopted the 'Merged Court' Protocol in July 2008. See 11 AUA, *Decision on the single legal instrument on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice*, Assembly/AU/December 196(XI).

33 12AUA, Assembly/AU/Dec.213(XII).

34 Wasinski, 'Distant sound of thunder', 198.

35 See, retelling of a discussion between US Special Envoy to Sudan Richard Williamson and then ICC Chief Prosecutor Luis Moreno Ocampo in 2008 illuminating this possibility. The exchange, told by Williamson, thus went: 'I told him that it would be a bad idea – that an arrest warrant would not be productive. I told him not to go after the top. It limits the options of how we can move forward. He said: "my job's easier than yours. I'm like a train moving down the track and I just follow the evidence." That's how he characterized it. I said "I'm afraid you might hurt the institution you are trying to build." We agreed to disagree.' See Bosco D, *Rough justice: The International Criminal Court in a world of power politics*, Oxford University Press, 2014, 143, cited in Asin J, 'The 'great escape': In pursuit of President Al Bashir in South Africa' 2(1) *Strathmore Law Journal*, August 2016, 165.

36 A review of the collection of decisions and declarations of the AU Assembly between 2005 and 2009 (available at AU, 'Decisions and declarations of the Assembly' -<https://au.int/web/en/decisions/assembly> indicates this.

To get a better view of the objectionable matters that drove the AU Member-State defiance that led to the October 2016 withdrawals steps, we turn to the relevant AU Assembly decisions. In the 17 AU Assembly sessions between 2009 and 2016, the AU-ICC-UNSC clash has been addressed 15 times, with no relevant AU Assembly decision adopted at the 20th and 23rd Assembly sessions in January 2013 and June 2014[37] respectively.

In these 15 decisions, the AU Assembly has (in order of frequency as a measure of priority): urged the UNSC (25 times) to defer cases against sitting heads of state (Sudan, Kenya and Libya),[38] and later, demanded withdrawal of the Sudan referral (10 times in just 4 decisions)[39]; urged African states to speak with one voice at international fora in order to protect African interests (21 times)[40]; sought to amend the Rome Statute (19 times)[41]; reiterated AU's commitment to fighting impunity (16 times)[42]; challenged the discretion of the ICC bench and Office of the Prosecutor of the ICC (OTP) (15 times)[43]; asserted the view that criminal proceedings against African leaders may jeopardise fragile peace processes (14 times)[44]; called on AU members not to cooperate with the ICC, particularly with regard to the Bashir arrest warrant (14 times)[45] and the Kenyan situation (twice)[46]; and linked AU-ICC concerns to the abuse of universal jurisdiction and the expansion of the ACJHR to include a criminal jurisdiction (12 times).[47]

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37 Curiously, session 23 adopted the Malabo Protocol. 23AUA, *Decision on the draft legal instruments*, Assembly/AU/Dec.529(XXIII), para.2(e).

38 12AUA, para.3; 13AUA, para.9; 14AUA, para.10; 15AUA, para.4; 16AUA, paras.3 and 6; 17AUA, paras.3-4 and 6; 18AUA, paras.3-4; 19AUA, para.4; 21AUA, para.3; Extraordinary AUA, paras.10(iii) and 10(ix); 22AUA, paras.4, 6, 7and 8; 24AUA, paras.3 and 17(d); 26AUA, paras.2(ii, iii) and 8; 27AUA, para.2(ii).

39 24AUA, para.17(e); 25AUA, paras.2(ii) and 5(i,ii); 26AUA, paras.2(iii), 5(i,ii and 8; 27AUA, paras.2(iii) and 5(iii, a).

40 14AUA, para.6; 15AUA, para.7; 16AUA, para.9; 17AUA, para.8; 18AUA, para.9; 19AUA, paras.8 and 9; 21AUA, para.5; 22AUA, paras.3 and 12(i),(ii); 24AUA, paras.6, 10 and 13; 25AUA, para.4; 26AUA, paras.2(iv), 6, 10(i) and 11(i); 27AUA, para.5(i, ii).

41 13AUA, para.8(i, ii,); 14AUA, paras.2(i,ii), 5, 7 and 8; 15AUA, para.8; 16AUA, paras.7 and 8; 22AUA, paras.11 and 12(i); 24AUA, paras.11 and 17(a); 26AUA, para.7; 27AUA, para.5 (i), (ii) and (iii.c,d).

42 See note 7 above.

43 13AUA, para.8(vi); 14AUA, para.2(iii); 16AUA, para.4; Extraordinary AUA, paras.10(x) and 17(d); 24AUA, paras.4(a), 17(e), 18 and 19; 25AUA, para.2(i); 26AUA, paras.2(ii), 2(iv), 4 and 5; 27AUA, para.3.

44 12AUA, para.2; 13AUA, para.3; 16AUA, paras.5 and 6; 17AUA, paras.5 and 6; 21AUA, paras.4 and 5; Extraordinary AUA, paras.3, 5, 6, 7,10(i) and 10(vii).

45 13AUA, para.10; 15AUA, paras.5 and 8; 16AUA, paras.4 and 5; 17AUA, para.5; 18AUA, paras.7 and 8; 18AUA, para.7; 21AUA, para.3; 26AUA, paras.3 and 4; 27AUA, para.2(iv, v).

46 Extraordinary AUA, para.10(i) and 10(xi).

47 13AUA, para.5; 19AUA, para.11; 21AUA, para.8; Extraordinary AUA, paras.3 and 10(iv, v); 22AUA, para.13; 24AUA, paras.14, 15 and 17(b); 26AUA, para.11(ii); 27AUA, para.2(v).

By contrast, the AU Assembly has: affirmed (8 times) their view on the applicability of sovereign immunities under the Rome Statute system based on reading of Article 27 and 98(1)[48] and more so, for states not party to the Statute[49], including considering seeking an advisory opinion from the International Court of Justice (ICJ) on the question of immunities of heads of state and senior state officials of states not party to the Rome Statute (twice)[50]; lamented OTP misconduct (8 times)[51]; sought to amend the ICC Rules of Procedure and Evidence or secure understandings on its interpretation (7 times)[52]; urged member-states to 'balance, where applicable, their obligations to the African Union (AU) with their obligations to ICC,' (thrice)[53]; urged the conclusion of bilateral immunity agreements among African states under Rome Statute Article 98 (twice)[54]; supported Libya's (once)[55] and Kenya's belated claim to complementarity (thrice)[56]; encouraged legal and judicial cooperation among member-states (once)[57]; and requested member-states wishing to refer cases to the ICC to inform and seek the advice of the AU (once).[58]

Significantly, the AU Assembly has asserted (thrice) a right to 'take any further actions' to preserve African state stability, dignity and sovereignty, which can be understood as a suggestion of mass withdrawal[59] and overtly threatened withdrawal (twice).[60]

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48 13AUA, paras.8(iv) and 10; 18 AUA, para.6; Extraordinary AUA, paras.4, 5, 9 and 10(vii); 24 AUA, paras.4 and 7.

49 14AUA, para.2(iv).

50 18AUA, para.10; 19AUA, para.3.

51 13AUA, para.11; 15AUA, para.9; 17AUA, para.6; 24AUA, paras.4(b) and 8; 26AUA, para.9(i, ii); 27AUA, para.3.

52 13AUA, para. 8(iii, v); Extraordinary AUA, para.10(vi); 22AUA, para.10; 24AUA, para.4(a); 26AUA, para.7; 27AUA, para.5(i).

53 15AUA, Assembly/AU/Dec.296(XV), para.6; 18AUA, para.5; 19AUA, para.5.

54 18AUA, para.7; 19AUA, para.7.

55 19AUA, para.6.

56 17AUA, para.4; 21AUA, para.6 (see also para.7). 'Belated' as the Kenyan Parliament had, prior to the ICC OTP *proprio motu* seizure of the Kenyan situation, debated and discarded the option of setting up a local tribunal to try suspects of the 2007-8 post-election violence (PEV) in 2009 as recommended by the Commission of Inquiry into PEV (CIPEV). CIPEV *Final report*, 15 October 2008, Part IV; also, Asaala EO, 'The ICC factor in transitional justice in Kenya' in Ambos K and Maunganidze O (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in Sub-Saharan Africa*, Universitatsverlag Gottingen, Gottingen,2012, 120-143, especially, 124-134.

57 13AUA, para.6.

58 Extraordinary AUA, para.10(viii).

59 13AUA, para.12; 22AUA, para.9; 24AUA, para.17(c).

60 26AUA, para. 10(iv); 27 AUA, para. 5(iii. b).

Several remarks can be made from the above analysis. First and most striking is that overt and disguised withdrawal threats formally appear so rarely as to suggest their relative lack of priority to the AU Assembly. Rather, UNSC disregard and disrespect for the immunity of high state officials are most prominent, in both the universal and ICC jurisdiction contexts.

While AU Assembly frustration over UNSC dismissal of its concerns is markedly high throughout the period under review, the official documents record a decrease in concern over dismissal at the Rome Statute Assembly of State Parties (ASP), especially from around the 12thASP, while at the same time registering an increase in forthright language over conduct of the ICC. The latter begins with explicit references to the OTP but moves more towards harsh criticism of the ICC bench as the cases against the Kenyan President and his Deputy progress beyond the investigation stage largely controlled by the OTP. It can be argued that AU Assembly decision language then becomes more conciliatory to the ICC as the concerted official African action at the November 2013 12 ASP bears fruit for the Assembly's views on the limits of ICC jurisdiction. In fact, references to the need to maintain a common position among African states at the ASP become more prominent from 2014.

