



The failure of Pan-Africanism: a critical analysis of the AU's Collective Withdrawal Strategy

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Abstract

African states helped to create the International Criminal Court (ICC) in 2002. As a result of the violence that unfolded on the continent in the 1980s and 1990s, African states realized the need for an international judicial institution responsible for prosecuting perpetrators of gross human rights violations. They were instrumental in garnering support for the ICC. However, what began as a cooperative relationship between the African Union (AU) and the ICC has become strained. This became evident when some African states presented a collective withdrawal strategy at the AU Summit in January 2017. This strategy called for African states to unify in their rejection of a neo-imperial court, calling for states to subsequently withdraw from the ICC. However, it appears that African states are not unanimous in their rejection of the judicial institution, taking opposing positions on the issue of withdrawal.

This research explores the diverging African positions on withdrawal as a weakness of Pan-African unity. The lack of a common position concerning whether African states should remain or withdraw from the ICC is indicative of a drawback of African solidarity. This apparent lack of a common African position is detrimental to the AU in realizing an African unity. Through the use of a narrative and descriptive literature review, the study aims to trace how the narrative of withdrawal arose by outlining the positions of influential AU member states namely Burundi, Nigeria, Senegal and South Africa. This method will take into account key events which have distorted Africa's relationship with the ICC and altered the relationship amongst AU member states. Lastly, the disgruntlement of some African states with the ICC has augmented the AU's creation of regional judicial institutions. This study concludes that the Criminal Chamber in the African Court of Justice and Human Rights is currently not a Pan-African alternative to the ICC.

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List of abbreviations and acronyms

APRM	African Peer Review Mechanism
ASF	African Standby Force
ASP	Assembly of State Parties
AU	African Union
AUC	African Union Commission
CAR	Central African Republic
CICC	Coalition for the International Criminal Court
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of Congo
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
ICC	International Criminal Court
IMF	International Monetary Fund
OAU	Organisation of African Unity
OTP	Office of the Prosecutor
NEPAD	New Partnership for Africa's Development
PAC	Pan-African Congress
PSC	Peace and Security Council
PTC	Pre-Trial Chamber
REC	Regional Economic Community
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
WB	World Bank

Chapter 1: Introduction

1.1 Identification of the research theme

Relations between the AU and the ICC have significantly deteriorated over the last decade, to the extent that African states deliberated a mass African withdrawal from the ICC at the January 2017 AU Summit. The AU's attempted mass exodus was premised on the belief that the ICC holds an anti-African bias, which the Court has exercised by predominantly prosecuting African heads of state in recent times. African states have since perceived the Court as an imperial and neo-colonial institution predisposed to prosecute statesmen and officials on the African continent (Vilmer 2016: 1310). The AU's divergence from the ICC has a complex trajectory premised on the AU's belief that the way in which the ICC dispenses justice is selective and reflective of global power imbalances (AU Withdrawal Strategy 2017: 1). This stems from the ICC's prosecution of predominantly African cases. As of the 23rd of June 2018, the ICC is currently investigating 11 cases namely in Burundi, two cases in the Central African Republic (CAR), Côte d'Ivoire, Democratic Republic of Congo (DRC), Georgia, Kenya, Libya, Mali, Sudan and Uganda (ICC website 2018). Only one of the 11 cases which the ICC is currently investigating is a non-African country. This fact has legitimised the view that the ICC perpetuates global power imbalances and is selective in its dispensation of criminal justice. Furthermore, the fact that the ICC has prosecuted high-ranking government officials and statesmen has further entrenched the perception that the ICC is a neo-colonial court created to target Africa and its leaders. The ICC has investigated African presidents, including Sudanese president Omar al-Bashir, former Kenyan president Uhuru Kenyatta and deputy president Samuel Ruto, amongst others (Clarke et al. 2016: 15). In addition, the reality that global powers such as China, Russia and the United States are not party to the Rome Statute, the principal document creating the ICC, has further entrenched the view that ICC is biased in some parts of Africa (Ngari 2017). The ICC's perpetuation of power disparities between the global North and the global South along with its inability to counter the narratives of an ICC-African agenda have significantly reduced the Court's legitimacy in Africa.

It was no surprise that African states would eventually denounce the ICC, opting to pull out from the Court. After years of experiencing an embattled relationship, the African Union Commission (AUC) created an Open-ended Ministerial Committee in 2015 tasked with drafting a document to inform the discussion on a possible mass withdrawal from the ICC

(AU Withdrawal Strategy 2017: 2). In January 2017, the Collective Withdrawal Strategy was submitted at the AU Assembly of the Heads of State Summit in Addis Ababa (Igunza 2017). The withdrawal strategy proposed ways for African states to reject a neo-colonial institution and advance regional legal institutions. While the strategy was eagerly anticipated, it did not garner as much support as previously considered. The outcome of the withdrawal strategy failed to establish a common African position.

The January 2017 AU Summit indicated the polarisation of AU member states on the ICC. It became evident during the summit that African states were divided as pro-ICC states, anti-ICC states and “fence-sitting” states (Ngari 2017). The anti-ICC faction was represented by countries such as Burundi and South Africa, who made public their dissatisfaction by announcing their subsequent withdrawals from the international judicial institution (Igunza 2017). The pro-ICC bloc within the AU reiterated the importance of the ICC to deter future human rights violations on the continent, opting to remain signatories to the Rome Statute. Pro-ICC states like Nigeria and Senegal, for example, are conscious of Africa’s violent past, recognising that the fight against impunity has the ability to achieve peace and stability (Vilmer 2016: 1320). However, while there are states who have clearly positioned themselves, a considerable number of African countries maintained a vague stance on the ICC. The topic of an African mass exodus dominated the summit, highlighting the disparities amongst its member states. At the summit, eight AU members, namely Cape Verde, Liberia, Malawi, Nigeria, Senegal, Tanzania, Tunisia and Zambia, entered formal reservation on the decision to withdraw, with some states calling for more time to study the document (Ngari 2017). It was evident that African states are not unanimous in their view of the ICC.

The AU’s withdrawal strategy is predicated on the belief that African states must unite to reject a neo-colonial institution. The debate concerning whether African states should remain part or withdraw from the ICC has largely been influenced by Pan-African values and norms. African states who wish to withdraw from the ICC have repeatedly pointed out the Court’s bias in prosecuting African heads of state and government officials. These states believe that the Court is selective in its dispensation of justice and therefore African states party to the Rome Statute must collectively withdraw. This anti-ICC faction has employed the rhetoric of Pan-African unity to legitimise their process of withdrawal from the Court. African states who wish to remain part of the ICC have similarly utilised Pan-African rhetoric to remain part of the judicial institution. This pro-ICC faction, to a lesser extent, believe that the collective best interest of African states is to remain within the Court. The AU-ICC withdrawal debate has largely been influenced by ideals of Pan-African

unity and how African states can create and implement collective decisions. Analysing the diverging position regarding an African mass exodus, it becomes evident that African states have failed to reach consensus on the ICC.

The lack of a common African position is a challenge for the AU to pursue and practise its Pan-African norms. This study is relevant in that it aims to explore Africa's international relations, beyond issues of economic cooperation and trade, and illuminate the challenges the AU faces in exercising the norm of African unity and generating collective African positions. Pan-African unity can be conceptualised in terms of collective decisions regarding Africa's peace and security. On a broader conceptual framing, the study conceptualises the failure of African states to coalesce in regional and international institutions such as the AU and the ICC. As a continent plagued by violent conflicts, characterised by grave violations of human rights, Africa and its member states have an interest in making collective decisions that support international criminal justice. Considering Africa's turbulent history, any attempts by African states to withdraw from international criminal courts must be thoroughly investigated. Furthermore, the exodus of a significant number of states, or the withdrawal by influential and hegemonic African countries, has the ability to significantly undermine peace and security efforts on the continent. In the absence of an alternative, regional mechanism, perpetrators will continue to commit war crimes and crimes against humanity unabated directly opposing the AU's mission of maintaining peace and security in Africa. The lack of a functional African Court as a substitute to the ICC raises concerns about the AU's ability to halt impunity on the continent. The AU's wavering commitment to ending impunity and the attempted mass withdrawal of some African states signifies a threat to the ICC and its legitimacy and role in Africa. Without a credible judicial institution in place, the vision of a peaceful and secure Africa is illusory.

1.2 Literature overview

Pan-Africanism is defined as an expression of solidarity and cooperation amongst African countries and societies (Murithi 2013: 1). In broad terms, Pan-Africanism refers to a set of political ideas asserting that the African continent unite (M'buyinga 1982: 28). The ideology of Pan-Africanism which has its roots in the early twentieth century, was formed with the primary aim of ending the subjugation and oppression of African people (Murithi 2013: 2). According to Ndlovu-Gatsheni (2014: 22), Pan-African ideology emerged from the subaltern world, whereby the "wretched of the earth" resisted enslavement and colonialism. Pan-

Africanism developed as a resistance movement to counter white domination and hegemony. Proponents of Pan-Africanism believe that the pursuit of Pan-African ideals would eventually actualise dignity and self-determination for the African race. The principles of the Pan-African movement would manifest as the pursuit of self-determination, psychological emancipation and the resistance of imperialism for the black race (Maloka 2001: 42). These principles, which would eventually result in the liberation of Africa and her descendants, could only be achieved through African unity. Diaspora Africans and those living on the continent would have to coalesce to achieve their independence and self-determination.

This African solidarity made the Pan-African Congresses of the early 20th century a reality. The Pan-African Congresses (PACs) were a series of conferences created for the purposes of uniting Africans in the diaspora to jointly pursue their liberation. Murithi (2005: 23) describes the PACs as the first phase of institutionalising Pan-Africanism. The institutionalisation of Pan-Africanism refers to a formalised process whereby structures and activities are created to implement and exercise the ideals of the Pan-African movement. The PACs occurred between 1900 and 1945 served as a consolidated means for diaspora Africans to resist imperialism (Murithi 2005: 24).

The legacy of the Pan-African movement continued with the creation of the Organisation of African Unity (OAU) in 1963. The creation of the OAU was a natural progression of institutionalising the Pan-African movement. The OAU was the first attempt to bring together all African states under a single continental organisation (M'buyinga 1982: 45). Although, the OAU was established amidst grave ideological disputes on the continent as African states held polarised and competing visions on Africa's unity (Ndlovu-Gatsheni 2014: 25). African leaders disagreed on the economic, political and social methods to integrate their respective states. Hence, the genesis of the OAU was a compromise between three factions in Africa at the time, namely the Brazzaville, Casablanca and Monrovia blocs (M'buyinga 1982: 50, Ndlovu-Gatsheni 2014: 25). The Brazzaville group constituted African states loyal to France; these states prioritised economic cooperation amongst African states and were very moderate in their support of Pan-African unity (Ndlovu-Gatsheni 2014: 25). The Casablanca group was led by revolutionaries such as Nkrumah, who favoured a radical and decisive institutionalisation of Pan-Africanism (Ndlovu-Gatsheni 2014: 25). The Casablanca faction advocated for radical political unification of the continent as a prerequisite for economic cooperation (Maloka 2001: 29). Last, the Monrovia group occupied a middle ground calling for absolute equality and

sovereignty of African states prior to the continent's unification (Ndlovu-Gatsheni 2014: 25). With a plethora of methods as to how to go about constituting the OAU, the organisation became a product of compromise between the three factions and incapable of realising continental unity.

The AU replaced the OAU in 2001 under the auspices of the AU's Constitutive Act (Dersso 2014: 51, Murithi 2013: 4). The AU was intended to be a move away from an ineffective and bureaucratic organisation to a more nuanced and efficient institution. The decade of the 90s proved that humanitarian laws and principles were dormant in Africa and that the OAU was incapable of adequately addressing these matters (Maqungo 2000: 42). The new organisation would be founded on Pan-Africanist values and ideals. Murithi (2013: 4) states that "the emergence of the African Union in 2002 was the result of a logical progression of Pan-Africanism and a realisation by the continent's leaders and citizens of the need to adopt a policy platform to engage the world on a more equal footing". The transformed organisation led by a new generation of Pan-Africanists, including Thabo Mbeki, Olusegun Obasanjo, Abdoulaye Wade and Abdul-Azziz Bouteflika, would significantly alter the continent's future and bring about a prosperous Africa.

The AU would allow African states to develop policies to engage global powers on an equal footing, whereby African countries could contribute meaningfully to global changes, informed by their African identity. However, the capability of African countries to collectively advance their interests has always been undermined by a lack of political will and unity amongst African leaders. The AU, like its predecessor, has been unable to foster practical policies that can advance common interests. This is evident considering the AU's failure to consolidate a Pan-African position on withdrawing from the ICC. On paper, the AU as a collective is open to considering a mass withdrawal, however when considering the diverging positions of African states, the reality becomes stark. Currently, out of the 34 African signatories to the Rome Statute, only two states have taken active steps to withdraw from the Court, namely Burundi and South Africa (Allison & Du Plessis 2016). The rest of the ICC's African member states remain committed to being party to the Rome Statute. Hence, Murithi (2013: 5) makes the point that time and again, African countries have been unlikely to prefer collectivist decisions. Whilst Murithi makes this point in light of African solidarity on matters pertaining to the United Nations Security Council (UNSC), the same point can be inferred on the AU's relationship with the ICC. African states have never held a common position regarding the creation and functioning of the ICC. Furthermore, Africa's inability to present itself as a coherent whole in its relations with the outside world

will continue to mean that the continent is disregarded as a global powerhouse (Maloka 2001: 31). The logic of national self-interest and political realism still prevail in many African countries; more so than Pan-African ideals of continental integration and unity. The aim of this research is to explore the notion of Pan-African unity with regard to African states' withdrawal from the ICC.

1.3 Formulation and demarcation of the research problem

This research seeks to investigate the different perspectives on withdrawal through the lens of Pan-Africanism. This research contributes to understanding how Pan-Africanism, more specifically the idea of an African unity, has shaped the discussion of an African mass exodus from the ICC. Pan-Africanism provides a theoretical framework with which the AU-ICC withdrawal debate and the diverging African positions is analysed. This research seeks to uncover whether the diverging African positions on the ICC indicate of a failure of Pan-Africanism. The research problem analyses whether the absence of a common African position on the ICC is a failure of African unity. Although the relationship between the AU and the ICC has been extensively covered, few analysts have investigated the positions of individual AU member states and the way in which these positions have been formulated and influenced.

The research analyses the positions of four influential AU member states on withdrawal from the ICC. Analysing individual country positions will aid in understanding the disjuncture between why some African states are pro-ICC, while others vehemently reject the Court. Tracing the trajectory of Pan-Africanism and the institutionalisation of Pan-African ideals in structures such as the OAU/AU, the research seeks to analyse if the AU's collective withdrawal strategy has generated a resurgence of Pan-African unity on the continent or if African states have once again employed the rhetoric of Pan-African unity whilst simultaneously failing to make collective decisions. In addition, if African states formulate a mass African exodus from the ICC, who will subsequently be responsible for prosecuting individuals guilty of mass human rights violations? Is the proposed Criminal Chamber within the African Court of Justice and Human Rights a Pan-African alternative to the ICC?

The AU's collective withdrawal strategy and the individual country positions will serve as the units of analysis and will frame the discussion of an African mass exodus from the ICC. The research follows a longitudinal approach tracing key events that have significantly

impacted on the AU's relationship with the ICC. The research is time-bound, covering approximately ten years of engagement between the two institutions from 2008 until 2018, with the initial point of departure for the AU's split with the Court being the issuance of an arrest warrant against the Sudanese President.

The study is limited by the inadequate research on the prevalence and implementation of Pan-Africanism within the AU, as well as the withdrawal of African states from international legal institutions. The existing literature is centred on comparative legal cases surrounding the ICC's selection and prosecution of African cases. Furthermore, since both the AU and the ICC are relatively new institutions and their subsequent dispute serves as a contemporary phenomenon, the literature on individual country positions regarding the ICC is negligible. The fact that nominal data exists on the stance of AU members towards the Court means that the research will be limited in only accounting for member states that have been most vocal in their support or critique of the ICC. Last, since the ICC is an international judicial institution established by the Rome Statute, the study only accounts for AU countries that are signatories to the Rome Statute.

