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THE POLITICS OF INTERNATIONAL INSTITUTIONS: A PATH-DEPENDENT ANALYSIS OF THE ICC-AU INTERFACE.

BY

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DECLARATION

I, Acheampong Emmanuel Kwadwo, hereby declare that this dissertation is an outcome of original research conducted by me under the supervision of Professor Abeeku Essuman-Johnson and Dr. Nene-Lomotey Kuditchar; and that no part of it has been submitted to any other tertiary institution anywhere for any other purpose, except otherwise indicated.

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ABSTRACT

After many unsuccessful years of deliberating the establishment of a permanent ICC, the end of the Cold war critical juncture would foster processes, as liberal ideological principles took center stage in international politics. Not only that, but this specific juncture also triggered a declining state of inter-state wars and an increase in intra-state conflict, posing a threat to the global order. This necessitated the adoption of new institutional measures (ICC) to combat the increasing levels of intra-state wars, the impunity associated with it, and further deter future occurrences.

As positive as the role of the ICC in global governance may be, translating from theory into practice has been marred with turbulence, as Africa, the continent with the highest number of signatories; in different phases, has declared a non-cooperation policy with the Court through the AU until now. This leads to a range of theoretical and practical issues that need to be explored to explain why the AU-ICC interface has been plagued with turbulence over time. As a result, this research work has examined the historical narrative of the ICC-AU interface through the Path dependent to explicate the temporal events and dynamics of politics in this interface.

The results of the study showed that the reasons behind the AU's move to not cooperate with the ICC until today is because of series of causatively connected events, which is best explained through the reactive path-dependent model. Through the lens of this research tradition, it emerged that the popular narrative of 'Africa is against the ICC' is false, that it is only a few powerful African countries who used their privileged asymmetrical power relations and

historical locked-in advantages to shape the ICC-AU interface to their interest. At the other end of the spectrum, the study also identified that the institutional design of the ICC emitted certain unintended consequences on the ICC-AU interface through the lens of increasing path-dependent dynamics. Whilst the ICC is a fully-fledged court with full legal responsibilities, through this research tradition, certain dynamics of politics were explored in the ICC-AU-UNSC relations.

DEDICATION

I dedicate this research work to God Almighty, who had already set and planned this day to take place even before I was ever conceived in my Mother's Womb. When the devil kept pushing the thought of failure into mind and I almost gave up, God kept igniting Jeremiah 29:11 and Philippians 4:4-13 in my heart to make this thesis a success. I am grateful lord for remaining faithful.

I also dedicate this work to all my family members, every prayer, time, and penny they invested in me to make the provisions of God manifest in the physical realm, I am grateful.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACPHR	-	African Commission on Human and People's Rights
ACJHR	-	African Court of Justice and Human Rights
ACILA	-	African Centre for International Law and Accountability
ACICJ	-	African Centre on International Criminal Justice.
ASP	-	Assembly of States Parties
AU	-	African Union
AUC	-	African Union Commission
AWG	-	African Working Group
CAR	-	Central African Republic
CIL	-	Customary International Law
CPA	-	Comprehensive Peace Agreement
DPA	-	Darfur Peace Agreement
EAC	-	East African Court of Justice
ECOWAS	-	Economic Community of West African States
EU	-	European Union
GC	-	Genocide Convention
HI	-	Historical Institutionalism
HoS	-	Head of State
ICC	-	International Criminal Court
ICL	-	International Criminal Law
ICJ	-	International Criminal Justice
IHL	-	International Humanitarian Law
IHRL	-	International Human Rights Law
IL	-	International Law
ILC	-	International Law Commission
ICRC	-	International Red Cross Community
ICTR	-	International Criminal Tribunal of Rwanda

ICTY	-	International Criminal Tribunal of Former Yugoslavia
JEM	-	Justice and Equality Movement
LAS	-	League of Arab States
LRA	-	Lord Resistance Army
NAM	-	Non-Aligned Movement
OAU	-	Organization of African Unity
OIC	-	Organization of Islamic Cooperation
OTP	-	Office of the Prosecutor
RS	-	Rome Statute
PCA	-	Permanent Court of Arbitration
Prep Comm	-	Preparatory Committee
PTC I	-	Pre-Trial Chamber I
P5	-	Permanent Five
RS	-	Rome Statute
SADC	-	South African Development Community
SLM	-	Sudan Liberation Movement
UNAMID	-	United Nations African-Union Mission in Daarfur
UNDC	-	United Nations Diplomatic Conference
UNCW	-	United Nations Commission of War Crimes
UNSC	-	United Nations Security Council
UNSG	-	United Nations Secretary General
UPDF	-	Ugandan People's Defence Force

CHAPTER ONE – INTRODUCTION

A SYNOPSIS OF THE ICC-AU INTERFACE OVER TIME

1.1 BACKGROUND OF STUDY

International institutions, formal or informal, have never been more relevant to world politics than they are today (Barnett & Finnemore, 2004). They play pivotal and diverse roles in global governance by laying down essential frameworks for conducting international relations. These institutions do not merely execute international arrangements between states. "They make authoritative decisions that reach every corner of the globe"; and cross realms of political realities such as, challenging or even revising existing regional or global orders that used to be the prerogatives of states (Barnett & Finnemore, 2004:2). This unsurprisingly triggers patterns of politics and turbulence in global governance in which the study seeks to investigate, particularly in the ICC's relationship with the AU over the years.

The ICC is described by many as the most important initiative by the International Community since the UN was established in 1945 (Kaul, 2007). It embodies a remarkable transfer of state authority and power to an International Court which is ever ready to 'pull the guns and trigger' prosecutions against persons believed to be perpetrators of international grave crimes (Bosco, 2016). By this, the institutional design of the ICC permits the court to decide how and when national courts should prosecute international crimes which have always been the prerogative function of domestic courts (Simmons & Danner, 2010).

Nevertheless, it was a welcoming development as evidenced in more than a hundred states agreeing to subject their citizens to the Court: with Africa, dominating such a choice

(Vormbaum et al., 2019). The ICC does boast of having 123 member states: “33 African States; 19 Asia-Pacific States; 18 Eastern Europe States; 28 Latin American and Caribbean States; and 25 Western European and other States” (ICC, 2021; Kenny & Norris, 2018; Monageng, 2014). This makes Africa the most represented continent within the Rome Statute and further affirms the continent's support that those who perpetrate gross human rights abuse will not go unpunished.

History depicts that, Africa contributed immensely to the processes leading to the creation of the Court. According to Monageng (2014), prior to the UNDC on the establishment of the ICC, African countries held several conferences and workshops to have a common stand on critical issues pertaining to the Court. This is evidenced in SADC meetings in 1997 and 1999; and Senegal in 1998 where participants affirmed their “commitment to the establishment of the ICC and underlined the importance that the accomplishment of this Court implies for Africa and the international community as a whole (Fernandez et.al, 2014: 14; Benedetti, 2014). Unsurprisingly, at the end of the Rome conference, 44 out of 47 African states voted to adopt and finalize the Rome Statute in 1998 (ACPHR, 1998).

The OAU, now AU was similarly enthused by issuing several directives calling on its member states to ratify the Rome Statute and to adopt them into national legislations (ACPHR, 1998). Consequently, in 1999, Senegal was the first to ratify the Statute (Apiko & Aggad, 2016; ICC, 2021; UN, 1999; UN, 2002). Africa could boast of 14 ratifications at the time the ICC had its sixtieth ratification in entering into force. Moreover, Uganda was the first to trigger prosecutions in 2004, followed by DR Congo in 2004 and then the Central African Republic in 2005 (ICC, 2021).

Despite Africa's immense contribution in birthing the ICC and being the largest regional bloc member, the Court's interventions in Africa have become highly contested with displeasure over the years. Within African political circles, the Court is criticized for being political and making Africa a "Repeat Customer" (Jalloh, 2009; Nouwen & Werner, 2011). Critics within this strand of argument depict that the ICC is a neo-imperial institution that subtly targets weak African states but fails to stick to its ideological guns and trigger prosecutions against big power nations that have been masterminds of egregious grave crimes (Murithi, 2014).

Against this backdrop, seemingly tensions have therefore been identified between the ICC, some important African states, and the AU as the latter in a string of decisions have made certain declarations to undermine and create public slight to the ICC's authority and image (Seymour, 2016). This backlash against the court, not from its outside staunch critics since its establishment, but from member states that were enthusiastic about the whole creation process is indeed dramatic and needs to be investigated further.

1.2 STATEMENT OF RESEARCH PROBLEM

There is no doubt that an array of literature explains the ICC-AU interface (Apiko & Aggad, 2016; Dovoh, 2018; Monageng, 2014; Murithi, 2014). Yet, they are not encompassing as little or less attention has been devoted to discerning the possible temporal and political factors that contributed to the 'ICC-African Problem', and how these historical consequences mattered in shaping the Court's relationship with the AU and some African Countries. The persistence of the 'ICC-African problem' for over a decade until today strongly suggests the relevance of path-dependent in this study. In this regard, the study seeks to ground this political outcome

in a sequential empirical setting by using Historical institutionalism's model of path dependence to explicate the temporal and political factors in this political outcome.

1.3 THE RESEARCH OBJECTIVES

The overall objective is to examine the temporal processes and political chains of events that contributed to the shift in AU's support to the ICC through the Lens of Historical institutionalism and Path-dependent. This objective is further disintegrated into the following:

- To examine the role of the ICC in global governance.
- To investigate if there is a change in the state of immunity in ICL through the lens of path dependence.
- To examine the legitimacy of the UNSC-ICC interface and how it reflects path-dependent dynamic

1.4 SIGNIFICANCE OF THE STUDY

This thesis is relevant for a number of reasons. First and foremost, the ICC's relationship with Africa, and for that matter, the AU is multifaceted and emanate from different discourses in Law and Politics. However, a focus on the Politics of institutions on the central phenomenon will highlight, expand, and deepen the understanding of the role of the ICC in a world of politics where states 'passionately and jealously' protect their sovereignty. It will help draw lessons from Political Scientists and International relations experts to understand the historical bargain struck between the Court and states concerning their roles in global governance in accordance with the justice of international grave crimes. This study therefore will expand if not deepen the understanding of the general populace within and outside Africa on the nature of the ICC especially the sort of politics that goes on whilst engaging with states.

The research findings will also add to the body of work that demonstrates Historical institutionalism to be effective in explaining the behavior and design of international institutions. With specific reference to the concept of Path dependence which offers a unique approach to the study of temporal factors and dynamics of politics within International Institutions, the study will help political actors and academicians understand the historical unfolding of events in the ICC-AU phenomenon and how these processes mattered in shaping the seeming tensions between the ICC and Africa over the years. This will involve retracing the current outcome of the ICC-AU interface back to the series of events that mattered in shaping this relationship. By doing this, it will highlight the chains of events that are tightly connected in the ICC-AU Interface while taking notice of the dynamics of politics at play. This will also give an empirical reference to the historical narrative void of an opinion piece or newspaper.

Finally, information gathered therein, and the findings of this research will provide fresh information on the Court's relationship with Africa.

1.5 STRUCTURE OF THE THESIS

Chapter one is titled: A Synopsis of the ICC-AU interface over time, which lays out a summary of the study by highlighting a few but key immense contributions by Africa and its regional institutions in birthing the court. This is further continued by stating the mundane and perceived notion of why the AU may have had problems with the ICC. It also states the research problem of the study, the objectives, and the significance of the study to the political and academic world.

Chapter two is titled: Then and Now: The evolution of ICL and the ICC-Africa relations. Per the aforementioned title, the literature review discusses the development of ICL over time and the unfolding events in the institutional design of ICC and its operations on the African continent. Accordingly, the literature review highlights four central themes: The Evolution of ICL and the Road leading to the formation of the ICC; formation of the ICC; a detailed description of Africa's immense contribution towards the creation of the ICC; and last, the ICC interventions in Africa.

Chapter three is titled: The Dynamic and Political Nature of institutions. It involves discussions on the theoretical framework in which this study is grounded. Discussions here involve a short exegesis of Historical Institutionalism and its basic tenets, discussions of the path-dependent model, and its basic tents. It further discusses criticisms labeled against this research tradition whilst countering it with the importance of the tradition and its relevance to the study.

Chapter four is titled: Decoding the Complexities of Political Outcomes the Qualitative way. This chapter involves discussions on the research methodology of the study. This includes the research approach and design of the study, the sampling techniques and the sample size, the data collection instrument, and sources of data. It examines how the research tradition of path-dependent will be employed in the ICC-AU narrative to explicate the politics within this interface

Chapter five is also titled: The Clash of Law and Politics: The ICC in the Trenches of Africa. This chapter discusses the answers to the research questions in chapter one of the study. More specifically, it situates the ICC-AU narrative into a reactive path-dependent sequence,

highlights temporal events and the political nature of these events through the lens of the research tradition.

Finally, chapter six summarizes the study, concludes, and provides recommendations on International Criminal Prosecutions and future research works.

1.6 CHAPTER SUMMARY

This chapter has discussed at length what the reader should expect from the preceding chapters of the study. It began with a brief discussion on the most popular narrative of the ICC relations with Africa, followed by stating the problem of the study which is to ground the historical narrative in a Historical Institutionalism model of path dependency. Subsequently, the chapter stated four related objectives of the study and how significant it is to the research tradition, the academic, and the political world.