What remains consistent through the period under review is the dismay, frustration and later angst at UNSC dismissal of AU concerns and the central problem of sovereign immunities that predated the AU-ICC-UNSC clash.

It is against this background, we opine, that the rise of AU withdrawal threats needs be seen. Assuming that the phrase 'take any further action' was AU diplomatic speak for mass withdrawal,[61] it is instructive that such language appears only thrice, with a lull between July 2009 and January 2014. Overt mention of withdrawal on the other hand is absent in the relevant decisions until January 2016, which is also the first time the AU Assembly meets after the Bashir fiasco in South Africa and the formation of the Open-Ended Ministerial Committee, composed of full powers bearing foreign ministers, to follow-up on the relevant Assembly decisions.

Among the best illustrations of *dissonance* that lends credence to the view that AU discourse is more political than legal is the conduct of Chad. In only the second AU Assembly decision on the ICC and the first after the arrest warrant against President Bashir was issued, Chad entered a reservation to the clause that called

[61] 'Take any necessary measures' is the UNSC language authorising coercive action under UN Charter Chapter VII.

on AU member-states to not cooperate with the ICC on arresting Bashir.[62] In 2008, the Chadian Government was under the threat of an armed coup from elements opposed to the Itno regime that were considered to have close ties with Khartoum.[63] However, after Bashir mended the fences with his neighbour, he has been received in N'djamena twice, much to the chagrin of the ICC[64] and to the commendation of the AU Assembly.[65]

2.3 A mass withdrawal roadmap

Among the matters considered at the January 2016 AU Assembly was the much anticipated first time invocation of the AU's right to intervene in Burundi under Article 4(h) of the Constitutive Act.[66] However, the AU Assembly instead made its first official mention of collective withdrawal from the Rome Statute, thus receiving significant media attention.[67]

The January 2016 Assembly's Decision on ICC included the following language:

> DECIDES The Open-ended Ministerial Committee's mandate will include *the urgent development of a comprehensive strategy including collective withdrawal from the ICC* to inform the next action of AU Member States that are also parties to the Rome Statute, and to submit such strategy to an extraordinary session of the Executive Council which is mandated to take such decision.[68]

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62 13AUA, para.10.

63 Ngarmbassa M, 'Chad threatens to strike rebels inside Sudan' *Reuters*, 5 January 2008; 'France condemns Chad rebels, accuses Sudan' *Sudan Tribune*, 3 February 2008; 'Chad, Sudan sign peace deal' *CNN*, 13 March 2008.

64 ICC-02/05-01- Pre-trial I Chamber decision of 27 August 2010 informing UNSC and ASP of Bashir's visit to Chad and Kenya.

65 16AUA, para.5; 21AUA, para.3. While an affirmation of the AU view of international justice threatening fragile peace processes, opinion on the validity of this view is not unanimous. See Maunganidze OA, 'International criminal justice as integral to peacebuilding in Africa: Beyond the 'peace v justice' conundrum', in Van der Merwe HJ and Kemp G (eds) *International criminal justice in Africa,* Strathmore University Press, Nairobi, 2016, 47-62.

66 By affirming the AU Peace and Security Council (AU PSC) Communiqué PSC/PR/COMM.(DLXV) of 17 December 2015 authorising 'the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU).' However, in a complete change of tact, the Assembly, in electing states to the 15 open seats to the AU PSC, included Burundi. See 'Five decisions from the 26 AU Summit' 10 February 2016, Institute for Peace and Security Studies, Addis Ababa University-<http://www.ipss-addis.org/new-ipss/news-events/five_decisions_from_the_26th_au_summit/> on 6 March 2016.

67 Kinyanjui M, 'African Union backs Uhuru's call to withdraw from the Rome Statute' *Daily Nation*, 31 January 2016; Editorial 'Leaving ICC is not an option for Africa' *Daily Nation*, 31 January 2016; AFP, 'African Union members back Kenyan plan to leave ICC' *The Guardian*, 1 February 2016.

68 26AUA, Assembly/AU/Dec.590(XXVI) *Decision on the International Criminal Court*, para. 10(iv). (author's emphasis)

The reporting of the collective withdrawal strategy was itself clouded in mystery in the immediate aftermath of the AU Assembly.[69] Although initially reported as a *fait accompli* decision to collectively withdraw from the Rome Statute, later reporting clarified that the AU Assembly 'endorse[d] having its Open-Ended Committee of African Foreign Ministers on the ICC consider a roadmap on possible withdrawal'.[70] The Open-Ended Ministerial Committee was mandated to engage the UNSC 'on the previous decision for deferral of the ICC proceedings against President Omar al-Bashir of Sudan and Kenya's Deputy President William Ruto in accordance with Article 16 of the Rome Statute.'[71]

And with this clarification, it seemed that this 'roadmap' was truly nothing but the usual hype. 'African states are not planning to pull out of the Rome Statute after all.'[72] The move was deemed as

> just the latest in a long-running anti-ICC campaign led by Sudan's President Omar al-Bashir and Kenya's President Uhuru Kenyatta and deputy William Ruto – all of whom have been charged by the ICC Prosecutor with committing grave crimes. Withdrawal from the Statute would have no impact on cases currently pending before the Court.[73]

However, subsequent events would seem to indicate a more fundamental concern. On 8 February 2016, barely a week after the AU Assembly, the AU Commission Acting Chairperson, Erastus Mwencha,[74] informed the February 2016 UNSC President of the AU's reiterated decisions seeking the abovementioned deferrals, expressed regret that 'these requests have either not been acted upon or have been turned down' and informed the UNSC of the Committee's intended visit to New York in March 2016 to 'engage the UNSC on all issues that have been consistently raised by the African Union.'[75]

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69 Oluoch F, 'Africa: Mystery of the "Resolution" at Addis African Union Summit to walk out of ICC' *The East African*, 6 February 2016.

70 Keppler E, 'Dispatches: On Africa and the ICC, don't buy all the hype' *Human Rights Watch Dispatches*, 1 February 2016.

71 Oluoch, 'Africa: Mystery of the "Resolution."'

72 'African States will not withdraw from the Rome Statute contrary to media reports' *Journalists for Justice*, 11 February 2016.

73 '6 facts about the African Union Summit and the ICC' *#globalJUSTICE,* 4 February 2016.

74 By letter BC/U/159/02.16.

75 See Letter of the Permanent Observer Mission of the African Union to the United Nations in New York, NY/AU/POL/14/104/16. See also, 'AU writes to UN Security Council over termination of Ruto and deferral of Bashir cases' Journalists for Justice, 19 February 2016.

At the subsequent July 2016 Ordinary Session of the AU Assembly in Kigali, while the AU Assembly formally decided to support the continued work of the Open Ended Ministerial Committee 'on the development of a comprehensive strategy including on a collective withdrawal from the ICC',[76] there was stronger opposition to the mass withdrawal project among AU member-states.[77] Clearly, the matter itself was not laid to rest. Predictably, it fell to the individual states to act.

Kenya's Parliament had, in September 2013, approved a motion to withdraw but this was not acted upon.[78] In June 2016, a bill was tabled to repeal the domesticating 2007 International Crimes Act, but this matter has, as at November 2016, stalled.[79]

On 18 October 2016, Burundi's President assented to a law that authorised ICC withdrawal.[80] On 21 October 2016, South Africa deposited its notification of withdrawal with the UN Secretary General.[81] On 24 October 2016, The Gambia also announced its withdrawal.[82] These announcements rocked public and diplomatic discourse and stirred some soul searching,[83] including within the ICC.[84] ASP President and Senegalese Justice Minister Sidiki Kaba called for 'dialogue with the nations which want to leave the ICC. For that we must listen to their concerns, their recriminations and their criticism.'[85] South Africa's withdrawal, in particular, drew strong reactions, including from neighbouring state Botswana.[86] While Namibia's

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76 26AUA, Assembly/AU/Dec.616(XXVII), para. 5(iii)(b).

77 27AUA, Assembly/AU/Dec.616(XXVII), para.5(iii.b). Reservations entered by Cabo Verde, Burkina Faso, DRC Senegal. No state entered a reservation to the earlier 26AUA, Assembly/AU/Dec.590(XXVI), para.10(iv) first officially endorsing mass withdrawal.

78 Zimeta G, 'What Kenya's withdrawal means for the international criminal court' *The Guardian*, 6 September 2013.

79 Njagi J, 'Kenya moves closer to pulling out of ICC' *Daily Nation*, 8 June 2016; Ayaga W, Otieno S, 'Kenya yet to decide on ICC withdrawal' *The Standard*, 24 October 2016; Mathenge O, 'Jubilee renews push to have Kenya withdraw from ICC' *The Star (Kenya)*, 24 October 2016.

80 Van Trigt E, 'Africa and withdrawal from the ICC' *Peace Palace Library Blog*, 28 October 2016; also, AFP, 'Burundi notifies United Nations of ICC pull out' 27 October 2016.

81 Van Trigt, 'Africa and withdrawal from the ICC'; BBC, 'South Africa begins withdrawal from International Criminal Court' *Daily Nation*, 21 October 2016.

82 Van Trigt, 'Africa and withdrawal from the ICC.'

83 Owiso R, 'South Africa's intention to withdraw from the Rome Statute of the International Criminal Court: Time to seriously consider an African alternative?' *AfricLaw.com*, 28 October 2016.