1.4 Research methodology

The study makes use of a systematic and comprehensive literature review. It specifically makes use of a scoping literature review that sets out an agenda for possible future research. A scoping literature discusses what is already known about a topic in order to focus on gaps, niches and blind spots within the existing literature (Grant & Booth 2009: 94). The research will further provide historical and contemporary Pan-African perspectives tracing and analysing key events that have resulted in the call for a mass withdrawal. The aim is to create a comprehensive assessment of Pan-African literature and its influence on withdrawal, as the topic of African states' withdrawal is a thematic issue for peace and security on the continent, which has not been extensively addressed. This descriptive study will aim to analyse the diverging African positions, possibly suggesting new research into compiling a database of African states and their respective individual positions on the ICC. Furthermore, the research expands into the regionalisation of international criminal justice institutions and the AU's capacity to create regional mechanisms to counter the ICC.

The research is primarily a literature-based study making use of primary sources such as the AU's Collective Withdrawal Strategy, the Constitutive Act of the AU, the Rome Statute,

the Malabo Protocol as well other decisions and resolutions made by regional or international institutions. Secondary sources will include journal articles, newspaper articles, reports and book chapters to compile the literature review recovered from libraries, online journals, as well as various websites of the AU, ICC, UN and other online platforms.

1.5 The structure of the research

This chapter has briefly touched on the AU's relationship with the ICC and the underlying divergence amongst African states with regard to the Court and its role in Africa. The following chapter traces the theory of Pan-Africanism conceptualising the genesis of the movement. It will trace the ideology of Pan-Africanism starting with the Pan-African Congresses, the creation of the OAU its and subsequent transition into the AU. This chapter will conclude with the institutionalisation of Pan-African structures in the AU. Chapter 3 contextualises the structure of the ICC and details watershed events that have led to the disintegration of relations between the AU and the ICC. Chapter 3 further outlines the diverging positions on the topic of withdrawal through the analysis of four country positions and the AU's collective withdrawal strategy. Chapter 4 examines the possibility of the African Court of Justice and Human Rights serving as a Pan-African alternative to the ICC. Last, Chapter 5 concludes with a set of recommendations aimed at improving the capacity of the AU to generate collective decisions concerning the ICC.

Chapter 2: Pan-Africanism reconsidered

2.1 Introduction

A resurgence of Pan-Africanism swept through the African continent at the beginning of the 21st century. The transition of the Organisation of African Unity (OAU) to the AU was an unexpected and surprising development on the part of African states. The birth of this new institution marked the beginning of a new dawn in Africa's future. The OAU subverting from traditional, archaic policies of non-intervention, would be transformed into a new institution embedded in the principal of non-indifference. The AU would afford the continent a new opportunity towards economic, political and social integration. Through the principles of African unity and solidarity, the AU would entrench Pan-Africanism in its various new institutions and policies. The transition from the OAU into the AU has been dubbed as an African Renaissance, however the extent to which this African Renaissance has been achieved is questionable. To understand the current status of Pan-Africanism in the AU and its structures, it is vital to first understand the evolution of the Pan-African movement. The following chapter traces the origins of the Pan-African movement to analyse how institutions such as the OAU and the subsequent AU have been embedded and founded on Pan-African ideals of unity and solidarity. This chapter aims to understand whether the AU has been successful in institutionalising Pan-African structures that are capable of forming a unified response to Africa's security challenges.

2.2 The origins of Pan-Africanism

The origin of the Pan-African movement traces back to the early 1900s when Pan-Africanism developed as a resistance ideology against slavery and colonialism. The theory of Pan-Africanism developed as a movement to liberate Africans and their descendants from oppression and racial discrimination. Suffering the brunt of colonial rule, Pan-Africanism developed as a means for Africans and Afro-descendants to pursue social, economic and political equality in their various societies (Murithi 2005: 11). Africans share a unique history of alienation and marginalisation by the West. The subjugation of the black race experienced over centuries has empowered African states to pursue common interests and depose colonial powers (Andrews 2017: 2501). This resistance movement would unite all Africans in their quest to liberate themselves from European hegemony.

Pan-Africanism would be an organised response to the conditions confronting the African people during colonialism. Destitute African-American communities, living largely in violent, anti-African communities could converge to form an organised response to their realities. This experience of white oppression helped to create a shared consciousness amongst Africans to resist hegemonic systems of rule (Young 2010: 153). This created an obligation and awareness amongst Africans on the continent and abroad that the only means for self-determination and liberation is through integration. The spirit of Pan-Africanism was born out of the shared plight amongst African people and a pivotal recognition that emancipation could only be achieved through unity. This African unity is one of the central tenets of Pan-Africanism.

2.2.1 Pan-Africanism as African Unity

Pan-Africanism has taken on different forms and come to have various interpretations at different historical moments and locations (Murithi 2005: 11). Traditional conceptualisations of Pan-Africanism are located within racial lines and identity politics bound by the slave trade and colonialism. However, the theory of Pan-Africanism has developed to the extent that, today, it relays the social and political integration of African states. As previously mentioned, one of the central tenets of Pan-Africanism is the norm of African unity. According to Matthews (2008: 27), African unity is the primary ideal with which African states can liberate themselves from colonialism and European oppression. This stems from the belief that Africa can only liberate itself from the yoke of colonialism through greater solidarity amongst its people.

It is important to note that African unity does not imply homogeneity. Africa is composed of various cultures, religions, languages and ethnicities that inform African societies in vast and contrasting ways. The theory of Pan-Africanism takes cognisance that as part of divide and rule tactics employed by colonial powers, Africans have always been divided amongst themselves and have been taught to compete (Murithi 2005: 8). What Murithi defines as African unity is simply a resolve for African states to coalesce in pursuing their shared interests. It is the recognition that dialogue in Africa will not always generate consensus, however that dialogue is crucial in informing Africans as to how they might commonly resolve their problems (Murithi 2005: 8). This form of African unity refers to a political integration of states.

2.2.2 Variants of Pan-Africanism

Whilst African unity is a central tenet, various other values and ideals are embedded within the theory. The ideals of unity, shared struggles and a responsibility towards kinsmen are all principles embedded in Pan-Africanism (Young 2010: 149). The theory can be understood in many antithetical ways, including radical politics of liberation, a liberal approach to integration and a common African identity (Andrews 2017: 2502). Taking this into account, Pan-Africanism can be interpreted as cultural and linguistic similarities, revolutionary overthrow of white hegemony or the demand of neo-liberal economic policies.

The most significant variants of Pan-African theory relating to this study are reactionary and revolutionary Pan-Africanism. Reactionary and revolutionary Pan-Africanism are merely two variants located in the broader conceptualisation of Pan-African theory. M'buyinga (1982: 44) states that revolutionary Pan-Africanism refers to a unitary strategy that strives for the political unity of African countries. This form of Pan-Africanism is employed to ascertain social and economic liberation of the African people. Gonidec (1982: 71), agrees that this notion of Pan-Africanism intends to significantly alter the living conditions of the masses. Revolutionary Pan-Africanism is a radical force centred on bringing about positive political developments. The approach taken by Nkrumah, as a stalwart of the Pan African movement, calling for the complete unification of the African continent, is an example of revolutionary Pan-Africanism. On the contrary, reactionary Pan-Africanism refers to a pseudo-unitary strategy put forward by African elites to evoke a false sense of solidarity. According to M'buyinga (1982: 44), reactionary Pan-Africanists emphasise the sovereign state, non-interference in internal affairs and the spirit of mutual tolerance as prerequisites to African unity. This variant of Pan-Africanism makes use of slogans and rhetorical statements regarding an African fraternity in order to dissuade the African people from actively pursuing their liberation.

Reactionary and revolutionary Pan-Africanism are just two conceptualisations of the theory of Pan-Africanism. These two variants are important in that they relate to the formation of the OAU. However, Pan-Africanism as an overarching ideal establishes principles to unite the African people in pursuit of emancipation and self-determination. The theory has various tenets and rather than being a unified school of thought, it broadly refers to the African struggle for equality and the freedom from economic exploitation and racial discrimination. Therefore, providing a singular definition of Pan-Africanism is challenging.

2.2.3 The failure of defining Pan-Africanism

Broadly defined, Pan-Africanism is a set of political ideas calling for the political, social and economic integration of the African continent (M'buyinga 1982: 28). However, providing a singular and concise definition of Pan-Africanism is complex. In fact, a number of authors have cautioned against the narrow and singular definitions of Pan-Africanism. Ackah (1999: 23) argues that due to the complex trajectory of the theory, Pan-Africanism defies definition as it has no particular founder or a solitary political tenet to which it is associated.

The theory of Pan-Africanism has developed along many juxtaposed and contrasting lines. Azikiwe (1965: 149) asserts that whilst the origins of Pan-Africanism are rooted in a political, racial resistance to white hegemony, the theory has developed in contrasting forms so that contemporary understandings of Pan-Africanism cannot be restricted to racial factors. Defining Pan-Africanism strictly in cultural, linguistic or racial terms would be futile. Any definition of Pan-Africanism must be broad to the extent that it encompasses the diversity of Africa's kinsmen (Azikiwe 1965: 148). The dangers associated with rigid definitions are that they directly oppose the inclusive nature of Pan-Africanism. Narrow definitions are exclusionary and in a continent with varying ethnicities, languages, religions and cultures, contracted conceptualisations of Pan-Africanism can create divisive lines in a continent characterised by elusive borders. Any operational definition of Pan-Africanism must be all-encompassing so that it includes Africa's kinsmen and diaspora. Therefore, Pan-Africanism broadly defined is a convolution of ideas regarding an African unity and solidarity for the purposes of social and political equality. Furthermore, one of the many challenges in defining Pan-Africanism stems from the fact that it can be seen as a theory, idea, ideal, inspiration or movement. Therefore, Pan-Africanism conveys a different understanding according to how and by whom it is defined.

Although providing a singular definition of Pan-Africanism is challenging, it is possible to trace the trajectory of the Pan-African movement. Pan-Africanism has its genesis in African-American communities of the early 1900s (Andrews 2017: 2502). The variant of Pan-Africanism conceived by the African diaspora was largely influenced by Pan-Africanists such as Marcus Garvey and W.E.B Du Bois and focused on ways to improve the living conditions of the diaspora (Kassandra 2016: 182). These Pan-African leaders created a series of conferences and congresses aimed at mitigating the social, economic and political realities

of Africans in the diaspora. The congresses were essentially a set of activities designed to relieve African descendants from various kinds of exploitation and oppression endured (Young 2010: 143). The following section traces the institutionalisation of Pan-African norms and ideals through the creation of the Pan-African Congresses (PACs).

2.3 The first phase of institutionalisation: the Pan-African Congresses

The Pan-African movement has been institutionalised in three phases. The institutionalisation of the Pan-African movement occurred with the inauguration of the PAC, the creation of the OAU and subsequently the establishment of the AU (Murithi 2005: 23). According to Murithi (2005: 23), the institutionalisation of the Pan-African movement refers to the process whereby structures are put in place to implement the ideals of the movement: "It is a pragmatic transition which seeks to regenerate African solidarity and unity to confront the adverse consequences of economic and predatory globalisation." This refers to the creation of formalised and consolidated activities to be carried out.

The PACs of the 20th century played a significant role in administering the Pan-African movement. The conferences were centred on ways to improve and alleviate the living conditions of diaspora Africans (Wa-Kinyatta 1973: 20). These PACs were an organised response by diaspora Africans to institutionalise the Pan-African movement. The following section expounds on the creation of the PACs as a means to institutionalise African unity and solidarity amongst diaspora Africans and those on the continent. This section largely concentrates on the first and fifth PACs as these two congresses brought about significant transformations to the Pan-African movement.

The first PAC took place in 1900 and was spearheaded by Sir Henry Sylvester William, one of the founding fathers of Pan-Africanism (Andrews 2017: 2503). A pivotal figure in the African-American civil struggle for independence, Williams organised the Congress with the objective of improved relations between Africans and Europeans (Andrews 2017: 2503). At the time, Pan-African leaders attempted to encourage relations between Africans and Europeans to improve educational, industrial and commercial enterprises amongst Africans in the diaspora (Murithi 2005: 23). The conferences aimed to expand the civil and political rights of African-Americans to pursue their business interests (Andrews 2017: 2503). As opposed to a radical call for the end to imperialism, the first Congress was an attempt by Pan-African leaders to improve relations amongst African-American and colonial communities.

The initial PAC was followed by four other Congresses convened between 1900 and 1945 (Murithi 2005: 24). The following PACs held in Europe attempted to bring about greater economic, social and political union amongst African communities. However, the initial conferences took place outside of Africa and were organised and attended by an African elite educated in the West (Andrews 2017: 2503, M'buyinga 1982: 31). Shaped by a Western education system, the ontologies of the various Pan-African leaders initially developed along similar lines. Hence, a number of scholars question the ability of the PACs to deliver on their mandates stating that the Congresses were passive in their approach to ending colonialism.

The Congresses of the early 1900s brought about little credible transformations in alleviating the living conditions of the African people. However, this failure was a by-product of the colonial regime, as European powers guaranteed that a mass congress would not take place on the African continent (Andrews 2017: 2503). Fearing that the Pan-African movement would find traction in Africa, the colonial powers prohibited the PACs from taking place on the continent. Consequently, the PACs were held at the seat of colonial power removed from the African masses. By ensuring that these Congresses were held in Europe, the Pan-African movement developed in a way that was favourable to the continuation of imperialism (Andrews 2017: 2503). Only African elites were allowed to attend the conferences (M'buyinga 1982: 40). This further entrenched the belief that the initial PACs were futile in altering the realities of the black race.

Separated from the masses and endowed by elitist notions, Pan-Africanism in the early 1900s developed along hierarchic, anti-revolutionary attempts to liberate the continent. Colonial powers continued to oppress and exploit African countries now supplemented by a black bourgeoisie. Thus, Andrews (2017: 2504) argues that Pan-Africanism has never been rooted in mass appeal. Pan-Africanism was never intended to nor has it ever achieved the support of the African masses; instead it continued to develop amongst African elites in formal settings such as the Congresses. Although the first PAC was instrumental in solidifying the ideas of the Pan-African movement, the Congresses that followed were deemed to be insignificant in transforming the lived experiences of diaspora Africans.

The fifth PAC held in Manchester in 1945 brought about much needed change for the Pan-African movement. The fifth PAC saw the transition of the movement from an antiquated and vulnerable Pan-Africanist movement to a reinvigorated liberation movement organised and led by leaders on the African continent. Kassanda (2016: 187) argues that the fifth PAC

took a substantive turn on “Africanizing Pan-Africanism”. The fifth PAC reverted the Pan-African movement to Africa and gave way to a new set of African leaders, with the likes of Kwame Nkrumah, Léopold Senghor and Ahmed Sékou Touré, who would determine the direction the reinvigorated movement would follow (Murithi 2005: 2). Furthermore, unlike the preceding meetings, the fifth PAC was attended by grass roots formations from Africa (M’buyinga 1982: 34, Ndlovu-Gatsheni 2014: 24). The fifth PAC was attended by workers, trade unions, farmers and students whose inclusion played a pivotal role in transforming the Pan-African movement (Kassanda 2016: 187, M’buyinga 1982: 34). The inclusion of civil society and trade unions meant that for the first time, the PACs took on a more radical and inclusive approach to liberation. Although the Conference was held in Manchester, the epicentre of the British colonial regime, the fifth PAC created a more consolidated and formalised response for the Pan-African struggle, focusing on the need for constitutional changes in Africa, the need for increased inputs to elevating universal suffrage and national independence as a precursor for African unity (Kassanda 2016: 187, M’buyinga 1982: 34).

The PACs played a defining role in the trajectory of the movement; they set out the principles to achieving African unity both at home and abroad. However, while the Congresses played a critical role in constructing the movement, the PAC’s placed rigid limits on defining Pan-Africanism (Young 2010: 149). Any definition of Pan-Africanism came to be closely associated with the Pan-African Congresses. Furthermore, it is important to note that the balance sheet of these meetings was rather modest in comparison to their mandates (Kassanda 2016: 186). Although the Congresses were instrumental in setting out the blueprint for African agency, in reality the declarations and petitions agreed upon during the conferences were given very little attention by the ruling systems (Kassanda 2016: 186). The apogee of these meetings was the creation of activities and platforms where the African voice could be heard. The conferences were instrumental in that they formed a more coordinated and formalised response to challenges facing Africa and her diaspora. The PACs were influential in allowing diaspora Africans and Pan-African leaders on the continent to converge and unite around common issues. The PACs served as the first phase of a coordinated and unified movement for the liberation of Africans across the continent and abroad.