CHAPTER TWO – LITERATURE REVIEW

THEN AND NOW: THE EVOLUTION OF ICL AND THE ICC-AFRICA RELATIONS

2.1 INTRODUCTION

The literature review of this study will involve an extensive reference to related researches, a synthesis of the most outstanding issues, and background information on the ICC-Africa phenomenon. Matters pertaining to the ICC's relationship with the AU, and certain key African states have recently been of keen interest in academia, and most of these literatures have the following under-listed thematic areas as their recurring topics:

1. The Evolution of ICL and the Road to the ICC's Establishment
2. Establishing the ICC to Stand Ready in Future Crimes.
3. Africa's role in the establishment of the ICC.
4. The Journey of the ICC in Africa

Hence, this chapter will focus on these four major themes. It will provide a historical account of ICL's development over time and the events leading to the ICC. This section will also provide information on the African continent's enormous contribution to the creation of the ICC by examining source documents that illustrate the continent's negotiating role on the ICC, as well as some key issues posed during the diplomatic Rome Conference. It concludes with the ICC's prosecutions on African Soil whilst highlighting the "number of cases and situations under investigation" (ICC, 2021). These thematic areas did not only reflect recurring issues in literature but also provided the context in which the analysis will be situated in.

2.2 THE EVOLUTION OF ICL AND THE ROAD TO THE ICC'S ESTABLISHMENT

The International community has always sought ways to deal with unimaginable atrocities that threaten the existence of humanity (Jamison, 1995). Bassiouni (1999), argues that there is indeed archaeological evidence that points to the existence of indictment proceedings against perpetrators of grave crimes as far as in 205 BC in Greece. Schabas (2004:1), also joins this argument by stating that *"War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that*". This could indicate a significant desire on the part of the international society to establish a supreme institution, such as the ICC to adjudicate international grave crimes.

As Moshan (1998) narrates, the concept of a permanent ICC has intrigued the international community since the thirteenth century; nonetheless, the principle of state sovereignty seemed to have reinforced exclusive National Jurisdictions. Here the idea of state territoriality was then strongly embedded in justice systems, and it is still profoundly embedded in International Justice systems, notwithstanding advancements in ICL. This system of justice was initially marred by power politics, which made criminal processes subjective in the long run, especially when those in authority were masterminds of the heinous crimes, which further entrenched impunity. (Schabas, 2004).

In 1872, Gustave Moynier of the ICRC presented the first serious plea for a Permanent ICC in an attempt to meet this difficulty (Schabas, 2004; Struett, 2008; Summerfield, 2019:26). His proposal for an ICC was largely aimed at prosecuting war crimes perpetrated during the Franco-Prussian War of 1870-1871, which breached the Geneva Conventions of 1864 and any other humanitarian legislation in effect at the time (Arnaut, 2002; Hall, 1998). However,

according to Glasius (2003), the international context at the time, as well as the dominance of power politics, portrayed this idea as far too radical and extreme. This was indeed, shocking since Moynier's plan was modest and did not impinge on national sovereignty.

Despite calls for international prosecution of horrific crimes, the international community lacked codified laws that constituted grave crimes, contributing to the delay in the establishment of an ICC. Only national regulations existed to combat horrific crimes, particularly war crimes. For example, the Lieber Code, which is described as one of the earliest contemporary regulations for the conduct of war, was exclusively applied to Americans and, like any other domestic law; its proceedings remained ineffectual when those responsible for heinous crimes were in power (McCormack, 1996).

The gravity of war crimes, as well as the increasing impunity associated with them, accelerated the formulation of international legal structures to prosecute war criminals (Schabas, 2004). As a result, the 1899 and 1907 Hague conventions were the first universal legal laws of war to include punitive provisions to deter terrible atrocities (Cox & Michaelene, 2009; Sadat, 1999). These Hague conventions were regarded as essential because they initiated legal means of resolving state disputes than resorting to war, and further heightened a general tendency towards international adjudications, especially the PCA which gained international recognition as the earliest precursor to a permanent ICC (Jamison, 1995). It is observed that the rules that governed the ICTY were adopted from The Hague Conferences. The Hague conferences have also greatly inspired the adoption of Article 8(2)(b), (e), and (f) of the Rome Statute (Gallarotti & Preiss, 1999; Schabas, 2004). This demonstrates the importance of these laws in international criminal law.

The next call for an ICC did not take place until the world witnessed its first international large-scale death during World War 1. The carnage and butchery perpetrated onto civilians, aside from the warring factions in battle ignited the world's need for international jurisdiction over these crimes (Andreason, 1999). There was a lot of demand to create institutions that would ensure that atrocities, not just violations of war crimes, but any crimes that threatened humanity's existence, were held accountable (Cakmak, 2017). These demands prompted the victorious nations to draft the Treaty of Versailles with Germany, which included a provision for an ad hoc commission, Leipzig Tribunal, to prosecute high-ranking officials such as Kaiser Wilhelm II, and other German War Criminals (cited in Cakmak, 2017; Jesberger & Werle, 2014; O'Keefe, 2019; Sellars, 2016).

It should be noted that these cases were clouded by national interests and power politics since the prosecution of high-ranking officials and the issue of immunity for heads of state was seriously deliberated among the allies. The US, in particular, opposed the commission's desire to revoke state sovereignty and indict heads of state, believing it to be too radical at the time (Cakmak, 2017). Furthermore, the prosecutions were biased because individuals facing punishment were on the losing side of the war (Schabas, 2004). Consequently, Wilhelm Kaiser II sought asylum in the Netherlands, and the Netherlands refused to extradite him for his crimes (Neff, 2005; Sadat, 2013; Summerfield, 2019). The victorious powers also failed to prosecute several German war officials. Even those who were prosecuted faced only minor penalties (O' Connor, 1998). Schiff (2008) notes that the indictments processes were merely symbolic because the victor states made little effort to prosecute war criminals but pursued peace instead. All additional attempts to establish an International Court was put on hold after that, as such initiatives were deemed premature and inconsequential at the time.

World War II was the turning point in ICL when the international community became more responsive to the unimaginable atrocities. Responsiveness to grave crimes was heightened to the extent that whilst the Second World War was ongoing calls for prosecutions had already begun (MacPherson, 1998). As a result, the Allied powers established the IMT in 1945 and 1946 to prosecute Nazi war and Tokyo war crimes respectively (MacPherson, 1998). The charter's declaration emphasized "crimes against peace, crimes against humanity, and war crimes"; and granted international recognition to these crimes (Eberechi, 2015:24; Tepperman, 2002). These crimes were rooted in International Criminal Law and had Universal Jurisdiction because they were too perverse to encourage jurisdictional arbitrage. Most crucially, despite an era that emphasized state sovereignty, individual criminal responsibility did apply to all, regardless of status or office of the perpetrator (Ratner et al., 2009). Elements of judgments of the Nuremberg Trial has their roots in modern practices of ICL:

> "*The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law"* (IMT, 1946)

Nevertheless, the Tribunal has been criticized for a variety of reasons, notwithstanding its significance as the birthplace of ICL. It was criticized for acting against international law which depicts that nations do not judge other nations. Jackson (1947:550) notes that the Germans fought for their sovereignty with claims such *as "For what we have done only Germany can judge us… It is no business of any other country what we did"*. This highlights

the importance of National Jurisdictions and how states preserved their sovereignty with authority. More importantly, there were doubts about the impartiality label of the tribunal because all judges in the Court were from the Allied powers (Latore, 2002). From a neutral perspective, this is understandable since the establishment of the Leipzig Trial, the UNWC, IMT, and IMTFE had been based on political consideration as the Allied Powers had veto authorities on the tribunal's functions.

Following WWII, the international society began a concerted attempt to institutionalize IHL and ICL. (Sadat, 2013). From the Nuremberg principles, the UNGA adopted Resolution 95(1) stating:

> "*Crimes committed are done by persons, thus they are responsible for their acts; Criminal liability under international law is in existence even though national laws state otherwise; This principle explains that whoever violates international criminal law shall not be granted immunity. The Head of state or any top government official is not exempted from being tried if international law is violated;(cited in Cakmak, 2017).*

The UNGA tasked the ILC also with developing legislation to establish an ICC (Schabas, 2004). The ILC presented its report in 1952 but was again turned down like other past proposals (Schabas, 2004). According to Jessberger & Werle (2014), the commission, in this case, failed to define the crime of aggression in its report (Scheffer, 2011). The notion of creating a supreme judicial body to prosecute criminals was never brought up again until 1989 when Trinidad and Tobago recommended to the UN that a court be established to adjudicate drug trafficking and other major crimes that threatened global peace and security (Bassiouni, 1991; Bosco, 2016; Schiff, 2008; Werner, 2004).

This preceding event also coincided with internal rivalries and inhumane crimes in Former Yugoslavia and later Rwanda where these crimes merited the establishment of an ad hoc Tribunal (Ashiru, 2017; Bassiouni, 1997). Consequently, the international community through "civil society groups and human rights" movements pressured the UNSC to seek justice for the victims (Bassiouni, 1997; Cakmak, 2017; Dovoh, 2018). Following the orders of the UNSC in chapters VII of the UN Charter, the UNSC did set up the ICTY to try persons that committed "crimes against humanity, war crimes, and genocide" in 1993 (Bassiouni, 1999). Another Tribunal was also established in 1994: ICTR to seek justice for 3 million victims who lost their lives in the Rwanda ethnic conflict. Supporters saw this development as a new mechanism of ending cycles of ethnic conflicts by serving as deterrents. From another perspective, others saw it as entrenching the Nuremberg legacy where international justice was established only through the powerful UNSC than the international community creating these courts.

According to Barria & Roper (2005), these ad hoc tribunals were plagued with problems from the beginning to the end as they did indeed reflected problems from the Nuremberg Tribunal. There was non-compliance and lack of commitment amongst the victors of the wars, the tribunal did not lead to peace or reconciliation, there was also a perceived sense of one-sided justice, and the institutional design of the Courts prevented the institution from beginning indictment proceedings against non-nationals of the court's Jurisdiction. *"In theory, an American or Russian who signed up with one of the factions in Bosnia and committed crimes might come under the jurisdiction of the court"* (Bosco, 2016:36). However, this was not considered by the UNSC resolution. These weak individual criminal accountability institutions created momentum and ushered the International Community into the

establishment of a permanent ICC hoping that such flaws will not be adopted in the ICC's design (Goldstone & Smith, 2015; Meron, 2006; Oyugi, 2015).

2.3 ESTABLISHING THE ICC TO STAND READY IN FUTURE CRIMES

Cole (2013), illustrates that the end of the Cold War was the main bit that ushered the International Community into initiating processes to birth the ICC. The reason being that the end of the cold war blew away the "Iron Curtain" that had divided the East from the West and fostered diplomatic principles since geopolitics and the lack of political will were core reasons that had steered away processes for the realization of an International permanent Court (Balta et al., 2021; Cole 2013). Alter (2018), buttresses Cole's (2013) point by stating that the end of the Cold War led to the spread of Liberal ideals in international politics and this created a sense of forming more institutions for the common good like International Courts to bring an end to impunity (Olásolo, 2018). In other words, the timing and political climate were great to establish a permanent criminal court.

Accordingly, in 1994, the UNGA submitted the ILC report to an Ad hoc Committee established to debate and prepare a draft statute towards the establishment of the ICC (Schabas, 2004). The draft proposal of the ILC in 1994 enlisted genocide, aggression, "crimes against humanity, war crimes and other" horrendous crimes from other conventions that had in time past sought to end impunity (Schiff, 2008). Consequently, the ad hoc commission designed the court to have 'primacy' just like the ICTY and ICTR where national courts could not contest jurisdictions when such crimes had occurred. This was not accepted as delegates viewed the envisioned court as tempering sovereignty; as such the function and term 'complementarity' was coined (Schabas, 2004). The Ad hoc commission work also demanded

that a diplomatic conference be established to chart the path of establishing the ICC. However, the UNGA saw it fit that the draft statute needed further work and established the Prep Comm to make a consolidated text for the Rome Conference (Nanda, 1998; Schabas, 2004).

The Prep Comm invited states, and other Intergovernmental organizations to share ideas in making the consolidated document (Monageng, 2014). At this stage of the ICC institutional design, delegates had well accepted the complementarity principle where the court could only intervene when states are unwilling and unable to deliver justice (UNGA, 1995). Changes were also made to some proposed text and a date set for the diplomatic conference in Rome in 1998 (Schabas, 2004). Whilst preparations were ongoing to have the diplomatic conference, P5 members of the UNSC had criticized the idea of the Court for numerous reasons. Notable amongst such criticisms included the fact that the proposed Court could temper with the UNSC territory, and further limit the role of the UNSC in global governance.

In particular, whilst UK and China played delayed tactics by arguing that the proposed document for the diplomatic conference was premature and needed more work, Russia and the USA tend to 'hit the nail right on the head' by stating that the institutional design of the proposed court must not escape the realities of the political world where the role of the UNSC matter (Bosco, 2016; ICCNOW, 1995, 1996). France also echoed the privileges of the P5 members that the court should not in any way temper or limit the power of the UNSC.

In 1998 at the diplomatic conference, an array of state and non-state actors (civil society groups and other international humanitarian advocates). Struett (2008) notes that, although the creation of the ICC was mainly about states agreeing to delegate their authority to a Criminal Court; civil society groups nonetheless played pivotal roles in the formation of the

Statute. In this language, civil society organizations were the gatekeepers of the Rome Statute (Dovoh, 2018; Struett, 2008).

In a five-week conference, there were varying and sharp contrasting views as to what the structure of the ICC should be. Staunch proponents like the then newly formed regional bloc the SADC favored an ICC that was powerful and free from political influence or entity like the UNSC (Maqungo, 2010). Another group, the 'Like-Minded States' was also aligned with this interest. However, the P5 of the UNSC was cautious of their role in the ICC governance (Jessberger & Werle, 2014). Areas of disagreement involved: the crimes under the ICC jurisdiction, the prosecutor's powers, means of triggering cases to the court, and more importantly the Courts relation with the UNSC (Bosco, 2016). Though all P5 members were cautious of their role in the New Court, the USA stood to be one of its staunch critics and opponent (Iommi, 2020).