84 'ICC wants dialogue with African nations set to quit' *Daily Monitor Uganda*, 25 October 2016.

85 'ICC wants dialogue with African nations set to quit' *Daily Monitor Uganda*.

86 Republic of Botswana, Ministry of Foreign Affairs, 'Statement on the withdrawal of South Africa from the Rome Statute of the ICC' 25 October 2016; 'South Africa opposition party challenges ICC withdrawal in court' *Reuters*, 25 October 2016.

Cabinet had approved a withdrawal recommendation in November 2015,[87] it is yet to formally withdraw. Uganda too has indicated interest in withdrawing.[88]

At the UN General Assembly in October 2016, Kenya led Burundi and Sudan in a sharp critique of the ICC.[89] Tanzania, Nigeria and Senegal however publicly affirmed their support for the ICC.[90] By this point, it was clear that while frustration over perceived dismissal of African concerns was widespread and long held, clear divisions existed over what 'further actions' need be taken.

The discourse on AU objections to the conduct of international criminal justice has been uneven and incoherent. And so, it may be worthwhile to contemplate the history of threats of or withdrawals from international agreements. Granted, it is highly likely – nay, it is certain[91] – that, even if the current spate of withdrawals continues and is further endorsed at the January 2017 AU Assembly, not all African state parties to the Rome Statute would exercise their right to withdraw under Article 127(1) of the Rome Statute.

The foregoing review of Assembly decisions has allowed us to confirm the low priority of Rome Statute withdrawal to the AU Assembly relative to the perceived disregard for African sovereign equality, mostly by UNSC dismissal of AU concerns. This seems to suggest that withdrawal becomes a latter day tool of the state displeased with the political ramifications of the conduct of international institutions. Could this be a peculiar occurrence in international law? To answer this question, we now turn to international law history in the 20th Century. This should allow us to see whether the dissonance of African state practice and use of withdrawal threats to assert larger political concerns has any trend over time and space.

3 State practice on defiance and treaty withdrawals

This chapter's central aim is to place in the context of history, the AU's January 2016 threat to withdraw en masse from the Rome Statute in order to understand its import in the larger practice of states. This limited historical survey below is

87 Shinovene I, 'Cabinet affirms ICC withdrawal' *The Namibian*, 24 November 2015.

88 Mwagiru C, 'ICC meeting turns out to be doleful affair' *Daily Nation*, 19 November 2016. Reporting also on the Russian signature withdrawal and Philippine withdrawal threat announced at the November 2016 ASP.

89 Kelley KJ, 'Kenya criticises ICC as other African countries defend it' *Daily Nation*, 1 November 2016.

90 Kelley, 'Kenya criticises ICC as other African countries defend it'.

91 See public statement by Tanzania's Foreign Minister, Augustine Mahiga in Mwakyusa A, 'Dar reiterates support for ICC' *Daily News Tanzania*, 17 February 2016; 'Tanzania is not withdrawing from the Rome Statute' *Journalists for Justice*, 18 February 2016.

done with regard to defiance of international jurisdictions, and of international organisations.

3.1 Tantrums and withdrawals from the competence of international jurisdictions

No less a body than the ICJ suffered definitive defiance by the US over its reparations demands for violating Nicaraguan sovereignty in *Military and Paramilitary Activities*.[92] This 1986 ICJ decision offers probably the most high-profile case of a defiant state withdrawing from an international jurisdiction after losing a case (the US withdrew after losing at the preliminary stage). In 2012, Colombia, angered by the ICJ's affirmation of Nicaraguan sovereignty over disputed Caribbean islands and waters in *Territorial and Maritime Dispute*,[93] withdrew its acceptance of the Court's jurisdiction by denouncing the 1948 American Treaty on Pacific Settlements (ironically, the Pact of Bogota).

Predictably, human rights law features prominently in the abovementioned examples of state withdrawals. When the Human Rights Committee (CCPR) -the treaty monitor for the International Covenant on Civil and Political Rights (ICCPR) - issued its General Comment 24 on Invalidity of Reservations to the ICCPR in 1994, the US and UK issued strenuous challenges.[94]

In 1997, North Korea attempted to withdraw from the ICCPR, which lacks an express withdrawal provision,[95] following a resolution of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities that was critical of its human rights practice.[96]

The CCPR also drew the ire of Trinidad and Tobago by insisting that its death penalty practice was subject to its review. In 1998, Trinidad and Tobago withdrew

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92 *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14.

93 *Territorial and maritime dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624.

94 See, US and UK observations transmitted by letters dated 28 March 1995 and 21 July 1995 UN Doc A/50/40 in response to CCPR General Comment 24.

95 The Vienna Convention on the Law of Treaties provides that, in such instances, a treaty is not subject to withdrawal unless 'it is established that the parties intended to admit the possibility' or it is so implied in 'the nature of the treaty.' Article 56(1). See also, Human Rights Committee, *General Comment 26,* affirming the deliberate nature of omission of withdrawal provisions. See as well, Viljoen's discussion on this, and its link to the withdrawal of signature, relevant, in the present discussion to the US (2002) and Russia (2016). Viljoen F, *International human rights law in Africa,* Oxford, 2012, 27.

96 UN Doc. E/CN.4/Sub.2/1997/50, 5 November 1997, Resolution 1997/3, cited in Viljoen, *International human rights law in Africa*, 28. The UN Secretary General responded: thus: 'a withdrawal from the Covenant would not appear possible' unless all state parties so agree. Viljoen, *International human rights law in Africa*, 28, citing UN Doc. E/CN.4/1998/2.

its acceptance of the (First) Optional Protocol to the ICCPR (ICCPR OP), thereby rejecting the CCPR's complaint procedure competence, again over adverse findings against it.[97] Trinidad however re-acceded to the Treaty but with a reservation excluding the consideration of death penalty matters, which the CCPR rejected.[98] Trinidad then denounced the ICCPR OP in 2000.

Simultaneously, Trinidad and Tobago was also facing similar challenges to its mandatory death penalty practice before the Inter-American Court on Human Rights. In resisting the determination made in *Hilaire, Constantine and Benjamin,*[99] in May 1998, Trinidad and Tobago announced its denunciation of the American Convention on Human Rights (ACHR), blaming the Inter-American Court on Human Rights (Inter-American Court) for delayed proceedings that prevented implementation of the death penalty within municipal legal time limits.[100] The Inter-American Court nonetheless went on to rule on the case.

Venezuela, defying the Inter-American Court over executive interference with judicial independence in *Apitz Barbera et al*[101] denounced the ACHR in 2012, thus effectively withdrawing from the competence of the Inter-American Court.[102] In the above instances of the US, Venezuela and Colombia, the withdrawals of competence may be seen as *ex post facto* attempts to defeat implementation of the courts' decisions.

Significant to our context of redress for victims of mass atrocities, in May 1999, the Government of then Peruvian President Alberto Fujimori attempted to withdraw Peru's acceptance of the Inter-American Court's competence, but this was defeated on a technicality.[103]

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97 For instance, *Smart v. Trinidad and Tobago,* Communication 572/1995, CCPR/C/63/D/672/1995, 29 July 1998.

98 In the examination of *Kennedy v. Trinidad and Tobago,* Communication 845/1999, CCPR/C/67/845/1999, 31 December 1999, as cited in Viljoen, *International human rights law in Africa,* 28. Four CCPR members dissented.

99 *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago (Merits, Reparations and Costs)* Judgment of 21 June 2002.

100 Amnesty International, 'Trinidad and Tobago's unprecedented withdrawal from the American Convention on Human Rights becomes effective on 26 May 1999' Public statement, 21 May 1999.

101 *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela (Preliminary Objection, Merits, Reparations and Costs)*, Judgment of 5 August 2008.

102 IACHR Press release 'IACHR deeply concerned over result of Venezuela's denunciation of the American Convention' 10 September 2013.

103 IACtHR, *Ivcher-Bronstein v. Peru,* Judgment of 24 September 1999 (Competence), paras.32-54 and 56(1,b). Peru had attempted to only withdraw the competence of the Court while not denouncing the Convention, which was deemed impermissible. See also, Pascualucci JM, *The practice and procedure of the Inter-American Court of Human Rights*, Cambridge University Press, Cambridge, 2013, 145. Pascua-

The European Court of Human Rights (European Court) also faces the real challenge of the United Kingdom (UK) repealing its Human Rights Act and withdrawing its acceptance of its competence. The UK has been most defiant[104] over the European Court's decision in *Hirst*,[105] where a blanket denial of prisoner voting rights was found to be inconsistent with the (European) Convention on the Protection of Fundamental Rights and Freedoms.[106]

In light of the aforementioned developments, it comes as no surprise that the African Court on Human and Peoples' Rights (AfCHPR) has also had to contend with a withdrawal of acceptance of competence. Rwanda, State Party to the AfCHPR Protocol from 6 June 2003, had made its declaration under AfCHPR Protocol Article 34(6) granting access to individuals and NGOs to seize the AfCHPR on 22 June 2013.[107] However, on 1 March 2016, sixteen months after the AfCHPR received an application by Victoire Ingabire, a controversial political figure, Rwanda withdrew its Article 34(6) Declaration, and requested the Court to suspend hearings involving Rwanda, including the *Ingabire case,* until it reviews its Declaration.[108]

In its ruling on the question, the AfCHPR noted the lack of denunciation or withdrawal provisions in the African Charter, its AfCHPR Protocol and on Article 34(6) Declarations. However, it clarified that such Declarations are unilateral acts not subject to the law of treaties, thus the Vienna Convention on the Law of Treaties is directly inapplicable but may be analogously relied upon when appropriate. Drawing from earlier discussed *Ivcher-Bronstein v Peru,* the AfCHPR affirmed the validity[109] of the withdrawal but rejected the view that such valid withdrawal by

lucci cites Cassel D, 'Peru withdraws from the Court: Will the Inter-American human rights system meet the challenge?' *Human Rights Law Journal*, 199, 173, suggesting Peru wished to avoid adverse findings in *Constitutional Court v Peru,* (no 55 of 1999) in which three Peruvian Constitutional Court justices were challenging their removal for ruling against Fujimori's attempt to run for another term of office.