2.4 The second phase of institutionalisation: the Organisation of African Unity

The creation of the OAU was a natural progression of the PACs. The OAU would serve as a second attempt to integrate the various activities and structures of the Pan-African movement under a single organisation. The OAU was a renewed effort at institutionalising Pan-Africanism on the continent. On the 25th of May 1963, African states concluded the Conference of Heads of State and Government in Addis Ababa, Ethiopia (Naldi 1999: 1). At this meeting, independent African states adopted the constituent charter of the newly formed Organisation of African Unity (Naldi 1999: 1). The OAU would generate the objectives of the PACs in achieving independence and self-determination for the people of Africa. The OAU would serve as a more formalised and established means for African states to liberate themselves from the last vestiges of colonialism (Murithi 2007: 2, Twala 2014: 103).

During the founding of the OAU, the majority of African states had either recently achieved their independence or were in the process of transitioning to become independent, sovereign states. The OAU was in part created to assist African states in maintaining their independence as well as securing the independence of African states still living under colonial rule. African countries realised that the best route to sustaining the gains of independence would be through greater unity and solidarity. The OAU would serve as a more consolidated form of Pan-African unity capable of assisting African states in their liberation struggle.

The organisation was established after 32 African heads of state and government adopted the Charter of the OAU (Mboup 2008: 96). The institutional structure of the OAU would be made up of the Assembly of Heads of State and Government, the Council of Ministers, the General Secretariat, and the Commission of Mediation, Conciliation and Arbitration (Naldi 1999: 19). Under Article 2 of the Charter (OAU Charter 1963: 3), the founding purpose and objectives of the OAU were:

- a.) "To promote the unity and solidarity of the African States;
- b.) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
- c.) To defend their sovereignty, their territorial integrity and independence;
- d.) To eradicate all forms of colonialism from Africa; and

- e.) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights”.

These objectives would essentially govern the OAU and its mandates. The OAU was created to intensify cooperation amongst African countries so that each state on the continent would finally achieve independence and sovereignty. According to Article 3 of the Charter of the OAU (OAU Charter 1963: 3), the principles of the OAU which member states must adhere to include:

- 1.) “The sovereign equality of all Member States;
- 2.) Non-interference in the internal affairs of States;
- 3.) Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
- 4.) Peaceful settlement of disputes by negotiation, mediation, conciliation, or arbitration;
- 5.) Unreserved condemnation, in all its forms, of political assassination as well as subversive activities on the part of neighbouring States or any State;
- 6.) Absolute dedication to the total emancipation of the African territories which are still dependent; and
- 7.) Affirmation of a policy of non-alignment with regard to all blocs”.

These objectives and principles would guide the organization. The aims and principles included in the Charter clearly emphasise the importance of territorial integrity and sovereignty of African states. As previously mentioned, this new organisation would allow African countries to converge around a common objective of dismantling the colonial system and building a united Africa.

Initially, there was great enthusiasm regarding the new organisation and the expectation attached to it. A federation of states would significantly alter the status of African countries in the international system (Azikiwe 1965: 152). However, there were many ideologically opposing views about the shape and structure that the OAU should take (Gebe 2008: 42, Murithi 2005: 26). Naldi (1999: 2), mentions that the period of the 1960s resulted in many ideological differences, and in some cases personal antagonisms, between newly formed African states. The founding of the OAU took place amidst fierce political and ideological contestations on the continent.

These contestations revolved around ontological and ideological debates regarding the form African unity would take. The opposing camps consisted of African states who viewed national sovereignty as an absolute right and competing factions who called for an immediate and complete union of Africa (Twala 2014: 106). These competing camps consisted of three factions, namely the Brazzaville, Casablanca and Monrovia factions (Gebe 2008: 42, Ndlovu-Gatsheni 2014: 25, Twala 2014: 106). Each of these factions held a specific method regarding Africa's integration. The Casablanca group was the most vocal and radical in its approach to African unity and comprised countries such as Egypt, Ghana, Guinea, Libya, Morocco, and Mali (Ndlovu-Gatsheni 2014: 25). These countries were committed to a federal system of states and open to fundamental cooperation amongst all African countries (Andrews 2016: 2506).

Spearheaded by Nkrumah, the Casablanca group called for a United States of Africa (M'buyinga 1982: 40). Nkrumah envisioned a complete social, economic and military integration of the African continent; however, he was directly challenged by the Monrovia group, who had other ideas on continental unity (Twala 2014: 104). Moderate in their approach to integration, the Monrovia group was formed by Ethiopia, Liberia, Sudan, Somalia, Tunisia and Togo, who regarded the principle of national sovereignty as *sine qua non*¹ (Gebe 2008: 42). The last faction was labelled the Brazzaville group, this group consisted mostly of Francophone countries including Ivory Coast and Senegal who continued close political and economic ties with their colonial ruler post-independence (Gebe 2008: 42). The Brazzaville faction gave preference to gradual forms of integration that would eventually grow into a more permanent form of unity (Twala 2014: 104). The reality behind the different ideological formations at the time was that some African leaders who had recently attained control from colonial administrations were unwilling to sacrifice their newly attained power (Gebe 2008: 45, Twala 2014: 105). These groups realised the need for a continental organisation to unite the African people, but were unwilling to prioritise group preferences over individual interests.

The competing ideological positions surrounding the creation of the OAU is what Kassandra (2016: 187) labels as the maximalist and minimalist approach to African unity. The former refers to the complete integration of African states in social, economic and political spheres. The maximalist approach is in line with Casablanca's approach to continental integration, calling for a supra-national entity to integrate African economies and develop a

¹*Sine qua non* means an indispensable and essential action, condition or ingredient.

common African market (Kassanda 2016: 188). The belief was that African countries needed to collectively grow their economies, espousing African unity before the dangers of nationalism and the nation-state evolved. On the contrary, the minimalist approach regarded the idea of a supra-national entity such as the United States of Africa as both premature and utopian (Kassanda 2016: 188, Twala 2014: 104). African states with their newly attained independence needed to focus on internal challenges such as improving service delivery, better health care and education, and improved systems of transport. This minimalist approach was represented by the Monrovia group, who prioritised national sovereignty over continental integration.

Similar to Kassanda's classification of minimalist and maximalist positions, the variants of Pan-Africanism represent the ideological factions at the time the OAU was established. The creation of the OAU served as a compromise between reactionary and revolutionary Pan-Africanism. Revolutionary Pan-Africanists who constituted the Casablanca group called for the immediate and complete integration of the African continent. Its leaders, such as Nkrumah, desired a radical economic, military, political and social integration of the continent espousing a united Africa. On the contrary, the Monrovia group consisted of reactionary Pan-Africanists who derailed the revolutionary project of creating a United States of Africa (M'buyinga 1982: 41). However, this group's vision for continental unity ultimately prevailed so that the principles of sovereignty and territorial integrity were founding principles of the OAU. These principles namely; the sovereign equality of all member states, non-interference in internal affairs and respecting the sovereignty and territorial integrity of all member states would form the cornerstone of the OAU and its Charter. This would indicate the extent to which African states were unwilling to negotiate their newly attained independence as a prerequisite to complete continental integration.

The predominance of these principles in the OAU's Charter relay the weakness of the OAU in garnering an African unity. The OAU ultimately became a concession between radical politics of integration and more gradual, intransigent form of African unity. The OAU was largely conceived to safeguard and solidify the political independence, sovereignty and territorial integrity of African countries post-independence. The various approaches to achieving continental integration and African unity were relinquished as soon as the OAU started to take form. African unity within the organisation would be promoted to the extent that it helped member states maintain sovereignty and territorial integrity.

2.5 Transition from the OAU to the AU

The OAU would eventually collapse as an ineffective and fragmented organisation. Because it was a compromise between various factions, the OAU was unable to generate collective decisions. Towards the end of the 20th century, it was evident that the organisation had failed in uniting the continent of Africa. The expectations surrounding the objectives and mandates of the OAU had clearly not been met. The OAU's first objective of promoting African unity and solidarity had become imaginary and elusive (Twala 2014: 103). Prior to the end of colonialism, African states shared suffering under European powers, which acted as a basis for the growth of the Pan-African movement (Matthews 2008: 32). Ironically, it was Africa's shared experience of oppression and exploitation that provided the basis for its unity (Muchie 2000: 305). However, once African countries had achieved independence, Pan-Africanism merely became rhetoric. The OAU was labelled a Pan-African institution to the extent that it sought the end of colonialism (Matthews 2008: 32). Once independence had been achieved, the ideals of African solidarity and continental integration became elusive. For example, under Article 2 (2) f, the OAU encourages members states to cooperate in the areas of defence and security (OAU Charter 1963: 3). In fact, the OAU created a Specialised Defence Commission to encourage African states to implement collective security strategies. However, the majority of these specialised commissions, intended to foster cooperation amongst African leaders in an array of fields including defence and security, eventually became inoperable (Naldi 1999: 30).

Furthermore, while the OAU was created with the primary objective of liberating African states from colonialism, the organisation had notably failed to sustain the human conditions for peace and security for its African constituencies (Murithi 2007: 2). The Rwandan genocide, the collapse of the state of Somalia and the violence in large parts of Africa, including Angola, Liberia, DRC, Sudan and Sierra Leone, led to the death of millions (Murithi 2007: 3). These factors continued to illuminate the limitations of the OAU in securing peace and security on the African Continent. The OAU was ineffective in protecting African citizens from the excesses of state power and brutality (Matthews 2008: 36). Founded on principles of territorial integrity and sovereignty, the OAU became an outdated and archaic institution incapable of addressing contemporary challenges facing African states in the 1980s and 1990s. The OAU was failing to implement one of its own founding objectives, namely to improve the coordination amongst its member states in order to improve the lives of ordinary citizens on the continent. Furthermore, the mandate

of the OAU to eradicate colonialism on the continent and uphold territorial integrity was no longer a contemporary challenge that African states had to contend with. Grasping onto outdated norms, the OAU needed to be transformed into a new institution capable of addressing the development and security challenges of African states.

2.6 The African Union

The creation of the AU serves as the most recent attempt by African states to create sound institutions to address common challenges on the continent. Murithi (2007: 3) states that the creation of the Union was the third phase of institutionalising Pan-African ideals. The AU, like its predecessor, was a formal organisation dedicated to pursuing and maintaining Pan-African norms. Whilst the collapsed OAU was often accused of defending orthodox notions of sovereignty, the AU was tasked with reinterpreting these principles (Lotze 2014: 197). The AU would become a transformed institution embedded in universal principles of human rights.

The Constitutive Act of the AU came into force on the 26th of May 2001 (Akopari 2008: 1). A year later, on the 9th of July 2002, the AU was officially inaugurated in Durban, South Africa (Mboup 2008: 96, Opongo 2014: 95). The AU's Constitutive Act is currently ratified by 55-member states after Morocco's re-admission to the AU (AU handbook: 5). The Union would be a new source to promote African solidarity and cooperation so as to address Africa's challenges. Unlike its predecessor, the AU would place the destiny of the continent in the hands of its people through the transformation and restructuring of its various organs and structures.

The AU is effectively managed by two supreme organs, namely the Assembly of the Union and the Executive Council. The Assembly comprises all heads of state and government of AU member states (AU handbook 2018: 22). All member states jointly determine the annual programme and policies of the AU and ensure their implementation (AU handbook 2018: 22). The Executive Council is responsible to the Assembly and is responsible for coordinating its decisions (AU handbook 2018: 30). Under Article 13 of the Constitutive Act, the Council is mandated with monitoring and executing the various decisions and policies made by the Assembly (AU handbook 2018: 30). The Executive Council comprises a representative from each member country, usually a Minister of Foreign Affairs from the respective state (AU handbook 2018: 30).

The last overarching structure in the organisation is the African Union Commission (AUC) based in Addis Ababa, Ethiopia (Murithi 2007: 3). The AUC was established under Article 5 of the AU's Constitutive Act and is currently chaired by the Chadian, Moussa Faki Mahamat (AU handbook 2018: 84). The AUC replaced the General Secretariat of the OAU and like its predecessor, the Commission is responsible for executing the general administrative functions of the organisation (AU handbook 2018: 84). Besides the principal organs, the AU has created a multiplicity of structures and organisations to ensure that it can implement its visions of a unified continent. The organisation has attempted to entrench Pan-African ideals through its various structures. The success of the AU will be determined by whether the organisation can transform the various ideals, norms and principles codified in its various structures and protocols into strategic policies. The following section expounds on the AU and its institutionalisation of Pan-African institutions.

2.6.1 The African Union and institutionalising Pan-African structures

The AU attempted to underpin the principal of continental integration through various means. In terms of its peace and security architecture, the AU created multiple subsidiary organs to prevent and manage conflicts on the African continent whilst simultaneously introducing human security doctrines as part of its broader objective of continental integration. The AU became aware that bifurcated and fragmented approaches to maintain security on the continent would continue to go in vain. The nature of civil wars and abstract borders drawn by colonial powers would ensure that conflicts resulted in spill-over effects. The AU would have to create institutions to remedy the effects of colonialism, which were exacerbated by its predecessor. The AU would have to promote its objectives of maintaining peace, security and stability through the creation of institutions embedded in universal principles of human rights.

The Peace and Security Council (PSC) is the primary organ created to prevent and manage conflicts in Africa (AU handbook 2018: 64). The PSC is a standing organ responsible for the prevention, management and resolution of conflicts (AU handbook 2018: 64). The protocol establishing the Council came into effect on the 26th of December, 2003 after Nigeria's signature constituted the necessary number of ratifications required (Adjovi 2012: 144). In essence, the PSC puts in place mechanisms to ensure timely and efficient response to conflicts and crises in Africa (Adjovi 2012: 145, Murithi 2007: 4). The mechanisms within

the PSC consist of the Panel of the Wise, a Continental Early Warning System, an African Standby Force, and a Special Fund (Adjovi 2012: 152, Murithi 2007: 4).

The Panel of the Wise is composed of five respected individuals who have significantly contributed to security, peace and development in Africa (Adjovi 2012: 152). The Continental Early Warning System constitutes an observatory and monitoring centre to accurately and timely dispense information to the AU and its various organs in order to prevent the exacerbation of conflict (Adjovi 2012: 153). The African Standby Force (ASF) was created to supplement the AU with an active military force. It comprises military forces from willing AU member states deployed for the purposes of peacekeeping (Adjovi 2012: 153). Last, the Special Fund was created to finance the operations of the PSC (Adjovi 2012: 154). Through liaison with other AU structures and guided by the Constitutive Act, the PSC is mandated to cover all aspects related to the prevention and management of conflict in Africa.

The AU has further enshrined human rights with the inclusion of specific articles in its Constitutive Act. The AU has codified the principle of non-indifference in its Constitutive Act through the inclusion of Article 4 (h) (Akokpari 2008: 372). Article 4 (h) sanctions the AU to intervene in the affairs of its member states to prevent war crimes, genocide and crimes against humanity (AU handbook 2018: 122). This provision allowing the AU to intervene to prevent mass atrocities and flagrant human rights abuses means that African governments can no longer perpetrate mass violence on their citizens.

The transition of the OAU to the AU allowed African states to create multilateral economic and developmental institutions under the AU. Amidst ideological and political shifts during the 1980s and 1990s, African states became aware that the various structural adjustment programmes (SAPS) imposed by the World Bank (WB) and the International Monetary Fund (IMF) exacerbated their economies, further indebting these states to European powers. Realising this, the OAU attempted to instil RECs as a to resolve Africa's declining economies. In fact, Mboup (2008: 95) argues that the transition from the OAU into the AU was essentially a shift from a more political form of Pan-Africanism to one centred on strong regional economic communities. African states became cognisant that democracy, good governance, human rights, peace and security were all interrelated conditions for the growth of African economies (Kannyo 2012: 215). The OAU and its successor responded to these challenges by the creation of multiple RECs on the continent.