Nevertheless, after fierce contestation and brinkmanship, 120 states voted in favor of the final text of the Rome Statute, 21 abstained and 7 voted against it (cited in Dieng, 2020; Heller, 2020; Murithi, 2014). The failure of China, Russia, and the USA (signed and later unsigned) to accept the Rome Statute and its jurisdiction raised alarm bells and distress signals amongst the middle and weaker powers as they were the ones confined in the ICC jurisdictions.

2.4 AFRICA'S ROLE IN THE ESTABLISHMENT OF THE ICC

Historically, particular moments highlight Africa's ties with the ICC; and one such moment was when the International Community initiated proceedings to establish the Permanent Criminal Institution. More precisely, Clarke et al, (2017), depict that, the Court's relationship

with Africa began in the 1990s when nations deliberated and reflected upon what the legal and political structures of an ICC should constitute. Individual African countries, their institutions, and other civil society groups actively engaged in these processes leading to the establishment of the ICC (Bouwknegt, 2017; Cakmak, 2017; Maqungo, 2010; Mills, 2012; Monageng, 2014).

Notwithstanding the change, of course, the envisioned Court presented to International Politics, there was indeed a strong political will amongst Africans in the processes leading to the Rome Conference and the drive for ratification (Moshan, 1998; Struett, 2008). The support was even more evidenced whilst the Court translated from theory into practice. These immense contributions have led scholars and political actors to label Africa as the entity that birthed the ICC (Cole, 2013; Du Plessis, 2008).

Prior to the UNDC on the establishment of the ICC, African countries held sub-regional meetings in other to have a common stand on issues pertaining to the structure of the ICC (Kahombo, 2018; Monageng, 2014). Accordingly, regional bloc Institutions such as the South African Development Community (SADC) held series of meetings and workshops to educate African countries on the proposed Court, and more precisely to agree on a common goal, structure, and operation of the Court (Bensouda & Jalloh, 2009; Cole, 2013; Dovoh, 2018; Monageng, 2014). Another such meeting was also held in Senegal, Dakar in 1998 to again have a common goal and support for the ICC. It is necessary to note that principles of consensus adopted from these meetings became the main document and bargaining tool during the Rome Conference, and such principles found their ways into the final document birthing the ICC making it expedient to be discussed here (Schabas, 2004).

2.4.1 SADC DECLARATION IN SUPPORT OF THE ICC

The SADC is a 15-member intergovernmental organization whose mission is to foster "regional socioeconomic cooperation and integration, as well as political and security collaboration in Africa's Southern regions" (SADC, 2012). In September 1997 and June 1999, the SADC member states assembled in Pretoria, South Africa to chart the Pathways of the Rome Statute legitimizing the ICC (Monageng, 2014). Put differently, consultative meetings were established in order for Africa to come to a consensus on the basic principles relevant to the Court's institutional design and structure before it was actually implemented. According to Mochochoko et al., (2005), these procedures weren't just for African Support but also, for the leadership of member states to gain a better understanding of the envisioned Court.

As a result, legal experts from the SADC convened to secure a consensus on certain articles of the proposed draft statute for the creation of the ICC (Maqungo, 2010). These principles of consensus were presented to Ministers of Justice and Attorney Generals of states that made up the SADC; and became the manual and instrument of bargaining during the Rome Conference (Maqungo, 2000; 2010). According to Khiphusizi Jele (1997), the following issues had reached a consensus amongst the SADC states and were committed to establishing the ICC if these demands were met (UN, 1997; Zamani, 2013).

- Demonstrated unwavering support and commitment to the creation of the ICC, which will be independent and impartial with its proceedings and that, the composition of the Court, should reflect equity in geographical representation.
- Emphasized the importance for the ICC to have a complementary role with national criminal justice systems and attain a high standard of a legal personality.

- Resolved that the treaty-based Court should inherently and unquestionably have a subject matter jurisdiction over heinous crimes established in the draft proposal, including crimes of aggression, crimes against humanity, war crimes, and genocide (ICC, 1998).
- Highlighted the significance of the ICC's ability to determine when a scenario or case should be admitted before the court, particularly in determining whether a state is willing or unwilling to prosecute grave crimes.
- Affirmed that the ICC Prosecutor should have *Priopro Motu* powers, which depicts that the prosecutor can initiate investigations and indictment proceedings in countries where grave crimes may have persisted, without any influence from political entities like the UNSC.
- Also stresses that, while acknowledging the UNSC's role in global governance, this function should not interfere in any manner with the ICC's actions, particularly by subjecting prosecutions or judgments to political considerations.
- Asserts that as a humanitarian and criminal court, the ICC must respect the human rights of all persons brought before it in all stages of proceedings. Special regards were given to women and children in this essence.
- Further reiterates that the structures of the ICC must depict equality of all states under international law (Maqungo, 2010).

2.4.2 THE DAKAR DECLARATION IN SUPPORT OF THE ICC

In February 1998, Senegal under the leadership of President Abdou Diouf, also hosted a workshop of 25 African states in the Dakar region for the establishment of the ICC (Cole, 2013). It is interesting to note that the principles of consensus adopted at the SADC meetings

were adhered to and also agreed upon by the African states that participated in the Dakar Conference (Ankumah et. al, 2005).

For instance, the Dakar declaration concluded on the notion that indeed, lack of political will on the part of National Courts had been one of the detestable factors in closing the gap of immunity (Monageng, 2014). As such, it is only right for a supranational Judicial body to be formed not only to curb gross human rights violations but to attain international peace and security (Monageng, 2014). Accordingly, constituents of the Dakar declaration affirmed that their "commitment to the establishment of the International Criminal Court and underlined the importance that the accomplishment of this Court implies for Africa and the world community as a whole"(cited in Monageng, 2014: 14). Other principles such as an ICC free from UNSC powers, an independent prosecutor, and an automatic subject matter jurisdiction over core crimes for the ICC were in line with principles of the SADC declaration (Ankumah et al., 2005; UN, 1998:156).

2.4.3 OAU AND AU SUPPORT FOR THE ICC

The Council of Ministers at the OAU on February 27, 1998, adopted the Dakar declaration and further issued directives on member states to commit to the establishment of the Rome Statute (Ankumah et al., 2005; Dovoh, 2018;). The ACHPR also repeatedly called on African states to be present at the Rome Conference and contribute substantively to the creation of the ICC (ACPHR, 1998; Siang'andu, 2016). Subsequently, in a National leaders summit of OAU in Burkina Faso in 1998, the OAU reiterated all decisions made by the above commissions and institutions to commit to establishing the Rome Statute (OAU, 1998). Unsurprisingly, at the end of the Rome conference, 44 out of 47 African states voted to adopt and finalize the

Rome Statute in 1998 (ACPHR, 1998; Ahmed et al., 2014). This did not stop there, as the ACPHR made declarations and resolutions at its 38th Ordinary Session, urging African countries to adopt and ratify and implement the Rome Statute. (ACPHR, 2005; cited in Cole, 2013; Stone, 2006).

Panke (2015) identifies that the voices of smaller nations are hardly heard in international negotiations and decision-making processes, as such strategies of coalition building are employed to make sure their interests prevail. She again asserts that the effectiveness of this coalition-building relies on the number of members and strategic positions in the conference (Panke, 2015). Consequently, for Africa, to influence the outcome of the Rome Conference, African countries and its Civil Society groups were informed to be present at the Diplomatic Conference and exhibit the SADC principles of consensus and the Dakar declaration as the main two documents steering their negotiations of the Rome Statute (Maqungo, 2010; Monageng, 2014).

African countries occupied strategic positions to either chair or coordinate in departments that saw to it that the Rome Statute became a success (Maqungo, 2010). Without a doubt, eight African countries: delegates from Algeria, Egypt Nigeria, Gabon, Kenya, Malawi, Nigeria, and Tanzania were elected as Vice presidents amongst the 31 Vice presidents that served on the diplomatic conference (Dovoh, 2018; Monageng, 2014; Plessis, 2008; UN, 1998). South Africa and Malawi took part in the coordination of parts 4 and 9 on the formulation and coordination of the Rome Statute of the Rome Conference (Ankumah et al., 2005).

At the end of the Rome Conference, the principles of consensus: the Dakar declaration, and the SADC report that guided the African region in negotiating for the Rome Statute, were

incorporated into the concluding document of the statute (Eberechi, 2011). Despite the international community's immense contribution in creating the ICC, states were cautious of any factors that will limit the sovereign powers of states, like the 'Like-Minded States' who preferred a complementary role of the ICC than a primary role in the adjudication of egregious crimes, the SADC backed this idea, which is reflected in the first article of the Rome Statute and obviously serving us the cornerstone of the Court (Maqungo, 2010; UN, 1997). Giving the ICC prosecutor independence and power was a controversial topic among the participants at the Rome conference.

The Like-Minded States and the SADC states, however, managed to ensure that this was granted through hard lobbying and diplomacy. The ICC's independence and relation with the UNSC were also fiercely contested. The SADC and Dakar Declaration principles did not want the UNSC to play a key role in the ICC's operations. However, a compromise was reached, allowing the UNSC to refer situations to the Court, as demonstrated by Article 16 (Maqungo, 2010). Also, as demonstrated by article 5 of the Rome Statute, SADC was interested in extending the ICC automatic jurisdiction over the core crimes of genocide, war crimes, and crimes against humanity, if countries sign on to the treaty. This history demonstrates how consistent Africa has been in support of the ICC.

2.4.4 CONTRASTING VIEW ON AFRICA'S SUPPORT OF THE COURT

Despite the widespread notion that Africa has been a significant supporter of the ICC since its formation stage; Hoile (2014), believes otherwise and argues that African support was based on the Cotonou Agreement (Thierry, 2007). To Hoile (2014), the Cotonou agreement

originated by the EU included several distinctive measures that pushed African countries to agree to become ICC state parties. Art. 11.6 of the Cotonou Agreements states:

> "(*a) Share experience on the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court and (b)…The parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments*." (ACP, 2011; Hoille, 2014:39).

According to Hoille (2014), the preceding phrasing served as a legal underpinning, requiring African states parties to ratify the Rome Statute in order to receive development aid and benefits (Babaian, 2018). Failure to sign the agreement in its entirety then, as Sudan did, meant the loss of millions of dollars in development funds. As a result, many African countries became supporters of the Court.

Even though these events might have taken place, the African continent after the cold war had indeed experienced heinous crimes and there was a need to accept initiatives that ensured individual criminal accountability.

2.5 THE JOURNEY OF THE ICC IN AFRICA

After July 2002, the International Community awaited with great anticipation to see how the ICC would ultimately translate from theory to practice (Schabas, 2004.) Which country and situation would the prosecutor begin indictment proceedings against; had been the *subject of discussion amongst academics and political circles.* According to Moreno Ocampo*, "from inside and outside the Hague, there was intense pressure on the new institution to become operational*" (Cited in Bosco, 2016:90). This indicates the functioning of the ICC was of big

interest to all; even to the outspoken critics, who were ever ready to shield themselves from prosecution and identify adverse signals to buttress their opposition towards the court.

The Rome Statute (1998) mindful of the fact that "*during this century millions of children, women, and men have been victims of unimaginable atrocities…."; it* was obvious the scale and severity of death rates will be the yardstick to determine which countries to investigate first, particularly those that the ICC had jurisdiction. By this method, Moreno Ocampo contends that DR Congo came first on the list, followed by Columbia, and then Uganda which ranked third (Bosco, 2016). However, it is unclear why, given the prosecutor's authority, the prosecutor did not initiate prosecutions in these cases first. Perhaps, the prosecutor did not want to cause a stir in international politics by making a run into the sovereignty of states but expected a voluntary trigger of self-referrals. This can be evidenced in the first three situations before the ICC all being self-referrals: Uganda, DR. Congo, and CAR in 2004, (ICC, 2021).

Table 1. AFRICAN SITUATIONS AND CASES BEFORE THE ICC.

AFRICAN SITUATIONS AND CASES	HOW SITUATIONS WERE INITIATED
UGANDA	Referred by the Ugandan government in January 2004
DR CONGO	At the request of the Congolese government in April 2004.
	The UNSC referred the situation to the ICC in June 2005.

SUDAN	
CAR	The Government of CAR referred an armed conflict in December 2004 to the Court.
KENYA	The Prosecutor initiated an investigation through its Proprio motu powers and referred the situation to the Court in March 2010.
LIBYA	The situation was initiated by the UNSC in February 2011 for alleged crimes against humanity.
COTE D'IVOIRE	The Prosecutor initiated an investigation through its Proprio motu powers on the 15 of February 2013 after the government had requested.
MALI	Referred by the Mali government in July 2012
CENTRAL AFRICAN REPUBLIC II	Referred by the CAR Government in September 2014.
BURUNDI	ICC Prosecutor opened *Proprio motu* investigation in October 2017.

Source: (ICC, 2021;Mingo, 2014; Olugbuo, 2014; Souaré, 2009)

From the above data, five Situations have been triggered by State referrals: Uganda, DR. Congo, Mali and two cases for CAR; UNSC has referred situations in Sudan and Libya; and three situations referred by the Prosecutor's initiative: Kenya and Burundi with Cote d'Ivoire

after accepting jurisdiction (ICC, 2021; Tambe-Endoh, 2019; Werle et al., 2014). However, three of these situations and cases: Uganda, Sudan, and Kenya; will be discussed briefly to highlight the grave crimes that took place in these countries and how their cases were admitted before the ICC.