104 Former UK Prime Minister, David Cameron, speaking to Parliament in 3 November 2010 stated 'It makes me physically ill even to contemplate having to give the vote to anyone who is in prison.' Holehouse M, 'David Cameron: I will ignore Europe's top court on prisoner voting' *The Telegraph*, 4 October 2015; Aldridge A, 'Can "physically ill" David Cameron find a cure for his European law allergy?' *The Guardian*, 6 May 2011.

105 *Hirst v. the United Kingdom (no.2) (Grand Chamber)*, 6 October 2005 (Appl.no. 74025/01). Curiously, the UK has implemented the vast majority of ECtHR decisions. Jeffrey Jowell puts the figure at 28 out of 29 decisions. International conference on transformative constitutions, 9-11 June 2014, Nairobi, organised by Katiba Institute, KHRC, Judicial Training Institute.

106 4 November 1950, 213 UNTS 222.

107 AfCHPR, *In the matter of Ingabire Victoire Umuhoza v. Rwanda,* Ruling on the effects of the withdrawal of the declaration under Article 34(6) of the Protocol, Application 003/2014, 3 June 2016, para. 51; read along with AfCHPR, *Ingabire v Rwanda,* Corrigendum to Ruling, 5 September 2016.

108 *Ingabire v. Rwanda,* Ruling of 3 June 2016, paras. 1 and 18.

109 Even on this point, the Court was not unanimous. Justices Ramadhani and Niyungeko voted against the holding on the validity of Rwanda's Declaration withdrawal. *Ingabire v. Rwanda,* para.69(ii).

unilateral act can be allowed to take effect immediately. Such immediate effect would threaten juridical security and can therefore only be allowed to take effect after a year.[110] It further, like the Inter-American Court, affirmed its continuing jurisdiction over pending cases.

The foregoing discussion demonstrates that it is not unusual for states to threaten or use withdrawal from international agreements to express discontent with the treaty's legal obligations. Treaty denunciation, such states assert, is after all the logical concurrent of the sovereign right to consent to be bound. These withdrawals and withdrawal attempts have however not deterred the concerned international jurisdictions, but rather spurred judicial clarification of the limits of withdrawal decisions. Despite their varied reasons, the clear common ground is state displeasure at adverse and politically inexpedient findings. At the very least, they indicate that the ICC is not lonely in facing threats of withdrawal. Yet Africa also boasts of three international courts within its sub-regional formations. Is the foregoing affirmation of defiant state practice against political inexpedient findings also practised by African states against their own sub-regional courts?

3.2 Instances of defiance not including withdrawals

The three African sub-regional courts, the East African Court of Justice, (EACJ), the Court of Justice of the Economic Community of West African States (ECOWAS CCJ) and Tribunal of the Southern Africa Development Community (SADC T), have all suffered stringent defiance for adverse findings.

In reaction to a case limiting municipal discretion on political charged matters,[111] Kenya sought in 2006-7 to amend the EAC Treaty to limit access of private litigants to the EACJ, establish an appellate chamber and introduce a procedure for removing judges.[112] In a matter of weeks, the relevant amendments were approved and enacted by the various EAC organs and partner-states.[113]

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110 *Ingabire v Rwanda,* Ruling of 3 June 2016, paras.63-65.

111 *Anyang Nyong'o v. Attorney General of Kenya,* Reference No. 1 of 2006, 27 November 2006, paras.2-5; Alter J, Gathii J and Helfer R, 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' 27 *The European Journal of International Law,* 2 (2016), 301-303.

112 Alter, Gathii and Helfer, 'Backlash against international courts in West, East and Southern Africa', 304. Kenya had first unsuccessfully attacked the integrity of the Kenyan judges on the EACJ. See Alter, Gathii and Helfer, 303, citing *inter alia, Attorney Gen. of Kenya v. Anyang Nyong'o*(2007).

113 Alter, Gathii and Helfer, 304. At this time, Kenya, Uganda and Tanzania were the only EAC member states.

Given that Kenya's drive to weaken the EACJ was in reaction to adverse findings in *Nyong'o v Kenya,* it was somewhat unsuccessful as the EACJ affirmed its position in the earlier ruling and, pursuant to political pressure from partner-states,[114] Kenya complied with the orders to reform its municipal election of members to the East African Legislative Assembly.[115] The Appellate Chamber, which had been earmarked for 'pro-government jurists,'[116] initially gave indications of being more conservative than the First Instance Chamber.[117] Yet, even in the more contentious issue of whether the EACJ can exercise a human rights jurisdiction without the explicitly required additional protocol to so empower it,[118] both chambers have concurred, and on 28 July 2015, the Appeals Chamber 'equivocally held that it has "jurisdiction to interpret the Charter [African Charter on Human and Peoples' Rights herein the African Charter] in the context of the [EAC] Treaty."'[119]

In a similar reaction to the *Chief Manneh* and *Saidykhan* cases,[120] The Gambia, having boycotted proceedings at the ECOWAS CCJ and lost on the merits, submitted proposals in September 2009 to the ECOWAS Commission seeking to amend the Court's 2005 Supplementary Protocol[121] to introduce further restrictions on the Court's jurisdiction and admissibility of cases thereof. However, this attempt was roundly rejected by ECOWAS and serves as a singular exception of the trend in our present discussion and strengthened the Court's position. The Gambia has continued to defy execution of the said judgements.[122]

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114 Alter, Gathii and Helfer, 305, Citing Nyamboga N, 'East Africa: Partner states decline to support Kenya's plea' *East African Standard*, 9 May 2007.

115 Alter, Gathii and Helfer, 305-306.

116 Alter, Gathii and Helfer, 304.

117 Alter, Gathii and Helfer, 306, citing its strict view of the two months limit for filing cases introduced in the 2007 amendments in *Omar Awadh and 6 Others v Attorney General of Uganda*, Appeal No. 2 of 2012 (App. Div.), (2013), as opposed to the First Instance Chamber's application of the doctrine of continuing violations to defeat said limit in *Independent Medical Unit v Attorney General of Kenya*, Reference No. 3 of 2010 (1st Inst. Div.), (2011).

118 Article 27(2), Treaty for the Establishment of the East African Community (EAC Treaty) 1999, 2144 UNTS 255. In *Katabazi v Secretary General of the E. African Community*, Reference No. 1 of 2007,(2007), the Court, while noting it is not a human rights court, affirmed human rights material jurisdiction through Articles 6(d), and 7(2) of the EAC Treaty.

119 Possi A, 'It's official: The East African Court of Justice can now adjudicate human rights cases' *AfricLaw.com*, 1 February 2016, citing *Democratic Party v The Secretary General of the EAC and 4 Others*, Appeal No. 1 of 2014. Possi cites a new appellate bench and sustained persuasive arguments by litigants as factors that led the development. With this case, Kenya's defeat seems almost complete.

120 *Manneh v The Gambia*, ECW/CCJ/JUD/03/08, 5 June 2008; *Saidykhan v The Gambia*, ECW/CCJ/RUL/05/09, 30 June 2009.

121 Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (2005 Supplementary Protocol) (2005).

122 Alter, Gathii and Helfer, 297-300.

The SADC T has probably faced the most severe example. Zimbabwe, having not taken lightly the Court's decision in favour of white farmers after their farms were compulsorily acquired without compensation in *Mike Campbell*,[123] moved the SADC Summit, first, to suspend the Court's operations, then to shut it down entirely,[124] only to reconstitute it with limited jurisdiction, including eliminating *locus standi* for individuals.[125] Land reform being politically sensitive in southern Africa, the reaction of SADC states in this example is typical of the extreme reactionary backlash from states facing the prospect of an international court limiting their political discretion.[126] While there is no evidence that the suppression of the SADC T was influenced by the earlier unsuccessful attacks against ECOWAS CCJ and EACJ, the earlier attempts indicate the difficulty states face in securing the subservience of international courts.[127]

The above review demonstrates that African states follow a long held trend of states defying international courts for adverse findings against them. One obvious difference here is that given their greater control over sub-regional courts' treaties, African states have reacted far more harshly, with reactions ranging from failed attempts to amend the ECOWAS Court Protocol to the nullification of the SADC Tribunal. It is also noteworthy that none of the sub-regional African courts' treaties provide for optional acceptance of jurisdiction. This review seems to indicate that states, when so politically empowered by limited diversity of interests, are prepared to suppress any independent thinking international jurisdiction. This state diversity factor may also explain the AU's reaction to ICC related conduct and the UNSC.

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123 *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) (5 June 2009).

124 Final communiqué of the 32nd summit of SADC Heads of State and Government, Maputo, Mozambique, 18 August 2012.

125 Killander M, 'On constitutional values, Marikana and the demise of the SADC Tribunal' *AfricLaw.com*, 23 August 2012; Mwanyisa P, 'The SADC Tribunal: Concerted efforts for waves of change we want to see' *AfricLaw.com*, 19 June 2015. See also, Alter, Gathii and Helfer, 'Backlash against international courts in West, East and Southern Africa', 293-328.