After the creation of the OAU, these economic communities proliferated throughout the continent. Regional Communities like the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) were all established in the period from 1960 to 2000 (Mboup 2008: 95). Pan-Africanism within both the OAU and the AU is largely predicated on regional economic communities serving as the building blocks for continental integration. While Pan-African integration in the OAU was the creation of RECs, the AU predicated continental integration on regional economic bodies such as the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM). These frameworks were intended to set African states on a path towards sustainable growth, allowing them to participate in a global economy. These forums would allow African countries to dictate the development of the continent and compete in a global capital economy (Mboup 2008: 97).

NEPAD was established in 2002 as a solution towards Africa's continued socio-economic stagnation (AU handbook 2018: 98, Kannyo 2012: 214). It creates ways of improving Africa's peace and security by building a more constructive and conducive environment for development and growth (Murithi 2007: 6). The APRM supplements the activities of NEPAD by acting as a monitoring mechanism and was established at the inaugural AU Summit in Durban, July 2002 (Kannyo 2012: 222). It was another mechanism that affirmed the commitment of African leaders at the time to the principles of liberal democracy (Kannyo 2012: 222). Comprising five to seven eminent individuals, the APRM would monitor and assess the compliance of African governments with the norms of good governance and human rights (Kannyo 2012: 223, Murithi 2007: 7). The APRM serves as a voluntary, self-imposed mechanism for African governments to assess their governance standards to modify and improve governance and economic management in Africa. The APRM is important in that it challenges the norms of sovereignty and non-interference that African dictators have maintained for decades. Frameworks such as NEPAD and the APRM challenge these norms by allowing African states to assess and hold each other accountable.

Since its inception, the AU has increasingly continued to create forums, committees and councils in order to improve the socio-economic standards of ordinary citizens on the continent. The inclusion of the forums, mechanisms and organisation mentioned above has demonstrated the extent to which the AU has institutionalised Pan-African ideals. These

structures were Pan-African to the extent that they sought the wellbeing and advancement of Africa and its populations. In addition, the various institutions and organs listed above were created to ensure greater economic, political and social cooperation amongst African states. These institutions were meant to generate an improved sense of unity and collaboration on common issues affecting African populations. The AU has attempted to respond to the challenges facing the continent through the creation of institutions whereby African states can collectively respond to their common challenges.

2.7 Analysis: the success of the AU in garnering African Unity (the limits of Pan-Africanism)

The AU may have been successful in creating institutions that are labelled as Pan-African. However, the extent to which the AU has implemented these ideals and achieved a pragmatic African unity is precarious. This has left many scholars and practitioners wondering whether the AU is fundamentally different from the OAU or a repackaged form of its predecessor.

Since the decolonisation of the African continent, power struggles amongst African governments have served as the biggest threat towards achieving African solidarity (Twala 2014: 106). The OAU was controlled by and became ineffective due to the principles of territorial integrity and sovereignty. Having newly achieved their independence in the 1960s, African states were unwilling to relinquish their sovereignty to create an organisation capable of economically, politically and socially integrating the continent. The political and ideological disputes during the formation of the OAU resulted in a weak and fragmented institution that was incapable of truly uniting African countries. Furthermore, the OAU came to be viewed as a club of “big men” that supported and enabled the unconstitutional changes of government that occurred in Africa throughout the 1970s, 1980s and 1990s. Incapable of addressing developmental challenges and allowing African dictators to impose violent regimes, the OAU would eventually disintegrate as a bureaucratic and ineffective institution.

The challenge to African unity today is that African leaders continue to display the same rhetorical and fragmented approach to continental integration. The AU and its member states continue to adhere to outdated principles of sovereignty. The principle has continued to take precedence over ideals of African unity and solidarity. Whilst the AU is still considered to be an incipient institution, the resurgence of Pan-Africanism in the AU

has not taken full effect. The AU has continued a similar cycle of bureaucratic and ineffective institutions to the extent that the organisation has become another “talking club”. Inoperable institutions continue to plague the lives of millions of people on the continent. As stated by Houphouet-Boigny (1965: 40), “Africa can only seek her salvation through unity”.

African countries need to prioritise cooperation on matters of peace and security as prerequisites to achieving economic prosperity (Twala 2014: 107). The AU and its member states will fail to create a prosperous Africa if more effective means of cooperation and integration do not take place. The AU has already created the institutions and mechanisms necessary for African unity, the real challenge lies in whether these organisations conform to the various objectives stated in their charters, resolutions and policies (Gondicec 1982: 265). The AU’s biggest challenge lies in whether it is able to transform the Pan-African ideals, which it has adopted into practical and viable policies, and implement those policies accordingly. The only way to begin to enforce these policies is to tackle Pan-Africanism on the continent in a more radical and transformative way. Pan-Africanism in the AU needs to transform beyond theory and rhetoric towards concrete action. An African unity will only be achieved when the ideals that inform Pan-Africanism begin to manifest as progressive policies.

2.8 Conclusion

While the AU has made notable strides in institutionalising Pan-Africanism, the AU is not immune to criticism. The fact that the AU has successfully institutionalised Pan-African ideals in multiple structures does not equate to the AU achieving an African unity. The real challenge facing the AU is whether it can translate the various ideals, norms and principles located in the theory into effective and practical policies. The AU needs to prioritise peace and security as the underlying primary objectives for social integration on the continent. The wellbeing and security of African people must continuously serve as the primary objective of the AU and one which its member states must converge around. This resurgence of Pan-African unity should be founded on achieving human rights and the cessation of mass violence and conflict in Africa. The AU will only achieve its objectives if its institutions implement collective decisions regarding Africa’s peace and security, as prerequisites to the organisation attaining its other objectives. An outdated defence of

sovereignty over the principles of human rights and justice will continue to have detrimental effects for the AU and its member states.

Chapter 3: Decoding African positions on the ICC

3.1 Introduction

The decade of the 1990s was instrumental in pioneering human rights institutions in Africa. The continent was transforming regional organisations such as the OAU whilst simultaneously contributing to international criminal justice. African states had paid dearly for the absence of legitimate law and justice institutions in the preceding decade, the absence of which created a culture of impunity and a lack of political accountability amongst Africa's elite. The civil war in Rwanda and the injustice of the apartheid regime in South Africa continue to be a stark reminder that mass violence could be perpetrated in any region and at any time. With these realities in mind, African states strengthened their commitment to end impunity, recognising the need for an independent and permanent institution to prosecute perpetrators of gross human rights violations.

Africa's new commitment to developing a permanent judicial institution coincided with the transition from the OAU to the AU. At the onset of the 21st century, African states were eager to improve their human rights records by prosecuting individuals responsible for egregious international crimes and developing the AU as a bastion of peace and security on the continent. This renewed pledge witnessed the creation of the AU only eight days after the ICC's entry into force (Mills 2012: 412). African states and their leaders committed themselves to institutionalising human security doctrines within the AU as well as internationally. These states formed part of the "Like-Minded Group", a coalition of states that advocated for the creation of an international criminal court (Akande et al. 2010: 7). They played an instrumental role in securing the minimum number of ratifications required to enter the Rome Statute into existence. They took active steps to ensure that at least 60 other state parties ratified the Rome Statute (Chigara & Nwanko 2015: 253). While Africa's relationship with the ICC began on mutually beneficial terms, relations between the two actors have deteriorated over the last decade.

A number of African countries have been openly critical of the ICC, with states like Gambia labelling the ICC as an "International Caucasian Court" (O'Grady 2016). The emotive language is used to highlight power imbalances and racial discrimination between the global North and the global South, which has caused several African states to believe that the ICC is an instrument of Western powers. As previously stated, the fact that countries such as China, the United States of America and Russia have not ratified the Rome Statute

further entrenches this belief. Power imbalances and continued marginalisation of African states in the ICC has resulted in some AU states calling for a mass exodus from the Court. However, not all African states share the sentiments of the anti-ICC faction; it seems that African states are not unanimous in their view of the ICC and its role in Africa.

The following chapter will begin by contextualising Africa's relationship with the ICC. A brief history recording the role that African states played in creating the ICC will help to understand Africa's initial stance towards the ICC and the transition over the years. The watershed events that resulted in the AU's antagonism of the ICC are outlined, giving a historical and temporal context. Last, the chapter will conclude by analysing the positions of four countries, namely Burundi, South Africa, Senegal and Nigeria, to examine the lack of African unity regarding the ICC.

3.2 The creation of the ICC

The ICC is a permanent judicial institution created for the purpose of prosecuting persons responsible for the most serious crimes of international concern (Jallow & Bensouda 2008: 40). The Rome Statute entered into force on the 1st of July 2002 after the minimum number of ratifications was attained (Mbizvo 2016: 39, Chigara & Nwanko 2015: 253). The draft of the Rome Statute establishing the ICC was fiercely contested by state parties during the Rome diplomatic conference in 1998 (Vilmer 2016: 1336). All member states that adopted the draft Statute had the opportunity to significantly modify the provisions within the Statute according to their interests. The final draft of the Rome Statute was agreed upon by all member states attending the Rome diplomatic conference, which included many African states. The failure of African states to alter the provisions within the Rome Statute according to their geo-political interests would later be realised as a grave missed opportunity.

The ICC is responsible for prosecuting cases of genocide, crimes against humanity, war crimes and the crime of aggression (Rome Statute 2002: 3). Intended as a court of last resort, the ICC can only investigate and prosecute cases when domestic courts are unable or unwilling to prosecute (Rome Statute 2002: 13). The Court's ability to intervene where national governments have failed denotes that the ICC acts on behalf of the world's most vulnerable people (Mbizvo 2016: 39). Thus, the Rome Statute is representative of all heads of state and government officials as well as the citizenry of each of its state parties (Mbizvo 2016: 40). The Court that functions as the only international judicial body responsible for

prosecuting perpetrators of mass violence provides a safety net for millions of people around the world and is therefore crucial in fighting impunity in Africa.

Initially, the Rome Statute was intended to cover 12 crimes within its jurisdiction (Clarke et al. 2016: 13). During the Rome Conference, states debated the inclusion of crimes such as colonial/alien domination, trafficking in narcotics, apartheid, international terrorism, wilful and severe damage to the environment as well as the recruitment, use, finance and training of mercenaries (Clarke et al. 2016: 13). However, state parties attending the Rome Diplomatic Conference recognised that the Court's jurisdiction would be widespread and that most state parties would not agree to ratify the statute, effectively nullifying the state's power within its territory, these crimes were subsequently omitted from the draft (Clarke et al. 2016: 13). In order for the draft Statute to be approved and ratified, the ICC would have to avoid crimes that were too controversial or too widespread.

States in attendance finally agreed that the ICC's jurisdiction would cover crimes pertaining to the use of mass violence, namely crimes against humanity, war crimes and the crime of genocide. The crime of aggression was added to the jurisdiction of the ICC most recently on the 17th of July 2018 (ICC website: 1). The failure of African states to include crimes such as colonial and alien domination as part of the Court's jurisdiction was a grave missed opportunity for African states to advance their geopolitical interests in an international judicial body. The inclusion of these crimes would have allowed African states, vis-à-vis the ICC, the ability to prosecute acts of mass violence enacted on their territories by European powers. This would have been the first step in rectifying and holding Western powers accountable for atrocities committed on African territories, giving African countries the chance to address global power imbalances.

3.3 The structure of the ICC

The Rome Statute was adopted on the 17th of July 1998 and came into force four years later on the 1st of July 2002 (Nakandha 2012: 7). The architecture of the ICC composes the Presidency, an Appeals Division, a Trial Division as well as a Pre-trial Division, the Registry and the Office of the Prosecutor (OTP) and the Office of the Public Defence Council (Gentile 2008: 104). The Office of the Prosecutor is an independent organ responsible for achieving the objectives of the ICC. The OTP, currently headed by the Gambian Fatou Bensouda, is responsible for receiving referrals and information regarding the crimes within the Court's jurisdiction, examining the information and conducting investigations and prosecutions

accordingly (Gentile 2008: 105, ICC website 2018). There are three divisions within the OTP, namely the Investigation Division, the Prosecution Division and the Jurisdiction, Complementarity and Cooperation Division (Gentile 2008: 105). Together, these divisions are responsible for conducting investigations in accordance with the Rome Statute. The OTP has the responsibility of “investigating Rome Statute crimes, so as to unveil the facts and establish who is criminally responsible, to apply the law independently, objectively and fairly, and in doing so, contribute to the prevention of these crimes” (Mbizvo 2016: 40). The Registry effectively functions as the administrative organ of the ICC and is responsible for all administrative aspects regarding the management, finance and human resource organisation of the Court (Gentile 2008: 105). The Presidency comprises three elected judges out of a total of 18 judges and the three judges serve as President and First and Second Vice-Presidents (Gentile 2008: 105). The Office of Public Defence Council is created to protect and serve the interests of the accused during the early stages of investigations (Gentile 2008: 107).

The most critical aspect of the ICC related to this study and a grave point of contention between the AU and the ICC is the manner in which the Court acquires jurisdiction. In terms of temporal jurisdiction, the ICC can only investigate crimes that occurred after the Statute’s entry into force, namely crimes committed after the 1st of July 2002 (Rome Statute 2002: 10). The ICC exercises jurisdiction through a number of articles with the first being that any State Party or individual of that State Party may refer a case whereby alleged crimes that fall within the Court’s jurisdiction have been committed (Du Plessis 2008: 7). The second instance allows the Prosecutor to open investigations *proprio motu*²; this authorises the Prosecutor to open investigations where she/he has received credible information that egregious crimes have taken place (Du Plessis 2008: 8). Last, the Rome Statute empowers the UNSC to refer situations to the ICC for investigation (Rome Statute 2002: 11). This referral power allows the ICC to investigate any cases regardless of where and by whom the crime was committed (Du Plessis 2008: 8). This last mechanism whereby an external institution can direct cases to the Court has resulted in the antagonism of some African states towards the ICC.

²*Proprio motu* means by one’s own motion

3.4 Africa and the ICC

The preamble of the Rome Statute takes cognisance of the unimaginable atrocities that millions of women, men and children suffered in the preceding decades (Rome Statute 2002: 2). African countries that signed the Statute recognised that such egregious crimes would threaten the peace, security and well-being of people on the continent, adopting the Rome Statute as a precursor to peace and stability on the continent. Senegal, which was the first country to ratify the Rome Statute, signified that Africa and its leaders were ready to embark on a new journey of human rights, justice and liberty.

African states embarked on this journey by playing a critical role in the preparations for the Diplomatic Conference in 1998 where the Statute was adopted (Jallow & Bensouda 2008: 41). The Like-Minded group, composed of 16 African states, including Algeria, Benin, Burkina Faso, Burundi, Congo (Brazzaville), Egypt, Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland and Zambia, galvanised support for a strong and effective court (Akande et al. 2010: 26, Mbizvo 2016: 41). Civil society actors from countries such as Botswana and South Africa conducted interviews and held seminars and radio talk shows to lobby support for the establishment of the ICC (Jallow & Bensouda 2008: 42). South Africa, playing the role of a regional hegemon, lobbied within SADC for the creation of the Court. In September 1997, experts from SADC met in Pretoria to negotiate and align their interests in a supranational, judicial institution (Chigara & Nwanko 2015: 246). These states agreed on a set of principles that the various ministers of justice would approve before agreeing to vote on the constitution of the ICC (Du Plessis 2010: 7).