2.5.1. THE CASE OF NORTHERN UGANDA

Uganda, on June 14, 2002, became a state party to the ICC, shortly after the needed ratifications for the Court to enter into force (ICC, 2021). Not long after, the International Community witnessed President Yoweri Museveni of Uganda make a stunning and unexpected decision to refer the Northern Uganda conflict to the ICC. This conflict situation involved the LRA waging war in the Northern part of the country: in the Acholi districts of Gulu, Tiger, Pander, Lira, Kumi, Adjumani where grave crimes and other inhumane practices had persisted since the mid- 1980s (Allen, 2006).

The LRA, often described as a barbaric and insane cult, was led by Joseph Kony who had engaged in multiple heinous crimes for over 17 years (Allen, 2006). The militant group embarked on guerrilla campaigns against the Yoweri Museveni administration, and any other party or institution that sides with the government of the day. This is partly because, the North had been excluded from developmental projects as such wanted to seize power and protect their people (Akhavan, 2005). As part of making their voices known, the militant group engaged in the kidnappings of thousands of children, raping and putting some in front of combat lines; and further “compelling hundreds of people to kill and maim, or be killed and maimed themselves”(Allen, 2006:22). Former UN Under-Secretary-General for Children in

Armed Conflict, Mr. Olara Otunnu characterized the atrocities as a Genocide policy aimed at wiping the Acholi people off the face of the planet (Otunno, 2005).

These atrocities fell under the ICC's jurisdiction, and following the court's established mechanisms to trigger prosecution by two actors, the Republic of Uganda and the Office of the Prosecutor brokered the decision to refer the Lord Resistance Army to the ICC as the first of three voluntary state action referrals (Akhavan, 2005; Dovoh, 2018; Marrone, 2015; Monageng, 2014). Subsequently, the ICC opened investigations in July 2004 and issued arrest warrants in 2005 against the leadership of the LRA on "war crimes (murder; cruel treatment of civilians; intentionally directing an attack against a civilian population); and crimes against humanity including murder; enslavement; sexual enslavement; rape; and inhumane acts of inflicting serious bodily injury and suffering" (ICC, 2021; Marrone, 2015; Rome Statute, 1998). Arrest warrants were issued against 5 persons, however, all suspects remained at large until Dominic Ogwen surrendered himself in 2015. The leader of the cult remains at large (ICC, 2021).

According to Nouwen & Werner (2011), because Uganda was the first situation before the ICC, the international community was eager to test the Court's capacity in eradicating impunity, and as a result, the proceedings drew a lot of criticism. First, Uganda was criticized for portraying Africans as incapable of solving their problems. Amongst political circles, no one could imagine a circumstance in which a state party would voluntarily initiate charges against its citizens before an International Court (Imoedemhe, 2017). Undoubtedly, most deliberations concerning the ICC had always been on ways to limit the Court's intervention since the structure of the Court yielded much authority which threatened state sovereignty (Arbour, 1999).

The ICC has been criticized for engaging in a friend vs. enemy dichotomy, or, to put it another way, for being political. While identifying the LRA as an international threat, the ICC made friends with Uganda's government, implying that both forces were equally involved in heinous crimes against civilians. (Nouwen & Werner, 2011). To Ssenyonjo (2007), the UPDF on many accounts engaged in a military operation to eliminate the LRA, but it backfired and resulted in millions of people being forced to flee from their homes. In addition, the military committed brutal acts against civilians, such as bribe scandals and rape. Only when the Ugandan government attempted to broker a peace settlement with the LRA did inquiries into the UPFD begin (Nouwen & Werner, 2011). This showed a sense of desperation on the part of the ICC to have its first case and prove its legitimacy to the International Community and the Ugandan government using the ICC as a political and military tool against the LRA.

Surprisingly, Uganda did not implement and pass the Rome Statute Act after ratifications until the Kampala conference. It was assumed that because Uganda was hosting the conference that the government did so, otherwise it would not have happened (Iommi, 2020). President Museveni is still a vocal opponent of the ICC in 2020.

2.5.2 THE CASE OF DARFUR, SUDAN

Unlike Uganda where the government had accepted the jurisdiction of the ICC as such made it possible to self-refer a situation to the Court, or for the ICC prosecutor to initiate investigations on its own accord; the case of Sudan was a reversal (Okoth, 2014). Sudan was not a state party to the Rome Statute where the country could trigger the self-referral protocol or have the prosecutor could directly initiate investigations in the country (Materu, 2014; Nkansah, 2021). However, mechanisms enshrined in the Rome Statute enabled the ICC to have a unique jurisdiction of non-signatories to the statute through UNSC (ICC, 1998). For

this reason, countries that had not accepted the jurisdiction of the ICC could still face indictment proceedings once the UNSC triggered its protocols for referrals.

Accordingly, in March 2005, Sudan war crimes were referred to the ICC through the UNSC Resolution (1593) (ICC, 2005). The UNSC upon the report of the International Commission of Inquiry on violations of IHL in Darfur determined that "the situation in Sudan continues to constitute a threat to international peace and security" (ICC, 2005; UN, 2005). The report depicted that about 1.65 million persons have been displaced in Sudan including egregious crimes in the sub-region (ICC, 2005; UN, 2005).

A few years afterward, on 12 March 2008, the Chief Prosecutor Mr. Moreno Ocampo announced his intentions to begin investigations on the grave crimes happening in that part of the region (Seymour, 2016). Reports from PTC I revealed that from March 2003 to July 14^{th,} 2008 a counter-insurgency campaign had taken effect by the Sudanese government on several organized militant groups in the country (ICC, 2005). These militant factions and rebel groups involved the (JEM), and the SLM. Like Uganda, the military tactics to annihilate the rebel groups backfired and resulted in civilian deaths amounting to more than 300,000 deaths and displacement of millions of people.

According to Nouwen & Werner (2011), the ICC judges summoned two persons in 2007, Ahmed Haroun, the then Minister of Humanitarian Affairs in Sudan; and Ali Kushaybi, the Militia leader of the Janjaweed that is alleged to have assisted the ruling government in the fight against the rebel groups. This request was however rejected by the Sudanese government on the basis that the Court had no jurisdiction in the country since Sudan has never been a

state party to the Rome Statute. Sooner than expected, the ICC judges had decided to go higher up the chain of command of persons suspected to have masterminded these grave crimes.

The people of Sudan and Officials of the Sudanese government saw the President's arrest warrant as revenge for the government failing to present Ali Khasab and Ahmed Haroun to the court (Nouwen & Werner, 2011). Omar Al-Bashir, the then President of Sudan is charged with genocide: genocide by killing; genocide by causing serious bodily or mental harm; war crimes: murder; attacks against the civilian population; destruction of property and crimes against humanity: murder; persecution; forcible transfer of population; rape; inhumane acts (ICC, 2005). This situation is the first to be triggered by the UN Security Council, the first situation to be referred to the Court as a sitting President, and also the first situation to be attached as a genocidal act.

2.5.3 THE CASE OF KENYA

The Republic of Kenya became a State Party to the Rome Statute in March 2005 (ICC, 2021). By doing this, the country had delegated its authority and power to the ICC to investigate and prosecute persons, irrespective of person or office, who would mastermind and engage in large-scale grave crimes. Nonetheless, the ICC could only initiate prosecutions and open formal investigations when the National Courts are unwilling or unable to do so themselves (Mueller, 2014).

Two years after Kenya became a signatory to the Rome Statute, electoral violence of great magnitude occurred in the country which claimed thousands of lives, others victimized and led to the displacement of many others (Seymour, 2016). On the 27th of December 2007, a general election was held in Kenya where the incumbent President, Mwai Kibaki of the Party

of National Unity stood against Raila Odinga who was the flagbearer of the Orange Democratic Movement (ODM). At the end of this democratic process, the incumbent President, Mwai Kibaki was controversially declared the winner by the Kenyan Electoral Commission and hurriedly sworn in. Unsurprisingly, the leader of the opposed party, Raila Odinga declared the election as fraud and filled with irregularities which led to a shocking trail of violence in the country.

In response, supporters of the Orange Democratic Movement protested the result and this led to attacks on persons that are believed to have contributed to the election malpractices or supported the ruling government (Nichols, 2015). At the end of these conflicts, 1113 persons had lost their lives, about 350,000 people were displaced and others were also victims through sexual abuse and other inhumane practices (Waki Report, 2008).

A coalition and power-sharing government were later formed between President Kibaki and Raila Odinga as Prime Minister to form the Government of National Unity as part of a peace accord and mediation led by Kofi Annan (Nichol, 2015). The new government did set up the Waki Commission to investigate and inquire about persons that had masterminded the post-election atrocities (Seymour, 2016). The commission published its findings and recommended a tribunal be set up to punish the perpetrators. However, the Kenyan government failed to initiate prosecutions on several occasions, and in response, Kofi Annan presented the findings of the Waki commission to the ICC in other to begin investigations and indictment proceedings.

In December 2010, the ICC prosecutor named six high-level persons who became popularly known as the “Ocampo Six”, evenly distributed amongst rival factions. Amongst those

accused were William Ruto and Uhuru Kenyatta who were of opposed sides during the hostilities and soon became Vice President and President of Kenya respectively. These leaders were charged with crimes against humanity: murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts (ICC, 2009).

Later, the cases were dismissed from the PTC for lack of evidence and witnesses on the part of the ICC prosecutor Fatou Benson.

2.5.4 CONCLUSION

This chapter has discussed at length the evolution of ICL from the treaties of Versailles through to the formation of the Rome Statute, as well as the establishment of certain International Tribunals that promoted and institutionalized ICL and IHL, irrespective of the political nature of these institutions. The literature review also centered on the issues pertaining to the establishment of a permanent International Court, and how the political climate prevented the court from becoming a reality until 1994. As observed the end of the cold war promoted liberal ideas which helped the international community to accept the idea for an International Criminal Court, even that, power politics from the UNSC stood as an obstacle preventing the Court from becoming a reality. Nevertheless, the efficient roles played by civil society organizations, African countries, and their institutions helped foster processes to establish the court as evidenced by the unflinching support of these entities to end impunity.

CHAPTER THREE – THEORETICAL FRAMEWORK

THE DYNAMIC NATURE OF INTERNATIONAL INSTITUTIONS

3.1 INTRODUCTION

International relations, "as it is presented in the flow of daily news, concerns a large number of disparate events: leaders are meeting, negotiations are concluded, wars are started, acts of terror committed, and so on" (Ringmar, 2016). To make sense of this turbulence around us, in research in general or academic dissertations involves: not only focusing on the trends of information but also concentrating on the basic principles and history underlying these contemporary political outcomes. One needs to understand the empirical world through a theoretical prism in other to provide powerful logical arguments about why the international system is the way it is. In specific terms, the researcher needs to identify and provide logical arguments as to why and how certain key African states and the AU have embattled the ICC's operations over the years. Therefore, the study adopts the Historical institutionalism theory which serves as both an empirical theory of social science and a paradigm of social science research to explain the central phenomenon of the study.

3.2 HISTORICAL INSTITUTIONALISM FRAMEWORK

According to Conran et al (2016), historical institutionalism comes from an umbrella of research traditions tagged the 'New Institutionalism'. The New Institutionalism placed emphasis on the role of societal and political institutions; and how, these institutions themselves ordered, organized, and mediated political life (March & Olsen, 1998). In identifying accurate analytical tools for the study of real-world issues, led to three iterations within the research tradition: "Rational Choice institutionalism, sociological institutionalism,

and Historical institutionalism" (Furstenberg, 2015; Hall & Taylor, 1996). These theories have overlapping characteristics, yet they are premised on different approaches and assumptions to the study of politics.

Without getting into a long exegesis on the different strands of the theory, rational choice institutionalists argue that institutions and individuals matter in analyzing the complexities of the world (Thelen, 1999). This is because political actors are utility-maximizing individuals in the pursuit of their interests, as such select institutions based on a set of exogenous preferences. For Sociological institutionalists, the actor-centered approach remains insignificant, as norms and standard operating procedures are essential in real-world political analysis (Immergrut, 2006). To them, macro-structural conditions such as culture and society are important; and without them, the world cannot be interpreted (Powell & DiMaggio, 2012).

However, Historical institutionalists such as Steinmo (2008) argue that Historical institutionalism offers a balanced approach between "human beings are both norms abiding followers and self-interested rational actors". He argues that HI seeks to blend the calculus and cultural approach for institutional analysis. In his view, political actors are not always rational actors who tend to examine every situation to see which choice will lead to a maximum interest, but rather, political actors are rule-following satisfiers whose goals and choices are defined by the rules and institutions they are embedded in. In this vein, interests and values have no substantive meaning if taken out of their institutional context.

Contemporarily, the definitional trait of HI: is a research tradition that analyzes an institution's effects, source of origin, evolution, and development over time. Institutions, in general, are "humanly devised rules that affect behavior, constraining certain actions, providing incentives

for others, and thereby making social life more or less predictable" (Steinmo, 2008). They are, according to Hall (1986), "the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy". This would imply, both formal and informal institutions come into play as the main building blocks for accounting and explaining a political outcome since they impact and influence political actors, their strategies, and preferences. Overall, Historical Institutionalism places emphasis on "how structures that we take for granted (as 'natural') are the products of a set of complex processes" (Smith & Owens, 2005).

3.3 ASSUMPTIONS OF HISTORICAL INSTITUTIONALISM

Rixen et al., (2016), assume that in HI Institutional rules do not exist in isolation but are rather embedded within a larger institutional configuration that defines procedures within an institutional make-up.

HI also rests on the basic tenet that institutions come in a meaningful sense "from the past" because they do have mechanisms that reproduce historical configurations on political outcomes (Conran et al, 2016). In explaining this, political outcomes cannot be explained by the immediate effect of institutions, but rather, a visit to the extant structures that do mediate and structure politics in the present.