126 Tanzanian President Jakaya Kikwete is reported to have described the SADC T thus: 'We have created a monster that will devour us all.' See Quan M, 'Rising against the silencing of the SADC Tribunal: Tanzania' *AfricLaw.com*, 5 June 2015. This view by Tanzania is also another example of *dissonance* in African state practice on acceptance of international jurisdictions as compared with its continued support for the ICC.

127 For a discussion on factors that may affect independence of judges in relation to the EACJ, see Gathii JT, 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy', 24 *Duke Journal of Comparative and International Law*, 2014. See also, on the ICJ's practice in relation to 'political considerations', Sipalla H, 'The historical irreconcilability of international law and politics and its implications for international criminal justice in Africa' in Stormes J *et al* (eds), *Transitional justice in post-conflict societies in Africa*, 251-253.

Therefore, limited state diversity and lack of optional acceptance of jurisdiction seems to lead the defiant state to seek severe treaty amendments to an international court's competence, as opposed to simply withdrawing. This finding allows us to contrast with one other example of state defiance of an international jurisdiction where states lack both optional acceptance and political uniformity.

2015-6 witnessed a spectacular defiance of an international jurisdiction related to a long running feud over maritime delimitation and sovereign rights. China, having long asserted its claim to the Spratlies in the South China Sea,[128] rejected the controversial assertion of jurisdiction by the Arbitral Tribunal in *South China Sea Arbitration*.[129] After the decision, China boycotted the merits phase of the case and increased military activity in the disputed zone. China had, like Sudan in the case of the Rome Conference, raised concerns over the then proposed compulsory dispute settlement provisions of the UN Convention on the Law of the Sea at the 1970s Third UN Conference on the Law of the Sea. By way of compromise, certain matters, particularly maritime delimitation, were excluded from compulsory adjudication.[130] As such, China's rejection of the Arbitral Tribunal's jurisdiction and admissibility ruling draws parallels with *some* of the AU's arguments on the understanding of Articles 27 and 98 of the Rome Statute, and Rule 68 of the Rules of Procedure and Evidence.

3.3 Defiance or backlash?

The Inter-American Court is considered far more stringent than other regional human rights courts; in fact, in many ways the most stringent court on its state parties, especially as regards margin of appreciation and victim-centred remedies that are less concerned on balancing interests in international relations.[131] The CCPR's

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128 Kwiatkowska B, 'A regional approach towards the management of marine activities: Some reflections on the African perspective' 55 *Heidelberg Journal of International Law,* 1995, 479. Kwiatkowska notes 'tension caused by unresolved Spratlies dispute and [the] potentially unpredictable position of China claiming the entire South China Sea.'

129 Talmon S, 'The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility' *15 Chinese Journal of International Law,* 2016, relating to *Arbitration between the Republic of the Philippines and the People's Republic of China*, UNCLOS Annex VII Arbitral Tribunal, Award on Jurisdiction and Admissibility, 29 October 2015.

130 Talmon S, 'Denouncing UNCLOS remains option for China after tribunal ruling' *Global Times*, 3 March 2016.

131 Killander M, 'Interpreting regional human rights treaties' 7(13) *Sur International Journal on Human Rights*, December 2010, 145-154; Lixinski L, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law' 21(3) *The European Journal of International Law,* 2010, 585-604; For a critique of the Court's practice, see Neuman GL, 'Import,

'all or nothing' approach to Trinidad's attempts to exclude mandatory death penalty matters has also been criticised along similar lines.[132] Yet, it would seem that no court, no matter how pliant to state rights to accept international jurisdiction, as is the case of the ICJ, is immune to state defiance in the shape of competence withdrawal. The examples cited above lend credence to the view that the AU-ICC-UNSC clash is precisely consistent with the historical phenomenon of backlash against international jurisdictions.[133] In this sense, while backlash may be the action (which can range from treaty amendment to withdrawal), defiance of international obligations is the intention.

Our discussion thus far has allowed us to ascertain that states displeased with international jurisdictions will: withdraw optional competence if so permitted by treaty; will amend the jurisdiction's founding treaty even to the point of suppressing the jurisdiction if so allowed by treaty and lack of diversity; and in the exceptional case of China, will not denounce but use military and other expressions of state power to defeat the adverse findings.

In their objections to international criminal justice, the AU and its member states are clearly more displeased with the UNSC and European exercise of universal jurisdiction than with the ICC *per se*. Having failed to move the UNSC and European states appropriately, and UN Charter withdrawal seems unthinkable, the two tools of withdrawal threat and treaty amendment were redirected to the ICC and its Rome Statute and Rules of Procedure and Evidence, as we have demonstrated earlier. As international criminal justice is inextricably linked to the maintenance of international peace and security, and in light of the seldom discussed but formally manifest AU feud with the UNSC, we will now interrogate state practice on defiance of international organisations created precisely to ensure international peace and security.

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export, and regional consent in the Inter-American Court of Human Rights' 19(1) *The European Journal of International Law*, 2008.

132 Buergenthal T, 'The UN Human Rights Committee' 5 *Max Planck Yearbook of United Nations* 2001, *L*385 and McGrory G, 'Reservations of virtue? Lessons from Trinidad and Tobago's reservation to the First Optional Protocol' *23 Human Rights Quarterly,* 2001, 815, cited in Viljoen, *International human rights law in Africa*, 28.

133 See generally, Caron D and Shirlow E, 'Dissecting backlash: The unarticulated causes of backlash and its unintended consequences' in Ulfstein G and Føllesdal A (eds), *The judicialization of international law - A mixed blessing?* Available at SSRN: <https://ssrn.com/abstract=2834000>; Alter, Gathii and Helfer, 'Backlash against international courts in West, East and Southern Africa', 293-328; Huneeus A, 'Rejecting the Inter-American Court: Judicialization, national courts, and regional human rights'.

3.4 Withdrawals from international organisations

The preceding discussion has covered instances of defiant states employing their right to withdraw competence from an international jurisdiction to defeat adverse findings. This section reviews the history of withdrawal from treaties that create international organisations primarily to maintain international peace and security like the UN and the AU.

3.4.1 League of Nations to United Nations

The victor's justice charge, discussed earlier in relation to post-1945 war criminal tribunals, in some respects dates back to the Treaty of Versailles and its Covenant of the League of Nations. John Maynard Keynes called the 1919 agreements, a 'Carthiginian peace',[134] as 'the Covenant was tainted through its textual associations with the policy of massive reparations and the war guilt clause'.[135] In particular, the aggressor states were precluded from joining the League. However, following the Locarno Conference reconciliation, Germany was admitted to the League on 10 September 1926.[136] The optimism of Locarno was however crushed in 1933 when Germany, resisting challenges to their human rights record against Jews and Communists after the Nazis took over, denounced the Covenant of the League of Nations and withdrew from the League.[137] Similarly, Japan left the League in 1933 after the League condemned Japan's invasion and occupation of China in September 1931.[138] Italy in turn left in 1937 after the

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134 Keynes JM, *The economic consequences of peace,* Macmillan, London, 1920, cited by Crawford J, 'The Charter of the United Nations as a constitution' in Fox H (ed) *The changing constitution of the United Nations*,1997, 4.

135 Crawford, 'The Charter of the United Nations as a constitution', 4.

136 Duroselle JB, 'The spirit of Locarno: Illusions of pactomania' *Foreign Affairs*, July 1972.

137 Burns JJ, 'Conditions of withdrawal from the League of Nations' 29(1) *The American Journal of International Law,* January 1935, 40, 47. Even back then, Burns highlights the controversies around withdrawal provisions. For instance, she notes that the first draft of the Covenant was criticised by US senators for lack of a withdrawal provision. She also notes that the withdrawal provision in Covenant Article 1(3) was ambiguously worded, and adds Covenant Article 26 also contained language authorising withdrawal of membership by way of refusal of a state to accept amendments thus leading to cessation of membership.

138 Burns, 'Conditions of withdrawal from the League of Nations', 45-46. In a case similar to the Eritrea Ethiopia Claims Commission, *Partial Award Jus Ad Bellum*, 19 December 2005, Ethiopia's Claims 1-8 issued 72 years later, the League Assembly adopted a report noting the disproportionate and unjustifiable Japanese response beyond legitimate self-defence after the night of 18 September 1931, adding: '…the military measures of Japan as a whole, developed in the course of the dispute, [cannot] be regarded as measures of self-defence. Moreover, the adoption of measures of self-defence does not exempt a State from complying with the provisions of Article 12 of the Covenant.' *Official Journal [of the League of Nations]*, 1933, Special Supplement No. 112, 72 (Document A [Extr.J 22, 1933, VII, p.17), cited in Burns, 'Conditions of withdrawal from the League of Nations', 45.