The impetus of these states eventually resulted in the Court's establishment. More than a third of the countries that had voted in favour of adopting the Statute, 41 out of 120 states, were from Africa (Mbizvo 2016: 41). Libya was the only African state present during the Rome Conference to vote against the ratification of the Statute (Mills 2012: 409). These regional approaches were significant in enhancing universal support of the ICC as well as fostering an improved understanding of the Rome Statute (Mochochoko 2005: 246). The regional initiatives allowed African states to have a better understanding of the Rome Statute and endeavour to contribute to the draft based on their interests and alignments. The list of African States Parties to the ICC and their date of ratification is presented below:

List of African states party to the ICC

No.	African state party to the ICC	Date of ratification
1.	Senegal	02-Feb-99
2.	Ghana	20-Dec-99
3.	Mali	16-Aug-00
4.	Lesotho	06-Sep-00
5.	Botswana	08-Sep-00
6.	Sierra Leone	15-Sep-00
7.	Gabon	20-Sep-00
8.	South Africa	27-Nov-00
9.	Nigeria	27-Sep-01
10.	Central African Republic	03-Oct-01
11.	Benin	22-Jan-02
12.	Mauritius	05-Mar-02
13.	Democratic Republic of the Congo	11-Apr-02
14.	Niger	11-Apr-02
15.	Uganda	14-Jun-02
16.	Namibia	25-Jun-02
17.	Gambia	28-Jun-02
18.	United Republic of Tanzania	20-Aug-02
19.	Malawi	19-Sep-02
20.	Djibouti	05-Nov-02
21.	Zambia	13-Nov-02
22.	Guinea	14-Jul-03
23.	Burkina Faso	16-Apr-04
24.	Congo	03-May-04
25.	Liberia	22-Sep-04
26.	Kenya	15-Mar-05
27.	Comoros	01-Nov-06
28.	Chad	01-Jan-07
29.	Madagascar	14-Mar-08
30.	Seychelles	10-Aug-10
31.	Tunisia	24-Jun-11
32.	Cape Verde	10-Oct-11
33.	Côte d'Ivoire	15-Feb-13

The African continent is well represented at The Hague, the headquarters of the ICC (ICC website 2018). The 33 African State Parties to the ICC make Africa the largest regional bloc represented at The Hague, even after the withdrawal of the state of Burundi. Currently, four of the 18 judges in the ICC are of African descent (Ambos 2016: 451). Mutua (2016: 53) states that Africa's support of the ICC in the 90s was premised on an emerging large and active civil society, which pressurised African leaders to end impunity on the continent. Africa is represented by an extensive list of civil society organisations and approximately 800 African NGOs are members of the Coalition for the International Criminal Court (CICC), making up almost a third of its constituency (Ambos 2016: 451). This shows the extent to which the Court is supported by the African continent espousing legitimacy from African governments and civil society groups alike. African states helped to create the ICC and currently play a prominent role in how the Court functions. Thus, the African continent has been and continues to be an integral part of the ICC's structure.

The expectation is that since a large number of African states ratified the Rome Statute that would automatically translate into meaningful support for the Court in Africa. However, the trend over the last decade has indicated that Africa's support for the ICC is merely quantitative and not qualitative in nature (Nakandha 2012: 7). That is not to say that all African countries do not support the ICC as the commitment of African State Parties differs in degree. The next section will provide an account of watershed events that have resulted in the discord between the ICC and the AU and some of its member states.

3.5 Background to the AU-ICC dispute

The AU and the ICC were established during tumultuous times in the international system. It is no coincidence that both these institutions were formed at the beginning of the 21st century as a measure to rectify the human rights abuse of the previous century. African states supported the transformation of the OAU and the creation of the ICC as part of a broader universal human rights and development agenda. African states, for the most part, supported the ICC as its founding values and principles were consistent with the formation of the AU. African states traversed this wave of human rights developments supporting the ICC as an extension of their commitment to human rights and justice. Whilst African states initially supported "Hague Justice", some African countries, including Rwanda, have become rather critical of the ICC and its role in Africa. Several states have critiqued the

ICC's dispensation of justice predicated on the ICC's selection criteria and the prosecution of African heads of state. Some African countries have subsequently launched a campaign against the ICC for its disproportionate prosecution of Africa and its leaders. The ICC's investigation and prosecution of specifically three African presidents initiated the dispute between the AU and the ICC. The case against the incumbent Sudanese President Al-Bashir, the case against the former Kenyan President Kenyatta and his deputy Ruto and the case against the departed Libyan President, Muammar Gaddafi, were watershed events in the AU's campaign against the ICC. These cases will be discussed below.

3.5.1 The Al-Bashir indictment

The AU's first point of departure from the ICC was the indictment of the Sudanese president, Omar Al-Bashir. He is charged with financing and deploying a rebel militia group responsible for committing war crimes that resulted in the deaths of approximately 300 000 and the displacement of millions in the Darfur region of Western Sudan (Mills 2012: 413). The United Nations (UN) was initially slow to react to the unfolding crisis, however in the latter part of 2004, the UN launched an inquiry which discovered that war crimes and crimes against humanity had been committed in Darfur (Mills 2012: 414). The UN faced tremendous pressure from the international community to stop the killings, which the UNSC reacted to by referring the matter to the ICC through resolution 1593 to begin preliminary investigations into the conflict in Sudan (Akande et al. 2010: 5, Mills 2012: 415, Seymour 2016: 113). The UNSC made the decision to refer the case to the ICC, invoking the Rome Statute as a preclusion to funding an expensive peacekeeping mission (Mills 2012: 415). This referral would set the precedent for AU-ICC relations in the years to come.

Awarded the responsibility of investigating the use of mass violence in Darfur, the OTP opened an investigation on the 6th of June 2005 (Mills 2012: 415). The decision to open investigation into alleged war crimes and crimes committed against humanity stirred no response from the AU; only when the OTP applied for an arrest warrant for the Sudanese president in July 2008 did the AU begin to respond to the UNSC's referral (Clarke et al. 2016: 15, Nakandha 2012: 9). The AU did not initially perceive the ICC investigation as a threat to peace and security in Darfur and did not condemn the previous arrest warrants issued against two high-level officials, Ahmed Harun and Ali Kushayb (Seymour 2016: 113). In March 2009, the ICC issued the first arrest warrant against Al-Bashir for war crimes and

crimes against humanity (Nakandha 2012: 9). A year later, the ICC Pre-Trial Chamber issued a second arrest warrant for Al-Bashir, this time on account of genocide (Akande et al. 2010: 6, Mills 2012: 415). The ICC had finally indicted an incumbent president along with other high-ranking officials of war crimes, crimes against humanity and genocide.

After years of maintaining silence on the crisis in Darfur, the AU was suddenly outraged by the ICC's decision to indict a sitting head of state. Several African leaders opposed the indictment, claiming that the ICC's decision undermined the promotion of peace and stability in Darfur (Clarke et al. 2016: 15). Ironically, some African states had earlier supported the UNSC's decision to refer the case to the ICC, and only when the prosecutor took active steps to indict a sitting head of state did African countries label the indictment a very dangerous political step (Clarke et al. 2016: 15). The AU's PSC reacted by first issuing a communiqué reiterating the AU's commitment to fighting impunity, and second, emphasising the AU's belief that the pursuit for justice should not impede peace efforts in Darfur (Nakandha 2012: 9). According to the PSC, the issuance of the arrest warrant against Al-Bashir was untimely and could significantly hinder peace processes in Darfur (Nakandha 2012: 10). The AU was aggrieved by the referral, insinuating that international criminal justice is inconsistently applied and furthermore, the referral had the ability to undermine the rule of law, stability and national institutions on the continent (Mills 2012: 420). This feeling of double standards and persecution would further hinder the development of African institutions and impede the development of a united Africa.

The AU's PSC continuously requested that the Court, through the provisions made in Article 16 of the Rome Statute, defer the case against Al-Bashir (Akande et al. 2010: 10, Mills 2012: 422). Article 16 of the Statute sanctions the UNSC to defer an investigation for a period of 12 months (Akande et al. 2010: 7). When the UNSC ignored the pleas of the AU for a deferral, African leaders took a collective decision to denounce the ICC at the 13th AU Summit in Sirte, Libya in 2009 (Abdulai 2010: 1). The AU's Assembly of Heads of State instructed member states to not comply with the ICC's decision to arrest and surrender President Al-Bashir (Akande et al. 2010: 6). Whilst the AU was concerned with the timing of Al-Bashir's indictment, vis-à-vis the peace process in Darfur, the failure of the UNSC to properly consider the deferral request further entrenched the perception that the UNSC, using the ICC as an instrument, was marginalising African states. The AU's position regarding the Al-Bashir indictment was further clarified in an AU extraordinary summit in October 2013 when the AU reiterated the decision that its member states would not comply with the arrest warrants under Article 98 of the Rome Statute (Vilmer 2016: 1323).

African states party to the ICC disregarded their obligations towards the Rome Statute opting to prioritise their obligations to the AU.

Interestingly, the position of African states regarding the Al-Bashir indictment has never been consistent or uniform. As previously stated, some African states had initially supported the UNSC's decision to refer the case to the ICC, and only when the ICC issued an arrest warrant against a sitting president were the calls for a deferral made. Furthermore, according to Mills (2012: 427), AU member states have inconsistently applied the AU's decision to disregard the arrest warrants. For example, Chad entered an official reservation in the AU's decision of non-cooperation with the Al-Bashir arrest warrant, while Botswana, South Africa and Uganda stated that they would prioritise their obligations to the Rome Statute and would arrest Al-Bashir accordingly (Mills 2012: 425). While hosting the 2010 Africa-EU Summit, CAR and Libya denied the Sudanese president entry into their respective territories (Gegout 2013: 806). On the contrary, Al-Bashir travelled to several African countries party to the ICC, including Chad, Djibouti, Kenya and Malawi, during the same period and was not arrested (Gegout 2013: 808). This indicates that African states have interpreted their obligations to the ICC in various ways and whilst some states have prioritised the AU amongst competing obligations, other African countries remain committed to the ICC.

The Al-Bashir case is a significant moment in the AU's history with the ICC for a number of reasons. First, the Al-Bashir indictment sparked the AU's antagonism towards the ICC. The Al-Bashir indictment was the first case to challenge the notion of presidential immunity of African presidents (Nakandha 2012: 9). It signalled to African states that the treaties that they had signed, notably in the interests of peace and justice, could now be enforced against them. Second, the indictment of a sitting head of state demonstrated that there was no consensus or qualified support for the ICC in the AU. The position of Africa regarding the Al-Bashir indictment was largely predicated on regional alliances and interests. Third, from a state perspective, the dispute between the AU and the ICC represents a clash of identities and interests as well as a set of competing obligations for African states. The Al-Bashir case has shown that Africa is experiencing a contradictory flux as its member states set out to establish their identities and deal with various internal and external pressures within the international criminal justice system.

3.5.2 The Kenyatta and Ruto case

Kenya's post-electoral violence in 2008 spurred the ICC's former prosecutor, Luis Moreno-Ocampo, to open investigations *proprio motu* into serious human rights violations perpetrated during the period of 2007 to 2008 (Vilmer 2016: 1322). The violence that unfolded after the elections and resulted in the death of approximately 1 000 people compelled the Kenyan government to launch an inquiry (Seymour 2016: 114). The Kenyan government which had set up the Waki Commission to investigate the post-electoral violence allegedly stalled the process and breached an agreement with the ICC to self-refer (Seymour 2016: 114). The Kenyan government had initially agreed to self-refer to the ICC for further investigation. Eventually, in November 2009, Ocampo requested that the Pre-Trial (PTC) division open an investigation into the post-electoral violence, which the PTC agreed to in March 2010 (Seymour 2016: 114). The prosecutor named high-level officials as suspects, including former ministers at the time: Uhuru Kenyatta and William Ruto.

Kenyatta and Ruto led a massive campaign against the ICC, calling for the UNSC to defer the case in February 2011 (Seymour 2016: 114). The attempt at deferral was ignored and Kenyatta and Ruto were forced to galvanise support elsewhere. Kenyatta and Ruto, having been elected as President and Vice-President earlier in 2013, joined forces to garner support from other African states (Mutua 2016: 54). Kenyatta initiated an AU Extraordinary Summit in October 2013 to discuss a mass withdrawal from the ICC (Seymour 2016: 115, Vilmer 2016: 1322). The Extraordinary Summit did not result in the withdrawal of any African state, but the AU continued to denounce the ICC at any given opportunity. The ICC proceeded with investigations into Kenyatta and Ruto at a time when African states began to begrudge the Court for its supposed fixation on prosecuting African leaders. Where Al-Bashir had failed, Kenyatta had managed to mobilise tremendous support within the AU for his deferral attempts. Kenyatta was able to unite the organisation by continuously calling for a deferral and politicising the AU's relationship with the ICC (Mutua 2016: 54). Although the UNSC did not defer the case, the investigations of Kenyatta and Ruto were eventually suspended as the Court found it difficult to amass evidence against them (Mutua 2016: 54, Vilmer 2016: 1323). Kenyatta had provided African leaders with a method to counter the ICC.

3.5.3 Libya

The Libya case, although not as impactful as the Kenyatta and Al-Bashir case, did have a bearing on the AU's support of the ICC. In 2011, Libya experienced popular protests spurred on by the Arab Spring. The protests eventually deteriorated into a civil war with various militias and insurgencies vying for power from the Gaddafi regime. In February of that year, the UNSC referred Libya to the ICC through resolution 1970 for further investigation (Mutua 2016: 54). A month later, the UNSC authorised a NATO-led intervention through resolution 1973, led by Britain, France and the United States (Seymour 2016: 114). According to Mutua (2016: 54), African states were enraged by the decision to refer Gaddafi to the ICC and perceived it as a way of hegemonic European powers disposing of an old enemy. However, the A3 members, South Africa, Nigeria and Gabon serving as non-permanent members in the UNSC at the time unanimously voted for Libya's referral to the ICC (Mutua 2016: 54).

When the ICC issued an arrest warrant for the Libyan president on the 27th of June 2011, the AU felt that its efforts to mediate the conflict were disregarded on the part of the ICC (Seymour 2016: 115). The AU was actively working on a resolution to end the Libyan conflict and felt that it had been bypassed (Mutua 2016: 54). The ICC's investigation came to a halt when the former Libyan president was captured and killed by militias. At the end of 2013, the ICC had set a precedent of prosecuting African presidents. Its relationship with the UNSC would have consequent ramifications for its relationship with the AU and the legitimacy of its prosecutions.

The ICC's indictment of African presidents has resulted in a major drift between the AU and the ICC. Determining the validity of the ICC's investigations into Al-Bashir, Kenyatta and Gaddafi is beyond the scope of this paper. What is important to note is the reaction by fellow AU member states and their contradictory and changing positions on the ICC and its prosecution of African statesmen. The AU's antagonism against the ICC was essentially born out of the cases discussed above. The sentiment that African states and their leaders were being persecuted was incessantly mentioned in the following years. In fact, some African states have based their antagonism of the Court based on the above cases and the ICC's alleged fixation of prosecuting African presidents. The following section analyses the countries that have been most vocal in their rejection of and support for the ICC.

3.6 Anti-ICC states

3.6.1 Burundi

On the 15th of October 2016, Burundi announced its exit from the ICC (The Guardian 2017). The President of Burundi, Pierre Nkurunziza, confirmed the decision after a vote passed in Parliament and the state subsequently notified the United Nations Secretary General (UNSG) of its forthcoming withdrawal as required by the Rome Statute (Stevenson 2016). A Burundi legislator had described the ICC as a “political tool used by powers to remove whoever they want from power on the African continent” (Stevenson 2016). Burundi’s withdrawal from the ICC came into effect on the 27th of October 2017, making it the first state to ever exit the ICC (The Guardian 2017). The withdrawal took place exactly a year after the Bujumbura government notified the UN of its forthcoming withdrawal.

Burundi’s decision to withdraw was widely seen as a measure for President Nkurunziza and other high-level officials to protect themselves from the ICC’s jurisdiction. Burundi’s decision to withdraw was made a few months after accounts of the regime’s wide-ranging violence and brutality had been documented and made public. In 2015, President Nkurunziza opted to run for a third presidential term, which violated Burundi’s constitution and instigated civil unrest in the country (Vikilahle 2018). When President Nkurunziza won a third consecutive term in office in the July elections, the PTC opened preliminary investigations following accounts of killings, torture, imprisonment, rape and other forms of crimes against humanity (The Guardian 2017). The State’s brutality, in silencing protesters opposed to President Nkurunziza’s third term in office, was recorded through a UN Independent Investigation report submitted to the UN in April 2016, a few months prior to Burundi’s announcement of withdrawal (Stevenson 2016). The documentation of alleged crimes against humanity caused the OTP to open preliminary investigations in Burundi (Miyandazi et al. 2016).

Following Burundi’s withdrawal, ICC officials have made it clear that the preliminary investigations opened in April 2016 would continue (The Guardian 2017). The fact that Burundi is no longer Party to the ICC does not impede the Court’s investigations. As previously stated, the ICC’s temporal jurisdiction authorises it to investigate crimes committed in the territory up until Burundi’s withdrawal took place, namely the 27th of October 2017. Amidst violence and political instability in the country, the decision to

withdraw from the Court asserted the notion that withdrawal was a calculated risk that served the interests of political leaders.