HI also rests on the basic tenet that institutions are formed by political coalitions, where political coalitions are defined as, powerful actors that come together and align their interests and resources to see to it that a particular project takes effect. Within this preposition, Korpi (2006), identifies an agency dynamic where power asymmetry exists within this social coalition as some actors are prime movers and others play supporting roles. This leads to an institutional arrangement that resolves the collection action problem, however, there is a

distribution of power that privileges the social coalitions at the expense of other actors within the institution (Moe, 2005). In sum, HI scholarship contends that institutions represent the distribution of material resources and preferences or the distribution of political power at a given moment in time.

The culmination of this strand of argument has also led to assertions that institutions are not just a reflection of the distribution of political contestations but over time these institutions assume greater roles and in turn also impact formation preferences, strategies, and political coalitions (Streeck & Thelen, 2005). For instance, HI, according to Hall & Taylor (1996), assumes that the social world is laden with complexities and surprises as institutions inherently "give some groups or interests disproportionate access to the decision-making process; and, rather than emphasize the degree to which an outcome makes everyone better off, they tend to stress how some groups lose while others win".

HI also rests on a core principle that politics is structured across space and time. According to Hall (2016), "the behavior of political actors and the outcomes of political conflict is conditioned, not only by variables whose values change fluidly across time and space but also by factors that are relatively stable for discrete periods and often divergent across cases". As an example, Hall & Lamount (2013), contend that political actors are not just atomistic individuals who make decisions that would yield the best result. They are relational actors, whose actions and inactions are deeply rooted in organizational structures, common structures, and practices. More specifically, their actions are embedded in Institutional practices, network relations, and shared cognitive frameworks. This implies political actions cannot be explained without reference to the actors' relational dimensions that they are embedded in.

Politics structured across time, according to Pierson (2000), implies that political outcomes may never be the same when there are similar causal factors in play. Here history is sectioned into periods where an event or outcome in place may not necessarily be the same in a different period when all factors may be equal. Consequently, HI applies analytical tools, which examine how temporal processes affect and mediates the origins and development of institutions in political relations. Amongst such analytical tools are critical junctures, path dependence, and path departure.

For the central phenomenon of the study: the temporal and dynamics of politics within the ICC and AU interface; particular attention will be paid to path dependence as the study will be situated in this analytical framework.

3.4 THE CONCEPT OF PATH DEPENDENCY

Path dependence is often described as the closest model associated with Historical Institutionalism as the toolbox connects history with politics in explaining political outcomes. In most cases, it is used to capture the idea that history matters and outcomes are contingents (Rixen et al., 2016). Steinmo (2008), discusses three reasons why this is so; in brief: decisions of political actors and events are embedded in a historical context, and this directly influences other decisions and events; second, political actors do learn from the past experiences and shape their decision-making patterns; last, history like institutions shape expectations because they inherently become the rules of the game and shape the future.

More precisely, it captures the idea that "early contingent events set into motion events chains or sequences that have highly predictable features culminating in outcomes of interest that could not have been explained in light of an initial set of conditions" (Mahoney, 2000;

Mahoney 2006:138; Pierson, 2000). The principle rests on tracing events or outcomes back to where some earlier random event leads to a pattern of subsequent events. According to Castaldi & Dosi (2006), there are two main types of sequences that emanate from the path-dependent analytical toolbox. These are path dependence as increasing returns sequence and path-dependent reactive sequence (Mahoney, 2000).

3.5 TYPES OF PATH-DEPENDENT SEQUENCE

Path dependence as increasing returns sequence posits that institutions (informal or formal) are strongminded and persist along a certain trajectory because preceding choices place constraints on its development (Arthur, 1994; Pierson, 2000). In minimal terms, increasing returns sequencing entrenches the idea that initial decisions, choices, or events are made along a certain path, they are further induced and reinforced to the extent that they become difficult or costly to reverse such earlier decisions. Conran et. al (2016), notes that in this type of sequence the source of increasing returns is the extant structures within the institutional design as this goes through positive feedback dynamics with political actors embedded deep within the system, making deviation to alternative choices difficult overtime. This reflects a historical dynamic where once certain choices are made, they are strengthened and further constrain future possibilities of change even if the path chosen may be suboptimal compared to other options that may have proven to be more effective. As an example, North (1990) notes that informal institutions are more resistant to change compared to formal resistance that could be changed by a political coalition's decision.

Conversely, a reactive path-dependent sequence desists itself from the reproduction of a given outcome over time. Reactive sequences do not take into consideration events or decisions that have become locked in via self-reinforcement but rather, highlight the role of historical

contingency. According to Mahoney (2006:144), "reactive sequences are chains of temporally ordered and causally connected events". In explaining this statement, each event in the sequence has a role to play as the event could either be "a reaction to antecedent events or a cause to subsequent events in the chain" Mahoney (2006:135). This sequence is not path-dependent because the initial path chosen is still followed, but it is path-dependent because "they begin from contingent events and are followed by closely linked reaction and counter-reaction events that can transform and even reverse the direction of the early steps" (Mahoney, 2000). The contingent events serve as the opening of the path taken where subsequent decisions or events which follow are in direct relation to the antecedent events.

3.6 IMPORTANCE OF THE RESEARCH TRADITION

Historical institutionalism and the concept of the path-dependent model are well-positioned to highlight prior institutional configuration and arrangement, and its effects on a political outcome. In the context of the study, the research tradition helps tease out the historical bargain struck amongst political actors during the formation stage of the ICC and its development, reproduction, and transformation over time. More importantly, this will highlight the interactions of structure and agent, and how asymmetries of power have been established and reinforced in the institutional design of the ICC and AU.

Analyzing institutions, the ICC and the AU, and any other institution relevant to the central phenomenon of the study, through a temporal lens helps tease out particular periods and times of interactions between the two bodies. The emphasis on analyzing events and situations over long periods and their temporal development gives room to analyze situations based on the identification of conditions and contingency. In the context of the study, this will help

understand the initial contingent event that led to this path of development, more importantly, scrutinizing ways past processes are contingent and dependent on this outcome.

Moreover, path dependence is also well positioned to give interpretations and implications of state consistent behaviours in time of history. By this, one understands why states repeat and sustain certain decisions, and it is clear enough that such decisions generate positive feedbacks.

3.7 CRITICISMS OF THE RESEARCH TRADITION

Despite the merits associated with the research tradition, some scholars have criticized its relevance in explaining a social phenomenon. For instance, Raadschelders (1998), posits that theory, in essence, is supposed to sharpen our thinking and point to specific areas in a political outcome that makes research study clearer and more explicit. To Raadschelders (1998), Historical institutionalism's concept of path dependence in social science lacks explanatory power, it is incomplete, too much storytelling, and has poorly formulated ideas with no mechanisms for identifying social processes and changes.

Nevertheless, the study by employing the Historical institutionalism model of path dependence will help pay attention to temporal events in the ICC-AU interface and highlight the dynamics of politics within these events. It will also help identify and explicate the trigger mechanisms and reactive sequence of events in the court's relationship with the AU and with key African states over the years. The persistence of the ICC-AU seemingly tensions for over a decade strongly suggests the relevance of path dependence in the politics of International Institutions, as such it helps understand the evolution of the Court's relationship with Africa and the processes that mattered in structuring this relationship over the years.

3.8 CONCLUSION

This chapter briefly examined the exegesis of new institutionalism with its underlying assumptions. With a focus on HI, I examined why history matters in explaining contemporary political outcomes which led to the assumptions of the research tradition. With attention to HI analytical tools, the study discussed what path dependence was, the types of path dependence, its criticisms, and its relevance to explaining the ICC-AU interface.

3.9 RESEARCH QUESTIONS

Through the lens of HI and Path-dependent why and how did the AU's support for the ICC shift over time?

- What is the role of the ICC in global governance?
- How legitimate is the ICC-UNSC interface and how does it reflect a path-dependent dynamic?
- Through the lens of path dependence is there a change in the state of Immunity in ICL?

CHAPTER FOUR - RESEARCH METHODOLOGY

DECODING COMPLEXITIES OF POLITICAL OUTCOMES, THE QUALITATIVE WAY

4.1 INTRODUCTION

Political scientists, like any other social science branch of knowledge, are concerned with understanding the complexities of political outcomes and other reality-based phenomena in a more disciplined way. The 'disciplined way', in this essence, refers to the strict and rigorous scientific procedures (research methodology) employed to investigate a social phenomenon (Berger, 1986).

Research methodology serves as an overarching blueprint and contextual framework for a study detailing how the research is to be conducted. It shows how the researcher will go about the study whilst highlighting major scientific canons that must be followed to get the expected results. Accordingly, MacMillan & Schumacher (2001), argue that an appropriate research methodology is determined by the type of data to be collected, the analytical tools to be employed, and most importantly, the specific research problem that drives the whole study.

This chapter, therefore, discusses the overall research mechanisms: the research approach, research design, sampling technique, and means of data collection employed in studying politics within the ICC-AU Interface.

4.2 RESEARCH APPROACH

There are three main types of research approaches in the social science field with each approach exhibiting core assumptions, competing principles, and contrasting priorities for conducting a research study. These are the quantitative, qualitative, and mixed methods.

Despite their differences, Roth & Mehta (2002), illustrates that they all demonstrate the capability to explain and interpret the same social phenomenon due to the varied advantages they provide. Nevertheless, each research approach gives its own meaning to the central phenomenon under study by eliciting peculiar types of data during data collection and analysis (Djamba & Neuman, 2002; Roth & Mehta, 2002)

Considering this, the research employs the qualitative paradigm to provide meaningful and substantial information on the ICC-AU interface. Djamba & Neuman (2002), defines qualitative approaches to research, as a kind of research that relies on soft data (data in the form of spoken language, words, sentences), and principles or assumptions that originate from social life. In qualitative research, the researcher emphasizes interpretative or critical social science principles and strategies such as historical research, a narrative inquiry, case study research, grounded theory, and so on (Newman & Ramlo, 2011).

This approach will provide an empirical description and rich account of the origin and development of the ICC-AU relationship. This methodology is appropriate for this study because it will naturally lead researchers to a thick description of institutional development and analysis over time. Evidentially, and as already discussed in chapter three, HI's interest in historical and process-oriented analysis usually implies a methodological preference for qualitative study research that builds on dense, empirical description (Rixen et., al, 2016:11).

4.3RESEARCH DESIGN

In general, a research design answers what, where, when, and how questions of the conceptual structure of the research or study. Selltiz et al., (1962:50), gives a more precise definition by stating that it is "an arrangement of conditions for collections and analysis of data in a manner

that aims to combine relevance to the research purpose with economy in procedure". Therefore, to achieve the objectives of examining the temporal and politics of events in the ICC-AU interface, the study seeks to adopt the explorative research design to avoid misleading conclusions.

Exploratory research is "defined as the initial research into a hypothetical or theoretical idea" (Kowalczyk, 2013). It is a preliminary investigation into a phenomenon where less attention has been devoted to or no one has explored it yet. It leads to the discovery of new ideas and insights into a phenomenon where little idea is known. Accordingly, the purpose of the study fits into the nature of this research design as most scholarly works have not grounded the central phenomenon (the ICC-AU phenomenon) into an empirical setting such as the Historical institutionalism concept of path dependence. The research design considers principles of flexibility, an investigative stance from numerous sources, and an advantaged role of serendipity which guarantees an in-depth understanding of issues not only from expected factors but unexpected as well.

In sum, this research design guarantees acquisition of rich and realistic data for the analysis and gives integrated meanings to further research on the phenomenon.

4.4 SAMPLING TECHNIQUE

Using the explorative research design as the logic or master plan for the study, the study seeks to adopt the purposive sampling method to attain the goals of the research. This is informed by the fact that explorative research designs lead and guides the researcher to attain high-level information of a phenomenon where less knowledge is known. Consequently, purposive sampling helps attain this goal as it points researchers to the right participants or respondents

for the study who will undoubtedly produce the best data void of misleading conclusions (Patton, 1990). In this sampling method, "information-rich cases" become the target of the researcher to best address the research problem and aims of the study (Morse, 2010; Patton, 2015:264).

Pertaining to the central phenomenon of the study, the population for sampling will be experts in international relation matters, more specifically, individuals (international legal experts and political analysts and scientists, and possibly, political actors) who are well abreast with the ICC-AU phenomenon. The identification of these persons or experts knowledgeable in the ICC-AU interface will provide richer data, an in-depth understanding of issues, and data analysis void of ambiguities.

4.5 DATA COLLECTION INSTRUMENT

The Qualitative research approach according to Mills (2003:4), uses "narrative and descriptive approaches for data collection to understand the way things are and what they mean from the perspective of the research respondents." This points the researcher to use only instruments of research that elicit rich and reliable data on the phenomenon. Therefore, the qualitative approach used to collect data for this study was a semi-structured interview.

An interview method of data collection is a direct form of communication between the respondent and the researcher involving oral-verbal stimuli and responses. This involves an intense experience between the researcher and informant where questions are organized in a structured or semi-structured or loosely structured manner (Bauman et. al, 2002). For the study, the semi-structured interview model was adopted as a generative tool to explore meanings and understandings experts apply to the ICC-AU relationship. Here, a combination

of pre-determined questions and non-standardized questions are employed to generate supplementary answers that may lead to interesting discussions and give room for respondents to give out their best. Kothari (2004), notes that a combination of this approach for data collection is essential to an explorative research study since it will lead to the discovery and rediscovery of knowledge.