League imposed economic sanctions against it for invading Abyssinia (present day Ethiopia).[139]

It is also noteworthy that, beyond the aggressor states, the League of Nations was troubled by three withdrawals by other states. On 24 December 1924, Costa Rica notified the Secretary-General of the League of its withdrawal, stating disaffection with the League's Assembly financial demands on Latin American states and enclosing a cheque covering its financial obligations to the League for the years of membership.[140] After expiry of the two year notice period, the League's Council efforts, communicated on 9 March 1928, to secure Costa Rica's agreement to rejoin the League met official challenge by Costa Rica on the meaning of the Monroe Doctrine and reasons for its inclusion in Article 21 of the League's Covenant.[141]

In addition, Brazil and Spain had, in 1926, served notices of withdrawal to the Secretariat of the League 'because both nations felt that they should be accorded permanent seats on the Council of the League of Nations, at the time when Germany was admitted to the League and given a permanent Council seat'.[142] Upon expiry of the two year notice period, the Council of the League, again on 9 March 1928, requested Brazil and Spain to reconsider their withdrawal decision. Brazil responded to reaffirm its withdrawal, while Spain rescinded its decision.[143]

By 1938, a year before the outbreak of war in 1939, Brazil, Costa Rica, Germany, Italy, Japan, had withdrawn from the League for diverse reasons. Validity of the reasons for withdrawal aside, these withdrawals nonetheless constituted unambiguous and undisguised moves by the concerned states to pressure the international organisation into accepting their particular interests. They thus constitute early but vivid examples of *state defiance of international obligations through withdrawals and withdrawal threats.*

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139 'Italy leaves League of Nations…News received calmly in London' *The Sydney Morning Herald*, 13 December 1937 (news report filed on 12 December 1937 in London). Available at Trove, National Library of Australia, -<http://trove.nla.gov.au/newspaper/article/17441091> on 20 February 2017.

140 Burns, 'Conditions of withdrawal from the League of Nations', 44.

141 Burns, 'Conditions of withdrawal from the League of Nations', 44, citing, *inter alia*, the *Official Journal of the League of Nations, 1928*.

142 'The League of Nations: Brazil out' *Time Magazine*, 21 May 1928, citing a new report featured in *Time Magazine* on 21 June 1926. In May 1928, *Time* was reporting an April 1928 note from the Brazilian government reaffirming Brazil's intention to withdraw. See -<http://content.time.com/time/magazine/article/0,9171,731754,00.html> on 20 February 2017; Burns, 'Conditions of withdrawal from the League of Nations', 44-45.

143 Burns, 'Conditions of withdrawal from the League of Nations', 45.

It was in a deliberate aim to redress the weaknesses of the Covenant of the League of Nations that the drafters of the UN Charter excluded a withdrawal provision but instead included, in Article 6, an expulsion provision. The Dumbarton Oaks proposals, Hans Kelsen recalls,[144] had expressly left out withdrawal provisions in the hope of precluding *'recalcitrant states' from extracting concessions by using threats of withdrawals*,[145] as witnessed with the League's experience,[146] and curiously as repeated contemporaneously with the AU-ICC divide. The drafters then, had in mind a truly 'permanent organisation'.[147]

When brought up to Committee, nineteen states voted for inclusion of a withdrawal provision while 22 states affirmed the Dumbarton Oaks position. With 51 founding members, fifty of whom attended the United Nations Conference on International Organisation, these numbers were representative of then existent states.[148] Thirty-eight states decided to insert a most insightful text into the Committee Report, whose reproduction below may be instructive:

> The Committee adopts the view that the Charter should not make express provision either to permit *or prohibit* withdrawal from the organization. The Committee deems that *the highest duty* of the nations which will become Members is to continue their cooperation within the Organization *for the preservation of international peace and security.* If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization. It is obvious, particularly, that withdrawals or some form of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organisation was revealed to be unable to maintain peace …[149]

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144 Kelsen H, 'Withdrawal from the United Nations' 1(1) *Western Political Quarterly*, March 1948, 29-43. See also, Abi-Saab G, "Membership and voting", in Fox H (ed) *The changing constitution of the United Nations,* British Institute of International and Comparative Law, London, 1997, note 4.

145 Kelsen 'Withdrawal from the United Nations', 29, citing United Nations Conference on International Organisation (UNCIO), Summary Report of Sixth Meeting of Committee I/2, 14 May 1945, Doc 314, 2. (author's emphasis)

146 James Crawford has reiterated the view that the UN Charter was drafted precisely to fill the gaps in the League of Nations system. See Crawford, 'The Charter of the United Nations as a constitution', 3-8.

147 Kelsen 'Withdrawal from the United Nations', 29.

148 46 states had been invited to the UNCIO. The Conference itself invited four more states. See '1945: The San Francisco Conference'-<http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> on 10 September 2016.

149 UNCIO, Report of the Rapporteur of Committee I/2 on Chapter III, Membership, 24 June 1945, Doc 1178, 4, cited in Kelsen 'Withdrawal from the United Nations', 29. (author's emphasis)

In practice, only one state has ever purported to withdraw from the UN Charter. On 20 January 1965, Indonesia notified the UN of its 'withdrawal'.[150] In effect, the Security Council and General Assembly 'reacted as if it were a withdrawal into mere temporarily "inactive" membership, under the standing invitation of the UN to reactivate the membership proper at any given time.'[151] On 19 September 1966, when Indonesia notified the UN of its 're-entry', 'the General Assembly accepted without objection the interpretation of Indonesia and the Security Council that Indonesia had only ended its cooperation, not membership,'[152] and full cooperation was thus resumed without a formal process of readmission. In effect, this event can be understood to have been a claim of withdrawal that was not so, and thus no effective UN practice exists of membership withdrawal.

The latest threat of withdrawal from the UN has come from Filipino President Rodrigo Duterte, who, on 21 August 2016, threatened to withdraw the Philippines, a founding member of the UN,[153] once its UN contributions were returned.[154] While it is quite impossible to state with any certainty whether Duterte would act on this threat and whether the municipal legal order would oblige him,[155] it is fairly certain

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150 Nizard L, 'Le retrait de l'Indonesie des Nations unies' 11 *Annuaire français de droit international*, 1965, 498-528. Nizard reports appeals by fellow Third World states to Indonesia to reconsider its decision, terming it as regrettable and dangerous, quite similarly to current views on the ICC withdrawals. Nizard disputes Kelsen and asserts the view, probably valid at the time, that Indonesia's capacity to withdraw was 'incontestable.'

151 Ginther K, 'Chapter II: Membership' in *The Charter of the United Nations: A commentary*, Simma B (ed), 2 ed, Oxford University Press, Oxford, 186, para.40.

152 Ginther, 'Chapter II: Membership', 186, para.40.

153 India and the Philippines, which gained independence in 1947 and 1946, respectively, participated in UNCIO. The Philippines gained independence from the US in 1935 but was occupied by Japan between 1942 and 1945, and signed the Declaration of the United Nations of 1942, thus being the basis for invitation to the UNCIO.

154 So LA, 'Can Duterte withdraw Philippine membership to UN?' *Philstar.com,* 22 August 2016.

155 Dr Juan Carlos Sainz-Borgo has suggested that, for states whose municipal regime vest treaty ratification authority in the legislature, treaty denunciation by executive action can be attacked at the competent municipal court as *ultra vires*, being that if the executive is incompetent to ratify a treaty it cannot possibly then be competent to denounce it, unless so empowered by municipal law. Personal communication with Dr Sainz-Borgo, March 2013. In this vein, the Philippine Constitution vests ratification authority with the Senate (see Article VII, Section 21, which provides that 'No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all members of the Senate'). The Philippine Supreme Court in *Commissioner of Customs v Eastern Sea Trading* has, 31 October 1961, G.R. No. L-14279, had distinguished between treaties and executive agreements. The latter are now ratified by presidential decree, as provided for by Executive Order No 459, series of 1997. See Malaya JE and Mendoza-Oblena MA, 'Philippine treaty law and practice' 35(1) *Integrated Bar of the Philippines Journal,* August 2010, 1-17, 2. See also, in relation to South Africa's ICC withdrawal, Woolaver H, 'International and domestic implications of South Africa's withdrawal from the ICC' *European Journal of International Law,* October 2016; 'South Africa opposition party challenges ICC withdrawal in court' *Reuters Africa*, 24 October 2016.

that if Duterte were to act on the threat of withdrawal, the General Assembly and Security Council are likely to react in a manner similar to their response to the Indonesian withdrawal in 1966.

3.4.2 Organisation of African Unity to African Union

The Charter of the Organisation of African Unity provided for withdrawal under Article XXXI on cessation of membership. Morocco, displeased with OAU's decision against its claim over Western Sahara and the admission of the Saharawi Republic as a full Member-State of OAU, exercised its right of withdrawal under Article XXXI in 1981.[156]

On transition from the OAU into the AU, the question of membership withdrawal at first seemed to have been overlooked. Article 31 of the Constitutive Act of the African Union, which is drafted similarly to OAU Charter Article XXXI, provided a procedure for the cessation of membership. Only a year after the AU's inauguration, in February 2003, and then again in July 2003, the AU Assembly adopted the Protocol on Amendments to the Constitutive Act of the African Union, whose Article 12 simply deleted Article 31 on cessation of membership. Girmachew Aneme and Ufuoma Lamikanra, citing the relevant Explanatory Notes, explain that the deletion aimed to reinforce continental unity, not to eliminate legal capacity.[157] However, the same Notes suggest that a state would have 'no grounds', presumably from a policy perspective, to withdraw and renounce membership and applicability of the Act.[158] This Protocol was, as at 2013, ratified by 28 states and requires at least 36 ratifications to come into force.[159]

Withdrawals from treaties, as a corollary of consent to be bound may be permissible and examples have been discussed above. While explicit withdrawal provisions provide clarity, those treaties that lack such provisions occasion the added burden on the disgruntled state to prove that the negotiating parties envisioned trea-

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156 Aneme GA, Lamikanra U, 'Update: Introduction to the norms and institutions of the African Union' *GlobaLex,* August 2015, note 22.