3.6.2 South Africa

South Africa's history with the Court is well documented. The state was an early advocate for the creation of the ICC playing a critical role during the Rome Conference (Du Plessis 2010: 8). As previously mentioned, South Africa was a major player in the build-up to the Diplomatic Conference hosting several neighbouring countries to negotiate the Rome Statute several times. South Africa's position as a champion of justice and human rights formed the basis of the state's post-apartheid foreign policy, which informed its decision to become the first state on the continent to codify the provisions of the Rome Statute into domestic legislation (Du Plessis 2010: 8). In 2002, South Africa became the first African state to domesticate Rome Statute provisions by passing the ICC Act (Du Plessis 2010: 8). South Africa currently forms part of only five African states that have consolidated domestic legislation with the Rome Statute (Fombad & Nwauche 2011: 22). The state was committed to prosecuting international crimes either through domestic processes or by cooperating with the ICC in fulfilling its functions and roles.

The last decade has altered a cooperative relationship between the two actors into a growing political crisis for South Africa. According to Mills (2012: 414), the first sign of breakaway occurred in May of 2009 during President Jacob Zuma's inauguration. As a Pan-African tradition to signify solidarity, all African heads of state were invited to attend the inauguration. As party to the Rome Statute, South Africa was obligated to arrest the Sudanese president should he attend the auspicious event (Du Plessis et al. 2013: 4). This created a diplomatic challenge for the state as it would have to choose between its legal obligations to the ICC or Pan-African obligations in allowing a fellow African statesman into the country. South Africa internally deliberated its decision, finally announcing that the government would be obliged to arrest Al-Bashir in accordance with its responsibilities towards the ICC (Clarke et al. 2016: 15). Although the South African government reinstated its support for the Court claiming that it would arrest al-Bashir upon arrival, the deliberation process indicated that this was the first time that South Africa had considered a move away from its obligations to the ICC. This would be confirmed a month later when South Africa made the decision to support the AU's verdict for non-cooperation with the Al-Bashir arrest warrant (Du Plessis 2010: 14). South Africa continued to hold a vague

stance by publicly supporting the AU's resolutions to discredit ICC arrest warrants whilst simultaneously affirming its support for the ICC and its mandate.

South Africa's position remained inconsistent until May 2015, when the South African government failed to arrest the Sudanese president upon his attendance of the AU Summit in Johannesburg (Stevenson 2016, Vilmer 2016: 1324). The failure of the South African government to arrest the Sudanese president after the High Court had passed an order prohibiting Al-Bashir from leaving the country triggered a confrontation between the South African government, the judiciary and human rights' organisations (Stevenson 2016). South Africa's decision to withdraw from the ICC is currently being challenged in court as a coalition of civil society organisations has taken the government to court (Allison & Du Plessis 2016). With considerable pressure from the international community, the state had to act quickly to protect its image by labelling the ICC as a Western tool with an African agenda.

In an attempt to save face, the government announced on the 21st of October 2016 that it would withdraw from the ICC (Veselinovic & Park 2016). In a press release announcing South Africa's exit, Minister of Justice and Correctional Service, Michael Masutha, declared that "South Africa was faced with the conflicting obligation to arrest President Al-Bashir under the Rome Statute, the obligation to the AU to grant immunity in terms of the Host Agreement and the General Convention on the Privileges and Immunities of the Organisation of African Unity of 1965, as well as the obligation under customary international law which recognises the immunity of sitting heads of states" (Veselinovic & Park 2016). According to the South African government, its obligations towards the ICC were inconsistent with AU provisions, awarding immunity to heads of states. In this instance, the state having to deal with competing obligations prioritised its commitment to the AU above its domestic legislation and the ICC.

South Africa had not only violated the Rome Statute, but contravened its own domestic legislation, namely the ICC Act of 2002. South Africa had notified the UNSG of its decision without any prior public debate or parliamentary approval and this meant that the country had violated its domestic legislation, rendering the withdrawal process unlawful. The High Court subsequently revoked the state's application to withdraw from the Court in March 2017 (Gumede 2018). However, a faction of South Africa's governing party (the ANC) has continued to hold a grudge against the ICC by stating that a renewed attempt to leave the Court would be made. This was reaffirmed when the ruling party announced during its

National Policy Conference in December 2017 that it was determined to exit the ICC (Gumede 2018). Whether South Africa remains part of the ICC is a decision likely to be made within the ruling party and one that would will not likely be made before the 2019 elections (Vikilahle 2018). Amidst policy uncertainty and deep ideological contestations within the ruling party, the South African government is likely to stall the decision until the national elections.

The decision of Burundi and South Africa to withdraw from the ICC is seen as a regressive step, considering the impetus that other African states may take in following their respective steps. Furthermore, considering South Africa's influential role as a regional hegemon, the credibility of the ICC has been significantly questioned. It is instructive to note the reasons why these states took measures to leave the ICC. The timing of Burundi's withdrawal is incongruous, taking place less than six months after the UN opened an investigation into possible crimes against humanity. Ironically, the AU's collective withdrawal strategy explicitly states that the Bujumbura government initiated withdrawal proceedings following the opening of a preliminary investigation in April 2016 (AU Withdrawal Strategy 2017: 6). The timing of Burundi's withdrawal indicates that the primary reason for its withdrawal was fear of prosecution amongst Burundi's elites, and the possibility that Burundian officials may be tried for murder, torture, forced disappearances and rape was a major cause for the state to denounce the ICC. On a similar note, the South African government acted in a self-interested manner when it condemned the Court. South Africa only made the decision to withdraw after it faced widespread criticism for not arresting Al-Bashir and violating its domestic legislation.

South Africa and Burundi have come to represent the anti-ICC faction within the AU. In rhetorical statements, these countries have taken up a Pan-African position in their rejection of a supposedly biased institution. However, the rationale that the ICC is a biased court that pursues an African agenda and therefore African states must collectively reject the Court is a false interpretation of Pan-African ideals. These states, like Kenya and Sudan, politicised the debate around the ICC's relationship with Africa to deter any further criticism and prosecution and in doing so undermined and weakened the anti-ICC position. These states have diluted the Africa-ICC discussion to consist merely of archaic, realist interpretations of state sovereignty and security. These states utilised reactionary Pan-Africanism to further their domestic interests. It is quite evident that the Court suffers from several systemic and structural issues and that its relationship with the UNSC is definitely of concern; however, the highly racialized and sensitised language is only damaging in trying

to improve the relationship between the AU and the ICC. African states are not completely absolved of fault when it comes to upholding human rights and ending impunity on the continent, hence the statements of double standard and persecution by the ICC tend to be rhetorical in and most cases fall on deaf ears. Hence, when states like Burundi and South Africa utilise Pan-Africanism to justify their positions, the rhetoric further weakens the Pan-African position and further obscures the actual challenges between the ICC and the AU.

3.7 Pro-ICC states

3.7.1 Nigeria

The continuous calls for an African mass exodus at successive AU meetings and Heads of State summits eventually resulted in several African countries publicly announcing their support for the Court. After years of dismissing the topic of withdrawal, increased criticism and denunciation of the Court finally led these pro-ICC countries to make clear their stance on the issue. The loudest of these voices stems from Nigeria and Senegal. Nigeria is arguably one of the ICC's strongest supporters in Africa and benefits from a rather amicable relationship with the Court. Nigeria was one of the few countries to vehemently oppose the call for withdrawal at the AU Summit (Kersten 2016). It is interesting to note that although Nigeria is under a preliminary ICC investigation amidst ongoing civil unrest in the country, the ICC benefits from a cordial working relationship with the state actively assisting the Court in carrying out its investigation (ICC website 2018, Kersten 2016). Nigeria is currently undergoing preliminary investigations into alleged war crimes and crimes against humanity concerning the excessive use of state violence in the armed conflict between the Nigerian army and members of the militant group Boko Haram (ICC website 2018). As opposed to other African nations, preliminary investigations into alleged human rights abuses by high-ranking government officials did not deter the country from committing to its ICC obligations; rather Nigeria has granted ICC officials entry visas and other logistical support to carry out the investigation. This indicates the extent to which the state supports the ICC's mandate and furthermore upholds its commitment to international criminal justice.

Nigeria's position as a pro-ICC state is informed by the state's active civil society. A number of civil organisation groups in Nigeria have been very vocal in their support for the ICC. These groups, which include the Affirmative Action Initiative for Women, the Civil Resource Development and Documentation Centre, the Coalition of Eastern NGOs, the Legal Defence and Assistance Project, and the Nigerian Coalition for the International Criminal Court, have ensured that Nigeria does not falter in supporting the ICC both domestically and abroad (Human Rights Watch 2016). These groups continue to advocate for human rights and justice both internally as well as at AU forums and meetings. The Nigerian foreign minister Geoffrey Onyeama emphasised the ICC's role in holding leaders accountable. The minister explained Nigeria's position on the issue of a mass withdrawal, stating that as the resolution was non-binding, each country had the right to withdraw on *a priori* basis (Daily Trust 2017). The minister's statement suggests that Nigeria is vehemently opposed to withdrawal, going further to suggest that since the withdrawal strategy is non-binding, Nigeria would not take part in a collective African withdrawal from the ICC.

3.7.2 Senegal

Senegal was the first state to ratify the Rome Statute establishing the ICC (Vilmer 2016: 1326). Being the first state to approve of an international treaty that more powerful states had not yet signed; a treaty that obliges states to prosecute their own individuals and a treaty that supersedes domestic legislation was a rather audacious move on the part of the Senegalese government. The government's support for the ICC has not waived since its ratification of the Statute and currently Senegal along with South Africa, Uganda, Kenya and Burkina Faso are the only African states to have domesticated the Rome Statute (Fombad & Nwauche 2011: 22). Senegal, like many of its African neighbours did not initially challenge the repeated criticisms against the ICC. Up until 2015, the state had been relatively quiet, at least publicly, on condemning other African states for denouncing the ICC (Kersten 2016). However, after increased denigration against the Court following the Al-Bashir dilemma in South Africa in 2015, Senegal along with other African countries moved to act on the issue.

According to Kersten (2016), Senegal was amongst several states that attempted to proscribe the withdrawal debate from reaching the subsequent July 2017 AU Summit in Kigali, Rwanda. These states wished to prevent the topic of mass withdrawal from reaching

the agenda of the next summit. Senegal vehemently rejected a mass exodus from the Court, acknowledging the role that the ICC plays in upholding justice and ending impunity on the continent. The Senegalese government opposed the withdrawal of any African state from the ICC to the extent that it publicly condemned the actions of Burundi and South Africa (Allison & Du Plessis 2016). The Senegalese Minister of Justice, who also happens to be the President of the ASP, has urged Burundi and South Africa to reconsider their positions (Vilmer 2016: 1336). Eventually, the attempt by these states to keep the withdrawal strategy off the agenda at the AU Summit failed. However, the presentation of the strategy at the AU Summit made other African states realise the need for a pro-ICC voice in Africa.

It is critical that this faction within the AU make their support of the ICC public for two reasons: first, a pro-ICC voice is needed in Africa to prove that African countries still value humanitarian norms and are genuine in achieving peace and security on the continent by forming part of a broader international criminal justice system. “Anti-ICC African states have relied on the silence of most African states when it comes to the continent’s relationship with the Court” (Kersten 2016). This anti-ICC faction, led by countries such as Burundi, Kenya and Sudan, amongst others, have benefitted from the silence of pro-ICC and fence sitting states in Africa. This has allowed members of the anti-ICC faction to continue to commit crimes unabated without fear of reprisal by other African states or the international community.

Second, this pro-ICC faction indicates that criticism of the ICC is not widespread within the AU. African states are not unanimous in their rejection of the ICC. The AU’s attempt to pass a resolution drawn up by and for the purposes of a few government representatives and officials is contradictory to the AU’s objectives and its Constitutive Act. It is important to note that Nigeria and Senegal are not the only countries opposed to a withdrawal. According to Human Rights Watch (2016), Burkina Faso, Cape Verde as well as the Democratic Republic of Congo have reinstated their commitment to the ICC by entering formal reservations to the AU’s decision of mass withdrawal. Hence, there exists a significant number of African states who reject the AU’s collective withdrawal strategy and whilst the majority of African states hold vague and unclear stances towards the ICC, the contrasting positions of Burundi, Nigeria, Senegal and South Africa have indicated that a common Pan-African position towards the ICC does not exist.

3.8 The AU's Collective Withdrawal Strategy

A collective withdrawal strategy was submitted to AU member states at the 28th AU Summit in Addis Ababa, Ethiopia (BBC 2017). The reason provided for the creation of the withdrawal strategy was the ICC's dispensation of prosecutorial justice. The preface to the withdrawal strategy asserts that African states no longer perceive the ICC as a beacon of justice (AU Withdrawal Strategy 2017: 1). African countries who made significant contributions towards its creation no longer hold the Court in high regard. The strategy declares that "growing numbers of African stakeholders have begun to see these patterns of only pursuing African cases being reflective of selectivity and inequality" (AU Withdrawal Strategy 2017: 1). The document further reiterates how global power imbalances in international decision-making processes have effectively side-lined African states from decision-making processes on the African continent. According to the withdrawal strategy, these power imbalances have led to an inconsistent and unreliable application of the rule of law whereby the interests of the UNSC Permanent Members are promoted (AU Withdrawal Strategy 2017: 1). In turn, these decisions raise issues of selectivity and bias within the international criminal justice system.

The withdrawal strategy acknowledges that the various attempts by the AU and its Open-ended Ministerial Committee to mitigate the relationship with the ICC have become futile. The AU, as previously stated, has requested on multiple occasions that the proceedings against sitting heads of state and government be suspended, to no avail. As a result, the Open-ended Ministerial Committee was tasked with developing a strategy that would allow African states to consider collectively withdrawing from the ICC.

The Open-ended Ministerial Committee of Ministers of Foreign Affairs on the International Criminal Court was established at the 25th AU Summit in Johannesburg in June 2015 (AU Withdrawal Strategy 2017: 2). The Open-ended Committee was created for the purposes of implementing the various decisions that AU member states took regarding the ICC, more specifically the AU's requests for deferrals (AU Withdrawal Strategy 2017: 2). In 2016, the Open-ended Committee was tasked with developing a strategy to coordinate a collective African withdrawal that would inform the decisions of its member states at successive AU summits (AU Withdrawal Strategy 2017: 2). The withdrawal strategy would be considered by the AU and African states party to the ICC. The objectives of the withdrawal strategy are to (AU Withdrawal Strategy 2017: 2):

- 1.) “Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
- 2.) Institute legal and administrative reforms of the ICC;
- 3.) Enhance the regionalisation of international criminal law;
- 4.) Encourage the adoption of African solutions for African problems;
- 5.) Preserve the dignity, sovereignty and integrity of Member States.”

This strategy would not only indicate the extent of Africa’s disapproval with the Court, it would also signify that unless significant legal and administrative reforms occurred within the ICC, then African states would no longer form part of it.

Those supporting the withdrawal strategy, which is ostensibly guided by Pan-African ideals of unity and solidarity, believe that if implemented, the withdrawal strategy would serve as an African solution to a common African problem. Proponents of the strategy believe that due to the UNSC’s subjugation of African leaders, vis-à-vis the ICC, African states will collectively band together to challenge the ICC in order to bring about a more equitable dispensation of international justice. Hence, the strategy’s fundamental aim, in line with objectives listed above, is to make African countries cognisant of the ICC’s African agenda, which would ultimately create a common anti-ICC position that challenges the Court’s bias and selectivity. The Open-ended Committee recognises the importance of a collective position, stating that “the collectiveness of the action (withdrawal) has the potential to radically reconfigure existing forms of international cooperation” (AU Withdrawal Strategy 2017: 6). African states solidifying their anti-ICC position would give the ICC impetus to reconfigure the international criminal justice system.

The withdrawal strategy presumes that a large majority of African states wish to withdraw from the ICC. The assumption is that due to Africa’s deteriorating relationship with the Court over the last few years, African states are willing to exit the Court en masse. The political battles between the ICC and Africa and the drafting of documents such as the withdrawal strategy have created the perception that African states are unanimous in their rejection of the ICC. These false and incomplete narratives have created the image of a univocal African continent with a singular, common position on the ICC. These false and oversimplified accounts fail to consider the varying positions of African states on the ICC. Perceptions on the ICC in Africa differ among innumerable audiences ranging from government officials, national courts, local communities, sub-regional organisations and civil society groups (Clarke et al. 2016: 6). The way in which these groups perceive the

Court can differ in many directly opposing ways, ranging from full support to complete denunciation of the ICC.