4.6 DATA COLLECTION

Obtaining data was two-pronged. First, the study will be document-based which draws data from secondary data. By secondary source of data, I mean the researcher partaking in an all-encompassing and comprehensive desk-based review of existing literatures on the International Criminal Courts interventions in Africa. Data will also be obtained from online scholarly websites and search engines that the University of Ghana gives free access to (Google Scholar, Jstor, Taylor, and Francis). From these websites, scholarly articles written by International Criminal justice experts such as lawyers of African descent, University senior lecturers, legal experts from the ICC, high-profile staff of the ICC, and AU will be examined critically to avoid misleading conclusions. This will provide detailed events as to the causal mechanisms that led to this political outcome and the changing dynamics.

Data will also be sourced empirically through respondents who are knowledgeable on the topic under the study. This will take place through a purposive non-probability sampling where experts highly knowledgeable in the context of the study will be interviewed to get an in-depth understanding of this political outcome. Through this method data will be obtained through the African Centre for International Law and Accountability, Ghana, and African Centre on International Criminal Justice, Ghana. The former institution (ACILA) contributes to African scholarship on the understanding of international law, engages in researches that

promote the understanding and interplay of numerous (regional and international) institutions in international criminal justice. The latter institution (ACICJ) is also dedicated to growing the scholarship of international criminal justice in Africa, however, it makes greater emphasis on Africa's relations with the ICC (Werle et al., 2014).

4.7 DATA ANALYSIS

In an academic qualitative research study, data analysis begins from the moment researchers gather data in a form of interview transcripts, documents, or recordings to describe the meanings of events and political outcomes. However, Djamba & Neuman (2002) posits that such analysis tends to be tentative, immature, and incomplete. They contend that data analysis is a process of systematically organizing, integrating, and examining data, whilst at the same time searching and drawing patterns and relationships in the settings in which they occurred (Djamba & Neuman, 2002).

For this reason, the study adopted the historical narrative analysis of the qualitative research design to undertake the study. Here, the researcher paid particular attention to the evolution of the ICL, the evolution of ICC-AU relations, and certain key African states over time (Werle et al., 2014). With this method, the researcher extracted the narratives from the data and explained it just as it is, and also identified "action- linkages" within the social reality (Abell, 2001; Franzosi, 1998). The historical narrative analysis does offer researchers specific tools for data analysis: path dependency, historical contingency, and periodization. For the objectives of the study, path-dependent analysis was employed.

Path dependent is defined as those sequences in which "contingent events set into motion institutional patterns or event chains that have deterministic properties" (Mahoney, 2000). To

Djamba & Neuman (2002:497), "It is an analytic idea used in narrative analysis to explain a process or chain of events as having a beginning that triggers a structured sequence so that the chain of events follows an identifiable trajectory over time". Put differently, it is the way a particular or unique beginning triggers a path of development that is restricted or limited by the earlier condition. With this analytical toolbox, researchers first identify outcomes and retrace series of events prior to the particular outcome.

Therefore, as part of the study, the researcher seeks to vividly explain the outcome of the relations between the ICC-AU while highlighting the politics of events that took place between these institutions; and finally, retracing the political outcome to earlier conditions or events to demonstrate the impact on the proceeding events. Hence, our analysis is focused on the task of uncovering how a specific sequence of events shaped the ultimate trajectory of the ICC-AU relation.

4.8 CONCLUSION

This chapter has detailed the processes that helped attain data for the objectives of the study. It sufficiently discussed how the research was undertaken: the research design, sampling techniques, and means of data collections. More importantly, it emphasized how the complexities in the ICC-AU interface were decoded through the qualitative method and the path-dependent research tradition.

CHAPTER FIVE- DISCUSSION OF FINDINGS

THE CLASH OF LAW AND POLITICS: THE ICC IN THE TRENCHES OF AFRICA

5.1 INTRODUCTION

This chapter involves a thorough analysis of document sources regarding the study's central phenomenon, as well as detailed findings from individuals considered knowledgeable in the ICC-AU Interface. It starts with discussions of the role of the ICC in global governance, explores the causally connected events in the ICC's relationship with the AU from the angle of reactive path-dependent, and further discusses the dynamics of politics in the AU's seeming opposition to the court through the lens of Historical Institutionalism and path-dependent.

5.2 THE ROLE OF THE ICC IN GLOBAL GOVERNANCE

Global governance is defined as "the collective effort by sovereign states, international organizations, and other non-state actors to address common challenges and seize opportunities that transcend national frontiers" (Patrick, 2014). Similarly, Weiss & Wilkinson (2014), defines global governance as "the sum of the informal and formal ideas, principles, norms, procedures, and institutions that help all actors, governments, IGOs, and civil society- identify, understand and address transboundary problems".

Per the aforementioned definitions, global governance denotes a global goal-oriented behavior directed at situations or issues, formally described by Kofi Annan as 'Problems without Passports'. The idea behind these interpretations is that several key interdependent actors or players must collaborate to tackle international issues that cannot be addressed individually.

What is again observed is that the above definitions have liberal precepts and ideas enveloping the definitions of global governance, which tends to dismiss attention from power, an essential element to see to it that the collective action problems and goals of the international community are realized. Therefore, by examining the role of the ICC in global governance, attention is paid to how the institution structures and exercises its jurisdiction in the international system. More importantly, attention is paid to how it declares its position with other actors by entrenching or even revising some existing international orders. Following these principles, respondents were sectioned into 2 main groups according to their expertise. International Criminal Law and International Law experts are indicated as Respondent (A), and international relations experts and Political scientists are indicated as Respondent (B).

Respondents (A) argue that the ICC, which doubles as an International Institution and a fully-fledged Court with full legal responsibilities, operates as a powerful structure in global politics by seeking to redress states' monopolized hold of power over the accountability of individual human rights. This idea is informed by the fact that individual criminal accountability did not keep pace with the growing number of atrocities and human carnages being committed, especially, when those who wield political power continue to institutionalize and reinforce mechanisms that entrench impunity. To them, the ICC at its core has become a key player for the enforcement of IL in general, and ICL and IHL in particular by adopting principles that question the exclusive prerogative of state supremacy and sovereignty which immunizes political actors who directly or expressly committed heinous crimes.

In other words, they identify the ICC's role in global governance as redefining the traditional notion of sovereignty and territorial independence to sovereignty as the responsibility to protect human rights in terms of jurisdictional equality. Here the Court has an inherent jurisdiction over

International grave crimes as enshrined in Article 5, and also through Article 13(b), the court offers a unique way through the UNSC to make every country responsive to international criminal accountability. However, the Court acting as "a court of last resort", is only complementary to domestic institutions who remain primarily responsible for the prosecution of international crimes. As such, Respondents (A) testify that the ICC, has a particular position in global governance as a lighthouse, but with limited powers in practice with little or no contribution to International Justice when states effectively, without malicious wrongdoing prosecute international crimes.

Respondents (B) also contribute to this strand of argument by arguing from a different perspective to the same conclusion. They contend that an essential part of the ICC's role in global governance is the enforcement of an anti-impunity norm different from what domestic criminal institutions provide and a different framework from what past international tribunals have provided. They argue that an essential feature of the anti-impunity norm establishing the ICC is the claiming of equality it offers to all individuals. To the respondent, Art. 21(3) of the Rome Statute explicitly makes mention of how the court executes its function by being "consistent with internationally recognized human rights"; and a well-recognized feature of ICL is the equality of all individuals before the law (Rome Statute, 1998). In this context, the ICC adopts Art. 27 to inherently scrape off any form of institutionalized mechanisms of impunity existing in national jurisdictions where special advantages and privileges may be accorded to high government officials which violates individual legal equality.

However, Respondents (B) attest to the fact that the ICC being a punitive institution in a world of power politics, its institutional design was limited by the political actors that formed it, by making it "a Final-Resort Court or a Court of Last Resort" where states have the primary

responsibility in indictment processes (Magnarella, 2012; Mendes, 2019). Nevertheless, they point out that the court takes power away from states in deciding 'who', the category of persons to face indictment, when indictment processes should begin, and how indictment processes should take effect making it a better international initiative than other past tribunals.

From these discussions, it is observed that the unique characteristics of the court in providing accountability for International grave crimes, at its core, revise pre-existing international practices that states hold very dear. Through Article 27 of the ICC statute, the Court challenges a key principle in international law under the UN charter 2 (1) where sovereignty is well entrenched. The institutional configuration of the ICC, therefore, serves as a significant counter-development by offering a strong form of a sharp shift from sovereign state equality and accountability to individual criminal accountability in an unusual jurisdictional limitation.

5.2.1 COMPLEMENTARITY IN INTERNATIONAL CRIMINAL PROSECUTION

The study discovered that the Jurisdictional allocation of International Criminal Prosecutions between States and the ICC is defined by the Complementarity principle in Art. 17 of the Rome Statute (Imoedemhe, 2017). The term complementarity is not necessarily expounded out in the Rome Statute, as it appears only twice in the 'Preamble and Article one; stating that: "the Court shall be complementary to national jurisdiction". However, its usage is implicated in all articles of the statute (ICC, 1998). As a legal discipline, its usage predates back to the treaty of Versailles where the Allied powers asked Germany to try some war criminals themselves at the expense of international prosecutions (El Zeidy, 2011).

Likewise, the respondents note that the concept of complementarity is the ICC's cornerstone, as it specifies the balance between domestic jurisdictions (state sovereignty) and the Court's

jurisdiction in the indictment of grave crimes. Complementarity under the Rome Statute is triggered when states are "unwilling or unable genuinely to carry out the investigation or prosecution" (ICC, 1998). They contend that the principle prioritizes and gives precedence to national jurisdictions to exercise individual criminal accountability because, despite the development of ICL, the state's sovereignty is still recognized. Nevertheless, when national jurisdictions fail or allow political circumstances to impede their fundamental role of seeking justice the ICC steps in to correct the deficiency. From these discussions, it can be deduced that the ICC was established to simultaneously complement and be mutually inclusive with other existing prosecutorial protocols which in the long run closes the jurisdictional gaps of eliminating impunity.

Nevertheless, the mutually inclusive nature of the ICC-Domestic Jurisdiction relationship was debunked by Respondents (B), who attest to the fact that the relationship to some extent represents that of 'hostility and opposition' to the other. Upon interactions, it emerged that for instance; the institutional design of the Court to take away national jurisdictions' authority in determining who, when and how prosecutions should take effect projects the court as a great force against the domestic jurisdictions, a right they have always guarded. To these respondents, the idea is that the ICC has appeared antagonistic to domestic jurisdictions at the early stages of its inception as observed in the Courts relations with certain key African states. They argued that what existed was negative complementarity as former Prosecutor Moreno Ocampo had asked certain African state parties to self-refer their situations to the Court, and not genuinely because these countries had a defective judicial system.

Nevertheless, Respondents (A) contend that the structure of the complementarity status is not meant to cause tensions between the Court and national jurisdictions but to maintain the

relevance of the ICC and ICL in global governance by preserving power and authority over irresponsible states that do not adhere to principles of modern individual criminal accountability. Consequently, when states take charge of their prosecutorial duties and effectively investigates and prosecutes perpetrators of egregious crimes, the sovereignty of the state is not impeded.

In summary, the respondents have argued that the ICC embodies and necessitates the stronger version of an anti-impunity norm by pointing out impunity everywhere it exists. On a practical level, the Court plays a critical role in developing and establishing international criminal law as a field of law, and on a structural level, the Court fills the gap between state and individual accountability by holding perpetrators irrespective of office and function responsible to their crimes. In this context, it deters the perpetuation of violence as a state policy, and on the other hand, leads to a culture of ending impunity by triggering and catalyzing states to hold perpetrators of heinous crimes accountable in domestic jurisdictions without malicious prosecutions.

5.3 UNPACKING TENSIONS IN THE ICC-AU INTERFACE: A REACTIVE PATH-DEPENDENT SEQUENCE.

Even if one looks superficially, at the African "situations under investigation" at the ICC, from the 'Uganda situation' in 2004 through to Burundi in 2017, none of them have been without controversies (ICC, 2021). Yet, a deeper look at these international criminal processes on the African continent, indicates that the critical turning point in the ICC-AU interface was at the Assemblies 13th Ordinary Session; where the AU decided that no member state shall cooperate with the ICC pursuant to the Omar Al-Bashir Arrest warrant (AU, 2009). Against this backdrop, the study adopted the principles of reactive Path dependent

and dated back into history by examining the origin and development of the ICC to understand how unfolding processes triggered and increased the chagrin of the AU.

5.3.1 EARLY FALSE START- APPLICATION OF ARTICLE 16

With the ICC coming into force on 1 July 2002, Art. 16 is observed to have been controversially triggered in Resolution 1422nd on 12 July 2002 and later 1487, a time when the ICC had not in reality begun operations (Akande et. al, 2011). At the core of this resolution: non-ICC states contributing to peacekeeping missions in Bosnia and Herzegovina were to be excluded from investigating or prosecution unless the UNSC determines otherwise *(*UN, 2002). Murphy (2002) notes that this resolution was adopted after the USA had threatened to veto the UN mission in Bosnia and Herzegovina; and probably veto other peacekeeping missions (UN, 2003). This resolution is found to have triggered the political nature of Art.16; as the supposed intent of the instrument was to defer situations when indictment processes would negatively impact international peace.

However, at the behest of a veto-wielding superpower, the instrument had been deep-seated in injustice by giving blanket immunity to personnel concerning unknown future events. Unfortunately, it highlighted how subsequent international criminal proceedings could be deep-seated in injustice as UNSC-P5 could manipulate the meaning of Art. 16 instruments at their behest.