157 Aneme, Lamikanra, 'Update: Introduction to the norms and institutions of the African Union' *GlobaLex,* August 2015, Section 2, citing AU 'Explanatory Notes on the Libyan Proposals for amendment of the Constitutive Act of the African Union', Proposed Amendments to Articles of the Constitutive Act of the African Union, AHG/238(XXXVIII).

158 Aneme, Lamikanra, 'Update: Introduction to the norms and institutions of the African Union', Section 2, citing AU 'Explanatory Notes on the Libyan Proposals for Amendment of the Constitutive Act of the African Union', AHG/238(XXXVIII).

159 Viljoen F and Kuwali D, *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act*, Routledge, 2013, 65.

ty withdrawals. With treaties creating international organisations, such as the UN and AU that are primarily aimed at maintaining peaceful, secure and harmonious international life, legal capacity to withdraw is not straightforward. As evidenced in the League's example, such withdrawals, if permitted, could be seriously detrimental to the maintenance of international peace and security, hence the contest over the validity of such withdrawals.

In the first part of this chapter, analysis of AU Assembly decisions between 2008 and 2016 gave strong indications that UNSC and European state disregard for African state sovereign immunities and not ICC conduct *per se*, has been the key driver of AU Assembly objections to international criminal justice. In Part Two of our discussion, review of state practice in defiance of politically objectionable international findings shows withdrawal or treaty amendment to be the norm of state practice since 1920s. Since we have ascertained the not unusual nature of AU Assembly reactions to the international criminal justice, we now return to the politically charged underpinnings of AU Assembly behaviour towards the ICC, especially in light of the dissonance between individual African state practice and AU Assembly policy.

4 Resurgence of African sovereign equality claims and international rule of law

In the immediate aftermath of the January 2016 Assembly's official mention of collective withdrawal, it was opined that a mass withdrawal was unlikely to occur, given that any such withdrawal would not relieve the then key accused persons of their legal problems.[160]

However, the analysis of the relevant Assembly decisions above, and along the lines of Nyawo (on *dissonance* in state practice and Gramscian understanding of hegemony) and Moravcsik (on why formerly repressive states adhere to restrictive international obligations), urges us to ponder as to why, six years into the controversy, African states would be so bothered as to even contemplate official language on collective withdrawal.

The 12th AU Assembly (February 2009) simultaneously pronounced itself on the abuse of the principle of universal jurisdiction and the objectionable actions of the ICC.[161] The similarity of these two pronouncements, criminal proceedings

[160] '6 facts about the African Union Summit and the ICC' *#globalJUSTICE,* 4 February 2016.

[161] 12AUA, Assembly/AU/Dec.221XII); and 12AUA, Assembly/AU/Dec.213(XII).

against high ranking state officials,[162] seems to point to the Assembly's *core concern*: the perceived challenge to the sanctity of African sovereign immunities and the dismissal of official African objections to said challenges.[163] Seen in this light, the AU protests go to the heart of a fundamental principle of harmonious international life,[164] namely, sovereign equality.[165] The question of sovereign immunity continued to characterise the AU-ICC-UNSC clash until South Africa's announcement in 2016 of its intention to withdraw from the Rome Statute.[166] The clash also highlights the AU view that criminal prosecutions may threaten delicate peace processes.[167]

The language of the AU Assembly decisions increasingly becomes forthright, especially as the Libya and Kenyan situations are added to the situation in Sudan and the UNSC continues to ignore AU calls for deferral. Apart from the direct language betraying the AU's frustration at the dismissal of assertions of sovereign immunity and the dismissal thereof by the UNSC, the statements of African states solidly committed to the Rome Statute are worthy of some reflection.

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162 By contrast, the other relevant Decision adopted by the AU Assembly in this session was on the Hissène Habré case. See 12AUA, Assembly/AU/Dec.240(XII).

163 'UNDERSCORES that the African Union speaking with one voice, is the appropriate collective response to counter the exercise of power by strong states over weak states', 12AUA, *Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.213(XII), para.5 (see also paras.4 and 6).

164 11AUA, *Decision on the report of the Commission on the abuse of the principle of universal jurisdiction*, Assembly/AU/Dec.199(XI), para.5(i, ii).

165 Article 2(1), *UN Charter*; Article III(1), *Charter of the Organisation of African Unity*, adopted 25 May 1963, 479 UNTS 39; 'All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: a) States are judicially equal; b) Each State enjoys the rights inherent in full sovereignty; c) Each State has the duty to respect the personality of other States…' Also, *Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations*, UNGA Res. A/RES/25/2625, 24 October 1970 (It may be noteworthy that Preamble 3 of the 1970 Declaration bears some similarity, *mutatis mutandis* to Preamble 3, *OAU Charter*); Article 3(a), *Treaty Establishing the African Economic Community*, adopted 3 June 1991; *AU Constitutive Act*; ICJ, *Arrest warrant* case, paras. 1, 12(1), 17 (submissions by DRC), 53-60 (*ratio* of the Court). The ICJ makes it clear in *Arrest warrant* that sovereign immunities enjoyed by duly designated officials are not personal but are those of the state, that these entail jurisdictional immunities and are not aimed at impunity but rather at preserving harmonious international life (para. 53). To be clear, the ICJ affirmations and findings (paras. 70-71) only refer to the lack of legal capacity of municipal courts to vitiate the sovereign rights (immunities) of other states (para. 61).

166 Asin, 'The "great escape"', 165-180.

167 12AUA, *Decision on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of The Sudan*, Assembly/AU/Dec.221XII, para.3. See also, Mbeki T and Mamdani M, 'Courts can't end civil wars' *New York Times*, 5 February 2014; Murithi T, 'Sequencing the administration of justice to enable the pursuit of peace: Can the ICC play a role in complementing restorative justice?' *Institute for Justice and Reconciliation Policy Brief*, No 1, June 2010; Nyawo, 'Through Antonio Gramsci's lens', 216-233.

At the height of the AU-ICC-UNSC clash in 2013, coming on the back of the controversial regime change pursued by NATO under the guise of Resolution 1973[168] in Libya and the imminent start of the trial of Uhuru Kenyatta, Tanzanian President, Jakaya Kikwete, speaking at the 68th session of the UN General Assembly, urged the ICC to be '"responsive to the legitimate concerns of the African people" if it is to enjoy support and cooperation on the continent'.[169] While lauding the ICC as a milestone in the international criminal justice system, he added that 'Africa will not relent in demanding reforms in the Security Council', thereby noting the irony in the fact that the continent with the largest base of UN membership lacked a permanent seat on the UNSC. Kikwete argues further that '[o]ur collective failure to respond to this reality creates scepticism […].'[170] It is noteworthy that between 2008 and 2016 the AU Assembly has adopted a decision reiterating its common position on UNSC reform at every session, except the 13th AU Assembly. Kikwete's statement indicates the strong official African view that ICC conduct cannot be divorced from UNSC disregard of African sovereign equality.

The Ethiopian Foreign Minister echoed this view in November 2015:

> We firmly believe that, Africa's commitment to solve its problems by itself should be appreciated, and the trend of lack of trust must come to its end.[171]

At the October 2016 UN General Assembly session, Tanzanian Ambassador Tuvako Manongi affirmed Tanzania's view: 'All too often, avoidable misunderstandings, when left unattended or dismissed as inconsequential, grow into regrettable outcomes. … *Lectures and claims of high moral ground from outside the continent are unhelpful.*'[172]

In its statement reacting to the South African withdrawal, Botswana expressed its conviction that the ASP remained the 'most appropriate platform for state parties

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168 Staff Reporter 'Zuma lashes Nato for 'abusing' UN resolutions on Libya' *Mail and Guardian*, 14 June 2011.

169 'Heed African concerns, JK tells ICC' *The Citizen (Tanzania)*, 30 September 2013.

170 'Heed African concerns, JK tells ICC.' See also, Presidential Strategic Communications Unit, 'Respect Africa's decisions on any matter, Uhuru tells international community' *The Star (Kenya)*, 20 November 2016.

171 'Statement of HE Dr Tedros Adhanom Ghebreyesus, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia "on behalf of the African Union" at the 14th Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC)', The Hague, Netherlands, 18 November 2015, 5.

172 'Kenya criticises ICC as other African countries defend it' *Daily Nation.* Statements from Senegal and Nigeria lauding ICC victim reparations and fight against impunity, respectively, are also here reported. (author's emphasis)

to address concerns.'[173] This view is supported *inter alia* by ASP President Sidiki Kaba and former ICTR Prosecutor Hassan Jallow.[174]

In light of the foregoing analysis, it would seem that the underlying dispute concerns a perception among African states of being dismissed in international relations on matters of particular concern to them. Against this background, the ICC has been the weakest link in the chain that is this particular international legal-political landscape, and therefore also the first to break.

4.1 Africa's rejection of the International Court of Justice and the creation of ITLOS

This present clash is not the first time African states' mass rejection of an international tribunal has caused significant upheaval in international law. African states, 'widely disenchanted with the International Court of Justice because of its dismissal of the [first] *Southwest Africa* Case'[175] exerted considerable pressure during the Third United Nations Conference on the Law of the Sea for a new standing tribunal to be created to adjudicate disputes under the law of the sea regime that was under negotiation at the time. They thus wanted this new tribunal to reflect their interests and secure their full participation, a fact that 'explains, for example, the size of the International Tribunal for the Law of the Sea.'[176]

5 Conclusion

> If all law is dependent upon self-restraint in some measure to achieve its objectives, international law is especially dependent upon the restraint of states in fashioning their claims and positions, which in turn *depends upon the restraint of various actors in various internal political systems*.[177]

The foregoing three part discussion has attempted to understand the historical context of state defiance of international obligations deemed politically inexpedient

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173 Botswana, 'Statement on the withdrawal of South Africa…' 25 October 2016.