Furthermore, it is important to note that African states are not unanimous in their rejection of the ICC. As stated above, African states are divided into pro-ICC, anti-ICC and fence-sitting states. Some African states such as Nigeria and Senegal have clearly and significantly supported the ICC and the role it plays in Africa. Other countries, however are more critical of the Court and its relationship with the UNSC. The reason for this divergence is that African countries are not homogenous entities and therefore the position of each African state towards the ICC is likely to be informed by a set of cultural, historical and societal factors. The trajectory in which each country has developed post-independence is likely to have a greater influence on whether said state will support or reject the ICC. The claim that African states will automatically unite in their rejection of an institution they willingly signed up for is misguided. This fact was confirmed when African states showed underwhelming support for the withdrawal strategy, with several states having reservations with regard to the AU's withdrawal strategy.

The withdrawal strategy created for the purpose of developing a common African position on withdrawal has revealed the disagreements amongst African states when it comes to the ICC. The feigned consensus on documents such as the withdrawal strategy has become rather evident. Burundi and South Africa's attempted withdrawal has indicated that the majority of African states have not bought into this anti-ICC movement. On the contrary, some African states repeated their support for the ICC after the culmination of the AU Summit where the strategy was presented. These states support the Court in fulfilling its functions in Africa and reject the view that the ICC maintains an African bias. The withdrawal strategy has signalled that there is no consensus on the ICC and its role in Africa and furthermore, whilst anti-ICC sentiments in Africa may be growing, the Court still garners support from a substantial number of African states.

3.9 Analysis

The AU's collective withdrawal strategy is noteworthy in that it has clearly signalled an extreme dissatisfaction of some African states with the ICC and the system of international criminal justice as a whole. Whilst scepticism of international institutions is not uncommon, the reality that some states have taken active steps, with one state achieving withdrawal,

indicates the severity of the matter that unlike previously, African states are willing to go to greater lengths to demonstrate their condemnation with the ICC. This threat of withdrawal poses a serious challenge to the ICC's ability to carry out its functions on the continent and is indicative of the ability of African states to dictate their interests in the international system. African states have the ability to reform the ICC according to their needs if they are able to align their interests and positions. The withdrawal strategy did not garner as much support as previously considered, however the withdrawal strategy did indicate that the AU is willing to go to greater lengths to clearly and codify its position on the ICC, even if that position was not representative of all its member states.

Second, the withdrawal strategy has not only inferred the AU's external relations, but has further indicated the nature of the AU's internal relations with regard to the ICC. The AU's withdrawal strategy has signalled the growing disparity among African states considering their perception of the ICC. Whilst the discussion of an African withdrawal from the ICC has been made at previous summits, the 2017 January AU Summit resulted in a more codified solution to Africa's grievances being put on the table. The strategy was a result of years of relegation and disregard of African states by the UNSC, vis-à-vis the ICC, in matters relating to the peace and security of African states. The refusal of the UNSC to even consider or respond to the AU's repeated requests for deferrals created a deep-seated hostility and entrenched the belief amongst some African stakeholders that the ICC is selective in its prosecutions. Eventually, some African states began to resent the ICC and reacted by presenting a collective withdrawal strategy as a means to reconfigure Africa's relationship with the ICC on a more equal footing. The collective withdrawal strategy clearly articulated the objectives of the AU to reform the ICC as well as to regionalise African legal institutions as a means to retort the subjugation of African states in the international criminal justice system.

It is apparent that some African leaders have politicised the ICC debate for their benefits. Countries such as Burundi, Kenya and Sudan have clearly politicised the AU's relationship with the ICC to further and protect their own interests. These anti-ICC states have come to characterise reactionary Pan-Africanism by making claim to ideals of African unity and solidarity for the sole purpose of denouncing the Court and its legitimacy in Africa.

However, whilst some of these states have politicised the AU-ICC debate, it is vital that the points of contention between the AU and the ICC be resolved so that the ICC can continue to act as a court of last resort. Without a credible alternative, the ICC is still needed to bring

some hope to African victims that where their governments fail them, the Court will hold perpetrators accountable. The ICC has the ability to act as a supranational structure capable of providing African societies with some form of justice. The only way in which African states can effectively transform and improve their position is if they maintain a common African position that can further advance their collective interests. African states have the ability to meaningfully reform the international criminal justice, according to their interests, if they form a consolidated position towards the ICC. African states forming the largest regional bloc within the ICC, have significant leverage to transform the Court and its structures from within. However, this change can only be achieved if African states produce a common position and vote at the ASP accordingly. The fact that African states have a quantitative advantage at the ASP allows these states greater leverage to amend the Rome Statute and revolutionise the international criminal justice system as a whole. If not, African states will repeat the same mistake made during the drafting of the Rome Statute.

3.10 Conclusion

The above chapter has aimed to briefly detail Africa's experiences with the ICC, starting with Africa's initial support for the Court and the resultant embattled relationship between the AU and the ICC. The chapter detailed Africa's initial support for the international judicial institution and the watershed events, namely the indictments against Al-Bashir, Kenyatta and Gaddafi, which initiated the split between the two institutions. This account not only demonstrated how complex Africa's relationship with the ICC is, but furthermore indicated how divisive the Africa-ICC withdrawal debate is amongst AU member states. The withdrawal strategy further demonstrated that a common Pan-African position on withdrawal from the ICC does not currently exist. Expressions of Pan-African unity and solidarity to counter a biased international judicial institution have fallen short on the topic of a mass African exodus. It seems that behind closed doors, the AU must contend with grave and mounting disagreements amongst its member states with regard to a collective Pan-African withdrawal.

Chapter 4: The African Court of Justice and Human Rights as a Pan-African alternative to the ICC

4.1 Introduction

The AU's collective withdrawal strategy has not only signalled disconnect amongst African states, it has further indicated the means that the AU is willing to take to find a substitute for the ICC. The withdrawal strategy has made light of the AU's commitment to creating rival norms and institutions to challenge the international judicial institution. Included in its objectives, the withdrawal strategy asserts the AU's vision to create African legal institutions. Proponents of the ICC believe that the Court is the only institution capable of addressing mass atrocities and conflicts on the continent. However, a growing faction in Africa believes that a regional criminal court is the only solution to the continent's instability and mass violence. The only way to counteract the ICC's African bias is if African states establish regional mechanisms to internally try perpetrators of gross human rights violations. The establishment of an African criminal court will not only challenge the ICC's role in Africa, it will afford African states primacy in decision-making processes that affect them. Opponents of the ICC believe that the only way to end the Court's African agenda is to create alternative judicial mechanisms and give primacy to African actors. The creation of a Criminal Chamber within the African Court of Justice and Human Rights may provide African states with an alternative mechanism to prosecute international crimes. This aims to decipher the myths surrounding the Criminal Chamber within the African Court of Justice and analyse whether the Chamber can truly serve as a Pan-African alternative to the ICC.

4.2 Alternative forms of justice

The creation of a Criminal Chamber within the African Court of Justice and Human Rights (herein referred to as the African Court of Justice) has widely been viewed as a political response to the AU's disgruntlement with the ICC. After a decade of confrontation and a perpetual war of words, the relationship between the AU and the ICC is at a critical stage. One of the primary points of contention between the two actors regards hierarchy and the monopolisation of justice practices and discourse in Africa. According to Arnould (2017: 15), the ICC has become the most widely used platform for dealing with armed conflicts and mass atrocity in Africa, over and above domestic and regional institutions. Classifying the ICC as the most appropriate response to mass atrocity on the African continent has

effectively marginalised other African actors and stakeholders in the criminal justice system. The ICC's primacy on mass atrocity and conflict has rendered domestic courts and institutions as illegitimate or secondary to the ICC (Arnould 2017: 15). Whilst alternative judicial mechanisms in Africa exist, including but not limited to domestic courts, hybrid courts and truth and reconciliation commissions, these methods of dispensing justice are all seen to be secondary to the ICC. Playing a marginal and often secondary role in dispensing justice, the AU has attempted to take the lead on addressing war crimes and crimes against humanity, refusing to play a subsidiary role in Africa. The AU is currently attempting to challenge the ICC's role and mandate by establishing rival institutions like a regional criminal court to serve as the primary instrument for addressing mass violence in Africa.

4.3 The Criminal Chamber of the African Court of Justice

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter referred to as the Malabo Protocol) was adopted by the AU Assembly in June 2014 in Malabo, Equatorial Guinea (Knottnerus & de Volder 2016: 376, Sirleaf 2017: 1). The Malabo Protocol ensures that the African Court of Justice be supplemented with a Criminal Chamber (Sirleaf 2017: 1). The establishment of the Criminal Chamber allows the African Court jurisdiction to try the most serious crimes of international concern, namely genocide, war crimes and crimes against humanity (Murithi 2013: 7). Once the Malabo Protocol receives the minimum number of ratifications and enters into force, the African Court of Justice will serve as the first regional court to cover the same jurisdiction of the Rome Statute (Sirleaf 2017: 2). In order for the Criminal Chamber to come into force, 15 members of the AU are required to ratify the protocol. The required number of ratifications will have to be achieved before the African Court of Justice can be considered as an alternative to the ICC.

Despite prevalent beliefs, the creation of the Criminal Chamber is not solely a political response to the AU's contestations with the ICC. In fact, discussions surrounding the creation of a regional criminal court predate the standoff between the ICC and the AU. The initial suggestion to create an African criminal court was made at the beginning of the 21st century (Knottnerus & de Volder 2016: 379). During discussions to merge the African Court of Justice and the African Commission on Human and People's Rights, legislators debated the plausibility of endowing the Court with international criminal jurisdiction (Knottnerus &

de Volder 2016: 379, Ssenyonjo 2018: 111). However, the AU was in its formative stages, having recently transformed from the OAU, and thus the idea of establishing a regional criminal court was deemed to be premature (Knottnerus & de Volder 2016: 379). The call for an African criminal court resurfaced a few years later when the Committee of African Jurists suggested that the African Court of Justice be allowed to try international crimes. The Committee of African Jurists was designated to provide possible solutions for trying the former Chadian President Hissène Habré for mass atrocities committed (Taffo 2015). The call for the Criminal Chamber did not materialise and the former Chadian President was subsequently tried by the African Extraordinary Chambers created by the AU in consultation with the Republic of Senegal (Taffo 2015).

The idea of a regional criminal court began to resurface in 2009 when the AU Assembly requested the Commission to examine the prospects of trying international crimes (Abass 2017: 12, Murungu 2011: 1067). In July 2010, the Assembly requested that the Commission document their findings and submit a report back to the AU a year later (Abass 2017: 12, Murungu 2011: 1067). The following year, the AUC began the process of amending the Protocol of the Statute of the African Court of Justice and Human Rights to include transnational crimes (Du Plessis et al. 2013: 8). In May 2012, ministers of justice and attorney-generals of the respective AU member states began to deliberate and draft the Amendment Protocol to establish a Criminal Chamber within the AU (Du Plessis et al. 2013: 8). Finally, the Malabo Protocol was adopted by the AU Assembly in June 2014. Hence, according to the timeline above, it is apparent that the AU's creation of a regional criminal court predates its standoff with the ICC. The Malabo Protocol follows on earlier initiatives by the AU to seek accountability for perpetrators of gross human rights violations on the continent.

The primary reason for establishing the Criminal Chamber was for African states to be directly involved in managing their own conflict situations. Therefore, the Malabo Protocol cannot be solely seen as a political response to the ICC's dispensation of justice. The ICC's track record of prosecuting African presidents has only acted as a catalyst for the AU to develop regional legal instruments. The AU's inclination to be more involved and responsible for advancing regional criminal justice has not developed as a result of its deteriorating relationship with the ICC. However, the ongoing contestation between the AU and the ICC has offered the AU an opportune moment to further develop and expand its judicial institutions. The ICC's alleged African bias has accelerated the AU's creation of a regional criminal court, thereby affording it the opportunity to develop its own institutions

with a rival set of norms. In this light, the Criminal Chamber can be viewed as a Pan-African institution created to challenge the West's hegemony through the creation of internal and regional structures that subdue the West's influence and give African states greater primacy in managing Africa's civil wars and mass atrocity.

4.4 The limitations surrounding the Criminal Chamber

Several critics question whether the Criminal Chamber can serve as an effective alternative to the ICC. A multitude of questions have been raised about the Court's jurisdiction, resourcing and finance. These concerns include but are not limited to the Court's expanded jurisdiction, human resource capacity and the financial implications associated with effectively running a new institution. The next section will briefly discuss the limitations surrounding the Criminal Chamber of the African Court of Justice in serving as a credible and functional alternative to the ICC.

The first scepticism concerns the likelihood and timing of when African states will ratify the Malabo Protocol. As previously stated, the Criminal Chamber will only come into force 30 days after the minimum number of 15 ratifications has been achieved (Ssenyonjo 2018: 114). However, as of January 2018, the Malabo Protocol has not received a single ratification (AU website 2018). It is apparent that African states are hesitant to ratify the Protocol. Although 11 AU member states signed, the Malabo Protocol had not received a single ratification approximately four years after it was adopted (AU website 2018). It seems that African states are still reluctant to hand over their sovereignty regardless of whether to regional or international courts. This seems to be a precedent within the AU, for example, the Protocol for the African Court on Human and People's Rights received the minimum number of ratifications almost two decades after its adoption (Ssenyonjo 2018: 115). The aversion of AU states to accept the African Court's criminal jurisdiction makes it highly unexpected that the required number of ratifications will be achieved anytime soon. It is unlikely that for at least the next decade or so, African states will have established a regional criminal court to boast about. Furthermore, it seems quite ironic that the most vocal anti-ICC states, namely Burundi, Gambia and South Africa, have neither signed nor ratified the Protocol (Ssenyonjo 2018: 114). These states have denounced the ICC as a neo-colonial institution and advocated for the establishment of a regional legal instrument to counter it, yet these states are unwilling to commit towards the legal instruments that they advocated for.

List of states that have signed the Malabo Protocol

No.	Country	Date of signature
1.	Kenya	27-Jan-15
2.	Benin	28-Jan-15
3.	Guinea-Bissau	31-Jan-15
4.	Mauritania	26-Feb-15
5.	Congo	12-Jun-15
6.	Ghana	28-Jan-16
7.	Sierra Leone	29-Jan-16
8.	Sao Tome & Principe	29-Jan-16
9.	Chad	24-Feb-16
10.	Uganda	03-Jul-17
11.	Comoros	29-Jan-18

Assuming that the Protocol receives the ratifications required and becomes operational, a number of questions regarding how the Court will be funded have gone unanswered by the AU. For the Court to effectively function, a vast amount of money is needed to ensure proper staffing to efficiently investigate international criminal trials (Du Plessis et al. 2013: 10). The silence regarding how the Court will be financed with the capital required raises serious questions about the functionality and impartiality surrounding the Criminal Chamber. To give a brief estimation of the financial implications associated, the cost of a single international criminal trial was estimated to be 20 million US dollars in 2009 (Du Plessis 2012: 9). In comparison, the total combined budgets for the African Court of Justice and the African Commission on Human and People’s Rights roughly amounted to 11 million US dollars at the same period in time (Du Plessis 2012: 9). The cost of a single international criminal law trial was almost double the combined budgets of two AU institutions. To give a more current estimate of the costs associated with international criminal justice, the ICC’s budget for 2018, funded through its member states and international donors, is approximately 170 million US dollars (Calzonetti 2012, ICC website 2018). This amount is exhausted to currently cover the four crimes within the Court’s jurisdiction (ICC website 2018). It is thus evident that criminal justice is an expensive endeavour and that the AU, which already bears the brunt of acute funding and resourcing shortages, will have to generate funds from multiple streams to finance the Court. Assuming that African states or international donors inject the Chamber with the required capital and resources, it is still

likely that the Court would be under-resourced and subject to the whim of its donors. The reality is that international criminal justice is costly, and given the fact that the majority of international and AU institutions alike suffer from a lack of resources and funding, the Criminal Chamber will face serious concerns regarding funding, efficacy and impartiality in prosecuting international crimes on the continent.