5.3.2 THE POLITICS OF THE DARFUR REFERRAL AND DEFERRAL

The next time Art. 16 would be addressed again by the UNSC was in the Darfur referral to the ICC, where the UNSC had 'interfered' in a civil war with a core aim of restoring peace and security (Ciampa, 2002). Just like the meaning of the Resolution 1422, Resolution 1593

determined that the UNSC recalls art.16, in that, current and ex-officials of contributing states to UN missions in Darfur, who are also not state parties to the ICC shall be excluded from the Court's jurisdiction unless otherwise stated by the contributing state *(*UN, 2005). History again depicts that this was adopted to mollify the concerns of the USA by protecting its officials (UNDL, 2005). What is common from Resolution 1422 and 1487, and 1593 is that the institutional configuration of Article 16 had led to an unintended consequence of entrenching unequal International Criminal accountability where blanket immunities were given to some states on account of not being ICC state party, at the expense of others. That said, the OTP after launching its investigation requested an arrest warrant from the PTC against the Sudanese President, Omar Al-Bashir a core culprit in the situation (Geneuss, 2009; ICC, 2021; Visser, 2019).

As a reaction to these processes, the AU's PSC asked the UNSC to defer the situation so that peace procedures can be properly observed and implemented, including the CPA and DPA. As a result, Libya also proposed a revision to the UK UNAMID draft resolution in order to defer the prosecution and give the Darfur region an opportunity for a political settlement. (UN, 2008; UNSC, 2008; UNSCR, 2008). While Chinese and Russian delegations backed the deferral proceedings, they did not advocate for peace over justice; however, emphasized how the timing of prosecutions could exacerbate tensions. (PSC, 2008: UN, 2008). Alongside the OIC, LAS, and NAM were all concerned about the critical situation in Sudan and how indictment processes against the sitting President could exacerbate another conflict (Hoile, 2014).

With these institutions together, they represented more than two-thirds of the international community, however, the will of the UNSC served as gatekeepers for invoking art.16. On the other hand, and for the first time, the USA is identified to have been in support of the ICC

principles, by arguing that a deferral through the UNAMID will only lead to entrenchment of impunity (UN, 2008). With a 14 affirmative vote and a USA abstention, a compromise was reached in Resolution 1828, in operative paragraph 9 suggesting political settlement was indispensable since no military intervention could secure peace. However, emphasized the need for the government of Sudan to cooperate with the ICC to ensure justice prevails (UN, 2008). Yet, there was no formal discussion or decision on the AU plea as soon as possible thereafter.

5.3.3 THE TURNING POINT PROCESSES IN THE ICC-AU

Following Sewell (2012) criteria in identifying an unanticipated breakpoint in history, the study identified the unexpected shock of the PTC issuing an "arrest warrant against Omar Al-Bashir" in March 2009 as the contingent event that set into motion patterns of controversies in the ICC-AU interface (Babaian, 2018; Fernandez et al., 2014). In as much as the referral was made using the UNSC's exceptional powers, it was the first occasion the ICC granted an arrest warrant against a sitting Head of State whose government had not consented to a treaty-based court. The sequence of events in which the UNSC continues to refuse the AU's request for deferral is also identified by HI as permissive conditions easing restraints in the pre-existing cordial relations between the AU-ICC.

To this effect, the PTC arrest warrant and continuous UNSC repudiation triggered the thirteenth AU Assembly Session, in Sirte Libya, where the AU adopted a non-cooperation policy inter-alia article 98(1) of the Rome Statute. The policy is identified as the critical turning point in the Court's ties with Africa, transforming the popular ICC-AU narrative from a continent with unwavering support for the establishment of the ICC to a perceived continent adamantly against it. In accordance with, International Law, the Sirte decision had almost no significance in halting indictment proceedings, but as a political decision, it ignited and paved

the way for International Criminal processes to be in a state of turbulence in Africa until now. Evidentially, the AU's decision complicated the African State Party's obligation to the Rome Statute who were also member states of the AU.

5.3.4 THE CALL FOR AMENDMENT AND MANIFESTATION OF SIRTE DECISION

The apparent dissatisfactions and disappointments of African governments at the AU's thirteenth session are observed to have fueled processes and driven efforts to modify the Rome Statute. (Oyugi, 2015). The AU, led by South Africa proposed a modification to Art. 16 in the ASP eighth meeting (Akande, et. al, 2011). Indeed, the urgency for such an amendment ultimately resonates with the scope and earlier false application of the deferral processes, and how Africa has been in a disadvantaged position in the ICC's institutional design. This amendment, therefore, demanded to restructure power relations in two provisions; stating that: according to the original meaning of Art. 16, a) a state having jurisdiction over a situation may first request the UNSC to defer the indictment processes; b) that the failure of UNSC to decide on the issue 6 months after the request, the UNGA shall assume such authority and decide on the matter consistent with resolution 377 of the UNGA (cited in Clarke, 2019: 238).

With the UNGA constituting 193 member states, with a democratic principle of a single vote and a two-thirds majority on peace and security issues, the AU sought to reconfigure the skewed nature of power distribution over the means of deferral processes into a democratic one. Put differently, if the role of the deferral process of the UNSC is to consider issues of 'peace and security in the context of the interest of the International Community, then allowing every state an opportunity to say no or yes to deferral processes was the best way to go. Nevertheless, this institutional amendment did not gain the needed attention at the eighth ASP which is later explained in the dynamics of politics session (Akande, et. al, 2011).

The failure to reconfigure the deferral processes coupled with another arrest warrant of the genocidal act, on July 12, 2010, resulted in the actual manifestations of Sirte's decisions. Several African states that were also state parties to the ICC and obligated by Art. 86 complied with the AU's non-compliance policy, prompting legal and political wrangling international politics. At its core, the manifestation of the Sirte decision of non-compliance triggered important questions on how a treaty-based court could revoke the immunity status of a third state and on the other hand how states that had relations with Sudan could revoke the immunity of a head of state. Omar Al Bashir, between the Sirte decision of non-cooperation and 2013 had visited twenty African states, including Chad, Kenya, and Malawi, where all refused to surrender the sitting President (cited in Bosco, 2016).

In Malawi's observance response to the PTC for non-compliance, which is almost analogous to Chad, stated that a) the then-Sitting President Omar AL Bashir, is not a state party to the Rome Statute and as such Malawi honored his immunity status; and b) Malawi reiterated that it had taken its decision based on the AU's directive of non-compliance in Art. 98 of the Rome Statute (ICC, 2011). In response, the ICC noted that Malawi by being a state party to the Rome Statute in December 2002, is obligated and has become an instrument to end impunity which comes first before any other international objective. According to the AU, if the PTC demanded fulfillment of an arrest of Omar Al-Bashir, then Art. 98 was redundant, non-operational, and inherently irreconcilable with the ICC institutional design (AU, 2012). At this point of analysis, what shaped the ICC-AU interface was the skewed application of the Art. 16 of the Rome Statute, the AU's peace over justice concerns, and the indictment of a sitting head of state of a third state which it considered was inconsistent with CIL

5.3.5. THE POLITICS OF THE LIBYA REFERRAL

With the AU's anti-ICC and UNSC sentiments still in force, Resolution 1970 (2011) and a subsequent Resolution, (1973) are observed to have been another main causally connected event in Africa's relationship with the ICC (Fernandez et al., 2014). Resolution 1970 was passed unanimously granting the ICC jurisdiction over Libya, resulting in an arrest warrant for Muammar Gaddafi, the then-President of Libya. Also, similar to antecedent Joint applications of Art.16 and 13 (b) the configuration of the Libya resolution questioned the legitimacy of the ICC-UNSC relationship as it again excluded contributing non-ICC parties from prosecution and investigation; and restricted the temporal jurisdiction of the Court (July 1, 2002) to 05 February 2011 in Libya (Hoile, 2014).

Whilst the resolution 1970 had been a great step in International Criminal Justice, its militaristic connotations also questioned the entire motive of the indictment processes. "Even as the prosecutor leveled legal charges at Gaddafi, NATO warplanes had the dictator's armed forces in their sights" (Bosco, 2016:1). With France, Britain, and the USA in lead, the indictment process had been marred with political and military connotations as it equaled a "regime change". The AU, consequently, expressed deep concerns stating the arrest warrant "seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually reinforcing way, issues relating to impunity and reconciliation", as such a call for deferral (AU, 2011). Like Sudan the UNSC didn't recognize such concerns, the AU then asked its member states not to cooperate with the arrest warrant. However, the demise of Muammar Al Ghaddafi in October 2011, silenced tensions between the two institutions until the critical agency role played by Kenya in the ICC-AU interface to keep the path-dependent processes going.

5.3.6 CRITICAL AGENCY ROLE OF KENYA

The ICC indictment processes against the President and Vice President of Kenya are also observed to have increased the chagrin of the AU in a more deterministic way. Consequent to the institutional design of the ICC to encourage national jurisdictions to first prosecute instigators of International Crimes, Kenya's National Assembly was accorded such opportunity to prosecute the instigators of the 2007-2008 election violence. However, upon the parliament's unwillingness, the OTP requested summons of Uhuru Kenyatta and William Ruto, and other four high-level individuals to the ICC in December 2010 (ICC, 2011; Okuta, 2016).

Subsequently riding on former President Kibaki's government's opposition to the Court and the fame of the indictment to win the 2013 elections, the AU seemingly sour relationship with the ICC took a new turn and gained much momentum in the continent. Clearly, Uhuru Kenyatta and William Ruto's ascendance to power on April 2, 2013, automatically qualified them as a serving AU HoS and further served as the catalyst to fuel processes in the ICC-AU relations (Ssenyonjo, 2018).

The government of Kenya requesting an AU extraordinary meeting in October 2013 the AU declared another policy stating: "*That to safeguard the constitutional order, stability and, integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity during their term of office*" (AU, 2013). Clearly, the agenda of state sovereignty was promoted since this was the first time in history a sitting President and its vice faced indictment proceedings together in an International Court. Whilst this is to serve the interest of Kenyatta and Vice President Ruto, it also went a long way to entrench the earlier Sirte decision by giving room for Omar Al-Bashir to make travels within the continent despite being an international fugitive (AU, 2013).

As a reaction to the indictment processes, Kenyan representatives and the AU contacts group petitioned the UNSC to defer the situation but this was denied as seven voted in favor (P5 support- Russia and China) of the draft resolution to defer the situation and eight on abstentions (P5 abstentions- the USA, UK, and France) (UNSC, 2013). Arguments for the outcome are based on the fact that Kenya's situation did not merit the threshold of Art.16, whereas those in favor argued the trial would endanger peace and security in Kenya and Africa at large due to the rampant attacks of terrorists. The Rwandan delegate stated that "the disappointing vote undermines the principle of the sovereign equality of States enshrined in the Charter of the United Nations, and confirms our long-held view that international mechanisms are subject to political manipulation and are used only in situations that suit the interests of some countries" (UNSC, 2013). On the merits of the earlier Article 16 application, the Kenya situation makes a better argument. However, it is of no doubt the request was to protect the leaders from prosecution.

Consequent to this outcome, the AU established the AWG on ICC Amendments, wherein such meetings Kenya requested to amend Art. 27 of the statute (ICC, 1998; Skander-Galaand, 2018). Unlike Sudan and Libya, Kenya by signing the Rome statute and domesticating the statute had automatically revoked the relevance of official capacity. However, per presumed interest of avoiding individual criminal accountability, a formal petition of amendments in Article 27 was made by adding a 3rd Paragraph where current Heads of States shall be barred from prosecutions until the end of the tenure of office. Not only that, but Kenya insisted and requested the expansion of the ICC structure of complementarity to include regional institutions including ACJHR and EACJ. This implied the ICC could only intervene when national courts, economic regional courts, and regional courts could not prosecute crimes before the ICC could intervene

(ASP, 2015; Visser, 2019). These requests were similarly refused because Art. 27 embodied the whole idea of establishing the ICC.

The failure to have its interest met again led to the significant regional development of reshaping of immunity through the adoption of amendments procedures into the ACJHR statute. Seen as a move for regional accountability and strengthening of the African renaissance mechanism, the AU in its 23rd Ordinary session of heads of state and government meeting at Malabo established the ACJHR Art. 46 A bis:

> *"The Court shall uphold the immunities provided for under international law. In particular, no criminal proceedings shall be initiated or continued against a Head of State or Government during his/ her term of office."*
>
> *"No charges shall be commenced or continued before the Court against any serving African Union 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".* (Manishimwe, 2019)

Apparently, this provision conflicts with the Institutional design of the ICC through the overlapping subject matter jurisdiction and granting immunities to Heads of State (Vourbaum et al., 2019). From the AU's perspective, the inclusion of protection for heads of state in the Malabo Protocol originates from a long history of inequalities in the application of international rules, with immunity for heads of state accepted in some jurisdictions but not in others (Fernandez et al., 2014). In other words, because there are structural inequalities in the execution of International Criminal mechanisms, there is nothing wrong with Africa establishing its own judicial system while relying on existing rules such as the immunity of Heads of State in CIL.

However, the study identified that the 'protest treaty', Malabo protocol, has not garnered much support among AU member states. Upon its adoption in 2014, and with the support of African key actors Ghana, Kenya, and Uganda to adopt the treaty, only 15 states have become signatories to the Malabo protocol with zero ramifications (Clarke, 2019). Indeed, one reason for its failure to take root in African politics is that President Kenyatta's case was dismissed from the court the same year the Malabo was adopted. After his case was dismissed, there was no more momentum among African countries to push the carving out of immunities for heads of state in Africa, as Kenya had pioneered and mobilized the idea.