174 Mwagiru, 'ICC meeting turns out to be doleful affair'; 'Justice Jallow urges Government to reconsider decision on ICC withdrawal' *Foroyaa Newspaper (Gambia)* 28 October 2016. See also, Owiso, 'South Africa's intention to withdraw…' *AfricLaw.com*, 28 October 2016.

175 Oxman H, 'The rule of law and UNCLOS', 7 *European Journal of International Law,* 1996, 369, note 28.

176 Oxman, 'The rule of law and UNCLOS', 369, note 29.

177 Oxman, 'The rule of law and UNCLOS', 359.

with a view to better understanding the AU's threat of collective withdrawal from the Rome Statute.

Our discussion has shown, in Part One and Three, that individual African states, in their bilateral relations with the ICC, tend to behave at dissonance with their collective views at the AU Assembly. Individually, they continue to seek ICC exercise of jurisdiction in their territories while denouncing it at the Assembly. Part One and Three discussions have also shown that the collective African concern is disregard for African views and its implications in sovereign equality particularly at the UNSC.

Part Two has demonstrated that withdrawal and treaty amendment are the preferred tools of defiant states. In our discussions, we have distinguished state defiance from the non-implementation of decisions of international jurisdictions, which is far broader and conceptually distinct subject beyond our scope.

Precluding 'recalcitrant states' from extracting concessions by using threats of withdrawals,[178] has been an international concern since Dumbarton Oaks. Withdrawal practice has led international organisations such as UN and AU to seek to exempt explicit withdrawal provisions. International jurisdictions in turn have issued decisions limiting the parameters of valid withdrawal from optional competence in the interests of juridical security. Where state membership was sufficiently low in number and uniform in political outlook, as in the case of SADC and EAC, the relevant treaties have been amended to suit the political views of the respective defiant states.

Bringing these three parts together may help explain a few points. First, our three part discussion may further explain dissonance in African state practice. African states' primary collective concern is disregard for African sovereign equality as expressed in UNSC dismissal of African views, European exercise of universal jurisdiction and conduct of the ICC OTP and bench. UN Charter amendment or withdrawal is impractical as a response to these concerns, hence the redirected attacks on the Rome Statute and organising for concerted African effort at ASP for treaty and procedural rules amendment. This explains the late entry, six years into the clash, of overt Rome system withdrawal threats and actions. However, the internal political interests of several African states continue to promote bilateral ICC relations, hence the dissonance.

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[178] Kelsen 'Withdrawal from the United Nations', 29, citing UNCIO, Summary Report of Sixth Meeting of Committee I/2, 14 May 1945, Doc 314, 2. (author's emphasis)

Second, from the limited historical survey, it is clear that no international jurisdiction worth its salt has not suffered some defiance in the form of withdrawal, including by major powers in international relations. This however has not diminished such jurisdictions' integrity, but rather affirmed their value.

It would seem that anything other than a mass withdrawal would simply place the ICC and the Rome Statute firmly within the ranks of the international jurisdictions that have earned their stripes. It is of great import that a mass withdrawal from a multilateral treaty of such significance as the Rome Statute has never been attempted by states, let alone by states acting under the aegis of a 'regional arrangement.' As such, the effects of any such mass withdrawal on the structure and integrity of international law ought not be gainsaid. However, anything short of mass withdrawal would simply place such defiant acts as part of the general incoherent development of international law.[179]

Third, as mentioned above, state withdrawal, even individually, from an international 'juridical organisation,'[180] created to preserve peace and security, and therefore occupying a certain legal-political centrality, is a far more troubling matter.

Fourth, flowing from the example of African sub-regional courts, states are willing to exercise their full legislative powers to suppress adverse findings by international jurisdictions, provided they have sufficiently low numbers and political uniformity in treaty membership. In other words, numerical and political diversity protects international courts. Elsewhere, we have suggested that the proposed Malabo Protocol court is likely to suffer the same accusations of bias as the ICC.[181] This present reflection suggests that this view is not peculiar to Africa.

Lastly, and probably most importantly, is the question of balancing the AU's core concern and preserving the accountability mechanisms of atrocity crimes. Costa Rica, back in late 1926, became the first state to withdraw from the League of Nations, superficially over financial obligations to the League but more fundamentally in opposition to a critical concern: the inclusion of the Monroe Doctrine,

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179 '… complete unity has never existed in international law; and its development has always been uneven.' Schwebel S, 'The proliferation of international tribunals: Threat or promise?" in Andemas M and Fairgrieve D (eds) *Judicial review in international perspective: Liber amicorum Lord Slynn of Hadley*, Kluwer Law, 2000, 5.

180 'Convinced that *juridical organisation is a necessary condition for security and peace* founded on moral order and on justice,' Preamble 6, *Charter of the Organisation of American States*, 30 April 1948, 119 UNTS 3. (author's emphasis)

181 Sipalla, 'The historical irreconcilability of international law and politics…', 257-263.

offensive to Latin states, in the League's Covenant. African states as well, offended by European exercise of universal jurisdiction and UNSC disregard, have set out to attack the Rome Statute system. This has led to dissonance in state practice and created the false perception of a mutually exclusive two camp attitude; either for or against. While Africans and their states firmly support African efforts to cement our sovereign equality in international life, many are unwilling to support attempts to defy structures of accountability.

Issa Shivji captures a researcher's attempt to clarify their critique of a system they identify with: 'I must make clear that I do not doubt the noble motivations and good intentions .... But we do not judge the outcome of a process by the intentions of its authors. We aim to analyse the objective effect of actions regardless of their intentions.'[182] If this statement holds true, the African states acting in AU collegiality must urgently consider better ways of articulating their intentions as regards the AU-ICC-UNSC clash. As noted by Shivji above, one is rationally drawn to considering the objective effect of actions, not simply of intentions. This is all the more compelling when intentions are *not* articulated.

One would dare say that the concern for Africa's rightful place in international life appeals to a broad base of Africans, and that any African dissention on the official actions of their states relate rather to the dissonance described earlier.[183] The fact that none of the withdrawing African states has made equal efforts to ratify the Merged Court Treaty and its Malabo Protocol cannot but lend credence to such fears. Other matters of equal, if not greater import for African progress, such as the Doha Development Agenda[184] and other structures of unbalanced economic relations,[185] may also fall under this purview.

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182 Shivji G, *Silences in NGO discourse: The role and future of NGOs in Africa*, Fahamu, Nairobi, 2007, 2.

183 Nyawo, 'Through Antonio Gramsci's lens', 231, referring to the public comments of support for the ICC by Archbishop Desmond Tutu and Kofi Annan. Rasna Warah, for instance asks, 'With all the chest-thumping at the African Union about African nations being sovereign, and why they must exit en masse from the "colonial" International Criminal Court, I wonder why African heads of state have not demanded that France "liberate" these 14 African countries from what essentially amounts to economic slavery.' Warah R, 'What is AU doing to liberate the former French colonies?' *Daily Nation*, 8 February 2016. See also, the response of the then French Ambassador in Kenya, Maréchaux R, 'France has no hold over its former colonies,' *Daily Nation*, 23 February 2016; and a sur-rebuttal, Omanga D, 'CFA zone no saviour of African states' *Daily Nation*, 29 February 2016.

184 Kanade M, 'Chronicles of the Doha wars: The battle of Nairobi – Appraisal of the Tenth WTO Ministerial' 2(1) *Strathmore Law Journal*, August 2016, 155-164; Campbell H, 'How Kenya confirmed the deathbed of WTO: Reflections on the 10th Ministerial Conference in December 2015' *Pambazuka*, 8 January 2016.

185 Nyawo reports the suggestion that the European Union coerced African states to ratify the Rome Statute by amending the Cotonou Agreement to include an obligation to so ratify, which, given its resistance,

It would serve the AU and overall African interests well if, along with clear efforts towards strengthening the African human rights system[186] and African accountability for international crimes under African universal or international jurisdiction, the AU were to employ AU Assembly language adopting a broad and consistent view of its well-intentioned concern for African progress that places its concerns over sovereign equality into context. Without these, one can only view the current wave of Rome Statute withdrawals as state defiance, which neither strengthens the withdrawing state's position within the international community,[187] nor absolves that state from its obligations towards the prosecution of international crimes.

may have led to Sudan withdrawing from Cotonou. Nyawo, 'Through Antonio Gramsci's lens', 224. Nyawo however dismisses this view, given than a majority of African states had already ratified the Rome Statute before the Cotonou Agreement amendment, and that six African states resisted US pressure to sign bilateral immunity agreements. Nyawo, 'Through Antonio Gramsci's lens', 231-2.

186 Sipalla H, 'African agency in contested contests: A reflection on TrustAfrica's work in international criminal justice' in Mahomed H and Coleman E (eds) *Claiming agency: Reflecting on TrustAfrica's first decade*, Weaver Press, Harare, 2016, 46-47.

187 Sipalla, 'The historical irreconcilability of international law and politics…', 249-250, giving the example of the Soviet Union and its attempts to deny the UNSC its 'concurring vote' during the 1950 Korean Crisis.