The financial implications associated with running the Court effectively and independently are further exacerbated by the Court's vast jurisdiction. The addition of the Criminal Chamber to the African Court of Justice means that the AU will have fewer resources to contribute to the other two chambers. Given that the African Court of Justice comprises two other chambers, namely a chamber concerning inter-state disputes and another regarding human rights violations, the AU's critics question whether the organisation is able to carry out its current obligations whilst simultaneously increasing its jurisdiction (Du Plessis et al. 2013: 10). Furthermore, the AU has not only expanded the jurisdiction of the African Court of Justice, but has further augmented the list of international crimes within the Criminal Chamber. Article 28A of the Malabo Protocol extends the Court's jurisdiction to cover 14 international crimes (Malabo Protocol 2014: 18). Included within Article 28A are the crimes of genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, drug trafficking, trafficking in hazardous waste, illicit exploitation of natural resources, and last, the crime of aggression (Malabo Protocol 2014: 18).

The Protocol allows the AU to prosecute crimes fixed within international criminal law, such as genocide, war crimes and crimes against humanity, as well as widespread and quotidian crimes such as drug trafficking, money laundering and corruption. This extensive list of crimes will hinder the Court's ability to simultaneously manage these crimes as well as the other human rights violations associated with the Court's first two chambers. As mentioned in Chapter 3, the initial draft of the Rome Statute included several of the crimes listed in the jurisdiction of the African Court of Justice, including the crime of drug trafficking, terrorism and mercenarism. However, it seemed unlikely that governments would ratify such a comprehensive agreement and therefore the list of crimes was shortened to include the crimes deemed to be of most concern to the international community. States rejected the widespread criminal jurisdiction of the draft statute as it extracted from the state's influence and authority in prosecuting internal crimes. State parties to the Rome Statute refuted widespread jurisdiction on that basis, noting that the state and its relevant authorities would play a subsidiary role to the ICC. African states have

currently endowed the African Court of Justice with an extensive list of crimes to prosecute, which they may later lament. Furthermore, crimes such as trafficking in hazardous waste or illicit exploitation of natural resources are not terms fixed within international criminal law (Du Plessis 2012: 7). These quotidian crimes are difficult to define and therefore difficult to prosecute. If the Criminal Chamber does come into force, it will be challenged with setting a blueprint for prosecuting such frequent and common crimes.

Last, a major point of contention surrounding the Malabo Protocol and the proposed Criminal Chamber is that the Protocol grants immunity to sitting heads of state and government. Noting that the underlying cause of antagonism between the AU and the ICC is based on the prosecution of African statesmen, human rights advocates and civil society organisations have criticised this presidential immunity. Article 46A *bis* of the Malabo Protocol explicitly states the following: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office” (Malabo Protocol 2014: 38). Ssenyonjo (2018: 113), critiques the ambiguous phrasing of Article 46A *bis* as it is unclear as to who exactly should be granted immunity. Determining whether this immunity extends to all senior government officials as well the manner in which the AU will be able to distinguish between statesmen, government officials, cabinet, ministers and other high-ranking government officials will be a preposterous task for the AU. In addition, this failure to explicitly distinguish and classify who is permitted immunity under Article 46 will shield a greater number of officials from accountability, thereby exacerbating impunity in Africa.

Taking cognisance of the fact that the majority of war crimes in Africa involve senior government officials, the inclusion of Article 46A *bis* essentially renders the Court ineffective in prosecuting the most serious crimes of concern in the region. The AU granting immunity to heads of state and government is in direct contrast with the organisation’s objective of ending impunity. Quite the contrary, the inclusion of this article in the Malabo Protocol is likely to encourage African leaders to prolong their terms in office and to continue to commit mass violence unabated. However, while the Malabo Protocol essentially absolves African leaders for taking accountability for mass violence and conflict effected, the Rome Statute still empowers the ICC to prosecute sitting heads of state and government (Knottnerus & de Volder 2016: 387). The Amendment Protocol does not affect the ICC’s jurisdiction in Africa and therefore the ICC can continue to be a last resort for victims seeking justice.

Although the Criminal Chamber has not come into effect, a lot of concerns have been raised about the efficacy and the impartiality surrounding this proposed element of the African Court of Justice and Human Rights. Given past experiences surrounding the AU and its predecessor, the criticisms raised against the Criminal Chamber are well-founded. The Criminal Chamber is likely to take years before it comes into force and even then, it will face various limitations regarding its financing, scope and legitimacy. Whether the Criminal Chamber can serve as a Pan-African alternative can only be determined from the AU's response to the various criticisms mentioned above.

4.5 Analysis

The creation of a Criminal Chamber within the African Court of Justice has been expedited by the AU's rejection of the ICC and the international criminal justice system. As discussed above, there are various structural and operational challenges that the Court will face when it comes into effect. However, whilst the current inconsistencies and flaws regarding the Malabo Protocol and the creation of a regional criminal court are pertinent and must be discussed, the debate surrounding the need for an African criminal court must be looked at in a broader context.

The Malabo Protocol is birthed out of a need for Africa to reassert herself in the world, and for African states to take charge of mass atrocities and conflict situations. Institutions such as the African Court of Justice and Human Rights were established to instate Africa's legitimacy and visibility in managing internal conflicts. More significantly, documents such as the Malabo Protocol allow the AU to take primacy in managing conflicts on the continent through the articulation of a regional vision of international criminal justice. The codification of regional legal instruments is an attempt by the AU to consolidate an African vision of international criminal justice aligned with the AU's goals and objectives. Underlined within the AU's Constitutive Act are three fundamental principles for eradicating atrocities and conflicts in the region (Knottnerus & de Volder 2016: 380). The AU's solutions for conflict management are guided by the principles of co-operation, self-reliance and ownership, and the principle of non-indifference (Knottnerus & de Volder 2016: 380). The principles embedded within the Malabo Protocol aim to unite African states towards greater co-operation and ownership of internal conflict situations. The creation of an African Criminal Chamber not only aligns with the AU's vision of ensuring peace and security, it also prioritises African actors in decision-making processes. This is a

move away from the OAU's policy of non-interference towards the AU's policy of non-indifference, it further entrenches the idea that conflicts should be primarily addressed by African actors and stakeholders. The AU's creation of institutions that address impunity by bringing perpetrators to justice is an additional step towards the institutionalisation of Pan-African norms.

Furthermore, documents such as the Malabo Protocol and the Collective Withdrawal Strategy are seen as progressive measures providing African solutions to Africa's problems. African states attempting to withdraw from the ICC, or creating alternative solutions such as the Criminal Chamber, relay the idea that the ICC is not the sole legitimate response to mass atrocities. African states have the capacity to address atrocities and mass conflict on the continent through domestic processes such as the Criminal Chamber, domestic courts, hybrid courts as well as other truth and reconciliations programmes. The creation of institutions such as the African Court of Justice and the advancement of existing judicial systems challenge the idea that the ICC is the sole response to war crimes and crimes against humanity.

However, while the ICC should not be viewed as the sole legitimate response to mass atrocity on the continent, domestic and regional institutions need to be properly developed if they are to serve as alternatives to the ICC. The section above has briefly touched on some of the limitations and challenges awaiting the Criminal Chamber of the African Court of Justice and Human Rights. These challenges range from financial implications, human resource capacity, extensive and vague jurisdiction over some international crimes as well the inclusion of articles contrary to the AU's objective of addressing impunity. If African states are solemn in their commitment to Africanising international criminal justice, then they must endow the African Court with the resources it needs. Last, the desire to establish Pan-African institutions has always been great, however the actual moves to forge unity and create credible, functional institutions has always been met with less enthusiasm. This lack of unity and collective decision making is evident in both the little enthusiasm shown for the Malabo Protocol as well as the Collective Withdrawal Strategy.

In theory, African states have always supported Pan-African integration, however in reality these states and their leaders have done little more than make rhetorical statements regarding African unity. The withdrawal strategy indicated the extent to which African states are not unanimous in their stance towards the ICC. The underwhelming support for the withdrawal strategy has shown that a mass African exodus is unlikely to take place.

While the collective withdrawal strategy is effectively a misnomer and each state effectively resolves whether to remain a part of or withdraw from the ICC, a collective African stance would be advantageous to the AU and its member states. A common African position will not only amplify and legitimise Africa's concerns with the ICC; it is likely to further advance African interests in the ICC's Assembly of State Parties. If African states are steadfast in their attempt to reform the international criminal justice system and Africanise the Rome Statute, these states will need to have a common position with which to leverage reform at the ICC. As the largest continental bloc with 33-member states, African states hold immense untouched power to reform the ICC. The real challenge lies in unifying these states to form a common African position and advance common interests at international forums.

Similarly, African states need to cooperate in strengthening Pan-African institutions. African countries have shown little enthusiasm to create a credible regional alternative to the ICC. The scant number of signatures and ratifications that the Malabo Protocol has received denotes Africa's commitment to institutionalising regional legal instruments. If not properly financed and resourced, the Criminal Chamber of the African Court of Justice is likely to become another talking club of African dictators. Only time will tell if the Criminal Chamber is solely a response to the ICC or a legitimate and credible institution to advance the regionalisation of international criminal justice.

Ultimately, the AU covets an audible international voice to advance regional interests, however the organisation is rife with internal divisions. As long as African states make bifurcated moves, the continent will continue to suffer economic, political and social crises. The spirit of Pan-Africanism needs to be evident in more than just the creation of institutions labelled as Pan-African. African leaders need to make credible decisions centred on building Africa's well-being and advancing the interests of the African people. The collective withdrawal strategy and the Malabo Protocol are mechanisms centred on ensuring accountability for violations and atrocities committed against African populations. These mechanisms have to be enacted and followed through if African states are legitimate in pursuing a Pan-African vision on the continent. Whilst the AU has institutionalised Pan-African ideals in its various strategies and protocols, African states need to make credible, cooperative decisions to bring about durable peace and security to its populations. The AU has successfully developed and institutionalised human right norms in its various structures, however the implementation of these strategies and policies has lagged far behind. This is due to a lack of African unity in making collective decisions within the

organisation. The real spirit of Pan-Africanism lies in implementing strategies and policies that advance the living conditions of the masses. The AU's inchoate and incomplete implementation of the documents created will continue to mean that Pan-Africanism within the AU has failed.

Chapter 5: Recommendations and conclusion

5.1 Recommendations

The following set of recommendations are concerned with improving Africa's relationship with the ICC as well the advancement of regional legal instruments in an effort to safeguard victims of mass atrocities and to continue the fight against impunity. The recommendations below focus on two aspects regarding Africa's relationship with the Court. The first aspect considers ways for African states to agree on a common position towards the ICC. The second set of recommendations considers ways of advancing the Criminal Chamber:

- Both the AU and the ICC must hold extensive awareness campaigns in Africa. These campaigns should be conducted at local, national and sub-regional levels. Although costly, this will help to determine the ICC's perceived legitimacy on the continent.
- African governments should hold referendums regarding whether their respective states should withdraw or remain part of the ICC. This will help to determine whether African citizens at grass root levels support or reject the Court. This will legitimise and solidify the positions of anti-ICC states in the case where referendums are largely in favour of withdrawal.
- The AU must hold excessive consultation processes to engage African states on their positions towards the ICC. The AU, assisted and guided by the Open-ended Ministerial Committee, should host an Extra-ordinary Summit meeting to discuss the positions of all member states regarding the ICC. The only way in which a common African position can be formed is if the AU provides greater opportunities for dialogue and consensus building amongst African states.
- The Open-ended Ministerial Committee must be strengthened with greater resources and capabilities in order to generate more fruitful discussions and collective decisions regarding the positions of all AU member states towards the ICC.
- The Open-ended Ministerial Committee can request that the AU extend an invitation to the ICC to attend AU Summits. The inclusion of the ICC at AU Summits will foster discussion regarding the concerns of some African states which the international judicial institution can actively note and address.

- Similarly, once a common African position has been formed, African states should actively engage members of the ASP to further their interests and reform the ICC accordingly.
- If African states are committed to withdrawing from the ICC, then alternatively the Criminal Chamber should be injected with the necessary resources and capital it needs to function.
- The AU should set aside an annual budget for the Criminal Chamber. This will indicate that the AU is committed to creating an impartial and credible institution.
- African states need to ratify the Malabo Protocol so that the Criminal Chamber in the African Court of Justice and Human Rights can begin to serve as an alternative to the ICC.

5.2 Conclusion

The ICC's investigation and prosecution of African presidents has resulted in a decade of political disputes and contestations between the AU and the international judicial institution. The investigations of alleged war crimes and crimes against humanity against African heads of state and senior government officials such as Al-Bashir, Kenyatta and Gaddafi has sparked a war of words between the AU and the ICC. The AU has incessantly stated the ICC is a neo-colonial institution with an African agenda. Regardless of the validity of these claims, which was beyond the scope of this paper, the AU has retaliated to this perceived persecution and marginalisation of its member states in two significant ways. Firstly, the AU attempted to organise a mass African exodus from the international court. The organisation employed highly emotive Pan-African rhetoric, classifying the ICC as an International Caucasian Court, in order to undermine and weaken the international court. The AU further created the Open-ended Ministerial Committee to formulate a strategy which would guide the organisation and its member states on withdrawal.

However, while there was initial support for the withdrawal strategy drafted by the Open-ended Committee, the presentation of this strategy at the January 2017 AU Summit indicated the extent to which African states differed in their views of the ICC. The underwhelming support garnered for the withdrawal strategy during the summit highlighted the varying positions among African states. The AU was faced with the harsh reality that a large majority of its member states do not support the call for a mass withdrawal. AU member states held varying positions on the ICC with some being clearly

categorized as pro or anti-ICC and other states labelled as fence-sitting states. In fact, the only states to take active steps to withdraw from the ICC were Burundi and South Africa. Although Burundi achieved withdrawal from the ICC, it seems unlikely that other African countries will follow suit. The AU's collective withdrawal strategy highlighted the lack of consensus and collective decisions made within the AU.

Secondly, as part of the objectives listed in its withdrawal strategy, the AU has attempted to create regional legal instruments to counteract the ICC. Whilst the AU's antagonism of the ICC has acted as a catalyst for the creation of an African criminal court, the AU's desire to regionalise legal instruments predates its standoff with the ICC. The desire to create a regional criminal court is a result of a re-energised Pan-Africanism whereby African states desire to take greater agency. These states are demanding a primary role in managing conflicts on the continent. Thus, the Malabo Protocol is a further attempt by African countries to grow Pan-African structures and institutions.

The collective withdrawal strategy and the Malabo Protocol serve as a response to the AU's deteriorating relations with the ICC. Both of these documents serve as efforts of the AU to foster greater cooperation and integration on the continent. However, the extent to which the AU has achieved this African unity and solidarity in garnering support and cooperation to implement these strategies is non-existent. The AU has essentially failed to generate African unity and solidarity amongst its member states. The AU's collective withdrawal strategy evidently pointed to the divergence of African states with regard to withdrawal from the Court. The reality that African states failed to form a common African position indicated that the decision of AU member states to remain or withdraw from the ICC would be one predicated on individual state interests. Similarly, the lack of support gained for the Malabo Protocol and the creation of a regional criminal court further displays a lack of Pan-Africanism in the AU. The scant number of ratifications that the Protocol has achieved and the imprecise blueprint for how the Court will function once it comes into effect, has left many sceptics wondering whether the AU is steadfast in implementing Pan-Africanism or if this serves as additional Pan-African rhetoric to discredit the ICC. The lack of support espoused for the withdrawal strategy and the Malabo Protocol confirms that Pan-Africanism, more specific Pan-African unity in the AU has failed.

To conclude, the African continent has suffered unimaginable atrocities. The inter-state and civil wars during the 90s propelled African states to support international criminal justice and prosecution of individuals guilty of war crimes and genocide. However, whilst

the continent is still plagued by the same atrocities, African leaders show less enthusiasm to cooperate and make collective decisions regarding criminal justice institutions. Regardless of whether African states choose to withdraw, or build alternatives to counter the ICC, African states must make their decision keeping in mind the continent's history and its vulnerable populations. The AU and its member states ought to make collective decisions in the interests of peace and security.

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Plagiarism Declaration

DEPARTMENT OF POLITICAL SCIENCES PLAGIARISM DECLARATION

I declare that:

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Maram Mahdi

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Signature



Date:

12 December 2018