5.3.7 CONTINUAL REPUDIATION OF ARREST WARRANT AND BACKLASH DYNAMICS OF ICC-AU INTERFACE

Whilst Uhuru Kenyatta's situation was dismissed due to inadequate evidence, Sudanese President Omar Al-Bashir's situation had not yet begun due to the unfulfillment of arrest warrants by African states (Bosco, 2016). One of the well-known situations occurred in 2015, when South Africa, under the leadership of Jacob Zuma, hosted Omar Al-Bashir at an AU conference. South Africa being a state party since 2000, was presented with a conundrum of which institution to cooperate with (Pillai, 2018). South Africa stressed that Omar Al-Bashir was a sitting head of state who could not be detained, citing one key concern of Malawi and other countries that had hosted Omar Al-Bashir since the Sirte non-cooperation decision. In other words, surrendering the sitting President to the ICC is an act of regime change. Having found that South Africa obstructed Justice, the country was bashed internationally and even locally, especially the North Gauteng South African High court's ruling (Werle et al., 2014).

Following this event, in an AU Ministerial meeting in 2016, there was a call for a mass withdrawal serving as a political protest to the institutional design of the ICC and foster

processes to regionalize CIL of immunities concurrently within a stipulated time. This decision was first invoked by Burundi, South Africa, and later Gambia to the UNSG requesting a withdrawal. This decision has not been unanimous in Africa as Senegal, Ghana and Nigeria have been great opponents of the call for withdrawal. However, such a decision has been rescinded by South Africa after its High Court revoked the executive's decision to withdraw from the ICC. The Gambia during the reign of Yaya Jammeh continued processes for withdrawal. However, after Adamma Barrow's ascendance into office in 2017, the decision has been rescinded. Burundi is now the only African country to withdraw from the Court (Kerr, 2020).

Within the same period in March 2017, Omar Al-Bashir as part of his duty as a Head of State visited Jordan for the 28th Arab League summit, despite being classified as an international fugitive (Petit, 2019; Weatherall, 2019). Like non-cooperation decisions from African states that were signatory to the Rome Statute, Jordan honored the personal immunity of Omar Al Bashir (ICC, 2018)

In a note verbale, the Kingdom of Jordan stated, "President Omar Al Bashir enjoys sovereign immunity as a sitting Head of State under the rules of CIL", and Omar Al-Bashir also enjoyed Immunity under "1953 privileges and immunities of Arab league", and UNSC referral cannot take away the immunity (ICC-PTC II, 2017; Weatherall, 2019). In response, the PTC noted that UNSC under Resolution 1593 involves an application of the entirety of the Rome Statute which includes article 27 (2), implying the irrelevance of heads of states immunity (ICC-PTC II, 2017).

Due to differences on the Head of State immunity, in September 2018, ICC judges invited the AU and the Arab league together with other International law experts to express their

views on the merit of Jordan's reasons not to indict Omar Al-Bashir and the legitimacy of Head of State which is a third state (Oyugi, 2015; Skander-Galaand, 2018; Weatherall, 2019). According to Maliti (2019), the meetings were sectioned into three groups and despite their difference in opinions "All parties agreed during hearings that once an individual who was head of state leaves office, that individual does not continue enjoying any of the immunities they may have had while in office". Maliti (2019) again notes that "all parties agreed that Sudan had the greatest responsibility to arrest and surrender Omar Al Bashir to the ICC". This is as a result of the UNSC resolution clearly stating Sudan needs to cooperate fully with the Court. However, the ICC chamber still declared that state parties to the ICC have their greatest responsibilities to the Court as such referred Jordan to the UNSC and ASP.

In April 2019, after months of non-violent demonstrations against the Sudanese President, Omar Al-Bashir has been ousted from office and is currently being held in Koper Prisons for corruption and money laundering crimes (Maliti, 2019). This endogenous change in the Sudan situation has changed the path of the ICC-AU interface and silenced the AU on the Chief Prosecutors' request to continue with Indictment processes. Obviously, the AU has no other tool to prevent the indictment proceedings of Omar Al-Bashir because the main tool for non-cooperation has been waivered by the Transitional Government of Sudan upon his arrest. Currently, in deepening ICC-Sudan relations a Memorandum of Understanding has been signed between the ICC prosecutor, Karim Khan, and the Transitional Government of Sudan, and all other parties that arrest warrants have been issued against, which includes Omar- Bashir (ICC, 2021). This decision stems from the fact that indictment proceedings

cannot take place unless the state agrees to cooperate fully with the ICC, just as the UNSC resolution 1593 demanded earlier in the sequence.

In summary, it wasn't possible to envisage a situation whereby the UNSC determines a situation as a threat to peace and security through Art. 13 (b) and again chooses to prevent indictment proceedings. This would have been an act of interfering with the ICC operations. Moreover, the AU also failed to provide credible and compelling evidence as to why the search for justice would trigger aggression in Sudan and Libya. However, assessing the merits of earlier Art. 16 applications in Resolution 1422 and 1428, and 1593 and1970, the AU request does make a better case than these false applications of Art. 16. Unfortunately, in this instance, there was a recognition of the double-standard application of the Art. 16 which favors the interest of the UNSC, especially the concerns of the USA. Nevertheless, it is also of no doubt that the deferral request of the AU was based on the self-serving interest to entrench impunity.

Indeed, the study by examining the temporal processes through which the ICC-AU narratives took effect revealed that; the chain of events in this historical narrative is a reaction to antecedent events and a cause to subsequent occurrences. The sequence of events and its causal processes were sensitive to specific historical events such as the consistent repudiation of the AU request for deferral, specific key choice points in the Sirte Decision, the Ghaddafi non-compliance of Arrest Warrant, and the deterministic role of the AU 2013 Extraordinaire Session. These events or choices indeed triggered the ICC-AU interface from a cordial relationship into a series of negative reactions against the court. As identified with reactive path dependence, earlier decisions are not necessarily locked in, but are causally related as backlash dynamics have been identified in the AU-ICC interface. The ICC-AU relationship

has moved towards a particular trajectory of non-cooperation and now endogenous processes are settling the differences between both institutions.

5.4 THE DYNAMICS OF POLITICS IN THE AU-ICC SEQUENTIAL ANALYSIS

5.4.1 INTRA-INSTITUTIONAL POLITICS IN THE AU

The study discovered that significant dynamics of politics through the lens of HI are in relation to the purported AU Heads of State and government unanimous decision to withhold cooperation with the ICC. This is demonstrated by the fact that intra-institutional power inequalities in the AU and power play between AU member states had transpired in this historical narrative, which is in line with HI expectations. Through HI, the study identified that politics is indeed structured across space and time as the decisions and actions of political actors are embedded in the time and structures, they find themselves (Hall, 2016). Again, in HI principles, it was also observed that indeed powerful political coalitions that lead the charge in establishing an institution are often privileged and become prime movers of certain policies at the expense of other actors' interest in the institution (Moe, 2005).

5.4.1.1 THE EVENT OF THE SIRTE DECISION:

From respondents, it emerged that the AU's call for non-cooperation with the ICC in Sirte, Libya, came as a complete surprise for International criminal experts and Political analysts that had examined the debate on AU's stance towards the ICC. To them, the sequence of events that had taken place prior to the AU summit meeting in Libya and after, proved contrary to what occurred in Libya. They note that the "Ministerial meeting of African States Parties to the Rome Statute held in Addis Ababa on 8-9 June 2009, presented recommendations that

projected a clear support for the ICC" (Njeri-Kariri, 2009). The AU-EU Ministerial Troika, in October 2009, following the Sirte decision, also underlined unflinching support for fighting impunity through the ICC (cited in Geneuss, 2009; Torricelli, 2009). This was to the extent that, countries such as South Africa, and Kenya, all regional hegemons in their respective rights were domesticating the Rome Statute into their National legislations. This shows discrepancies in the AU's position towards the ICC and highlights one key question of the study, how AU member states, who had previously expressed strong support for the ICC, could suddenly acquiesce to the Sirte decision.

In response, it emerged from the study that asymmetrical power relations in the AU through the lens of HI mattered in shaping the AU position towards the ICC. The study identified that notwithstanding AU member states' dissatisfaction with the UNSC's failure to defer the situation, there was no unanimity in the Sirte decision. In reality, the African-led anti-ICC backlash was driven by Muammar Al Ghaddafi, the then-President of Libya, as he engaged in rigged debates and canvassed other Heads of State to cede to the Sirte Decision of non-cooperation. In buttressing this position of the respondents, Greenberg & Dorak (2009) notes that "Shortly after being elected chairman of the African Union on February 2, Gaddafi instituted into AU meetings the Islamic practice that" 'silence is approval'". This change to the AU Assembly procedure instead of a consensus or two-thirds majority permitted Gaddafi to count those nations that do not oppose his decisions as supporters.

> *"A Nation must now publicly challenge Gaddafi in order to legally vote against his proposals". This is difficult for one nation to do alone, and far more challenging to rally two-thirds of the AU's 53 members to openly oppose the chairman to override his mandate. When the chairman of the AU barely allows for any discussion of the matter and silences possible*

> *detractors, the task becomes almost impossible" (*Greenberg & Dorak, 2009).

The respondents, recalling history argue that the Libya-led AU response to the Darfur situation can be analyzed in terms of internal histories and power dynamics in the AU which alludes to agent structure processes in the HI perspective (Hall, 2016). They contend that Libya, before the fall of Muammar Al-Gadhafi was a regional power that wielded a combination of relative diplomatic, economic, and political influence on the continent. Per this regional political advantage, it spearheaded the transformation of the OAU to the AU and locked in its historical advantage by trying to institutionalize the AU around his ideology. The respondents note that Libya, drawing its power from its ideological sway of being a staunch anti-Western institution, historical status as a leader in the AU formation, and its political agility; it could play determinative roles in AU decisions, by promoting regional policies, and even to the extent of being a major policy blocker.

These arguments are supported by Vanheukelom (2017) who notes that the institutional design of the AU to a strong degree is characterized by "informality, weak accountability and non-transparent arrangements" where swing states defined as relatively powerful nations such as Libya can play silent but determinative roles in regional politics that other countries cannot easily overturn them. Accordingly, in the Sirte event, Libya's role in African regional politics is seen to have reflected in the AU's call for non-cooperation with the ICC, where such a decision was made by a regional hegemon that had locked in its historical advantage in the AU institutional design. More importantly, it went a long way to influence the preferences of other member states. This makes the ICC-AU tensions more political than legal as few powerful states use their historical advantages to attain their interest.

5.4.1.2 THE EVENT OF THE 2013 AU EXTRAORDINARE SESSION

From the study, it also emerged that, just as Sudan had Libya, a regional hegemon and outspoken advocate of the AU to attain its self-serving interest, Uhuru Kenyatta and William Ruto exploited Kenya's regional power to influence the preferences of AU member states. This is demonstrated by the fact that, prior to their election in 2013, Uhuru Kenyatta and William Ruto received no political and legal backing from the AU to seek for a deferral of the indictment proceedings. Nevertheless, upon winning the 2013 election which immediately qualified Uhuru Kenyatta and William Ruto as Heads of State of the AU Assembly, the AU's relations with the ICC had re-ignited into a different phase owing to the country's dominant role in African politics.

In supporting this argument, Clarke (2019) argue that while Uhuru Kenyatta used his father's (Jomo Kenyatta) colonial arrest in the Mau Mau uprising to portray another colonial attack by a western institution in order to win the 2013 elections, he used his father's critical agency role in the Pan Africanist movement and the establishment of the OAU to galvanize support from AU member states and avoid indictment processes. Clearly, Kenya's dominant role in African politics and the consequent indictment processes against its topmost political actors served as a catalyst to garner support from other African countries. Again, Like Libya, Vanheukelom (2017) contends that Kenya is also of regional hegemon capable of effecting such policies that other states will cede to.

From interactions with respondents, while both Sudan and Kenya situations appeared to have shaped the AU's ties with the ICC, they all concur that it was Kenya's hegemonic role in Africa that actually institutionalized and propelled the ICC-African problem. This is evidenced in the African support which Uhuru Kenyatta had to secure a unanimous decision

to shield heads of state from facing criminal charges and extending such development into the Malabo Protocol. The respondents note that the call for an 'African Criminal Court' was always part of a progressive plan of the AU, but the indictment of heads of state by the ICC fueled plans to turn such a great African great initiative into a political tool to entrench impunity. This argument is also supported with literature where Oyugi (2015) contends that for decades now the AU has subscribed to modern practice in ICL (inapplicability of Immunity) which is evidenced in EAC Art. 10. She further notes that even the earlier documents of Amendment Protocol for the ACJHR made provision for the inapplicability of immunity in Art. 46 B, adopted by Ministers of Justice representing AU member states and subsequent support by the AU in its Nineteenth ordinary session, 2012 (IJRC Centre, 2014; Oyugi, 2015).

It was only at the timing of Kenya's situation that this was changed in Malabo Protocol 46 A Bis not for only sitting presidents but other government officials. Consequently, the withdrawal of the Uhuru Kenyatta and William Ruto situation from the ICC also explains why the Malabo protocol didn't gain root in African politics and why the seemingly tensions have suddenly disappeared.

The respondents again note that Sudan was never a regional force, capable of inflaming tensions between the ICC and the AU, as what actually shielded Omar Al-Bashir was his close relations to Muammar Gadhafi, few African countries, and the concurrent indictment processes of Kenya's President and Vice President. To them, the AU High-level Panel on Darfur (AUPD) formed by the PSC, and chaired by Thabo Mbeki, recommended the AU to set up a Hybrid Court to hold accountable individuals that may have spearheaded the atrocities in Sudan (Cole, 2013). To the respondents, this reinforces the notion that the AU

indeed was going to pursue individual criminal accountability through an "African Solution to an African" mechanism, and not necessarily because they wanted the then-President to avoid accountability.

Whilst the respondents identified Sudan as not capable of shaping ICC-AU tensions; similarly, they identified Former President Gbagbo's Cote d'Ivoire as not a regional hegemon capable of using the collective space of the AU to further its interest. This is evidenced in the lack of AU response in the Gbagbo situation at the exact period when the AU kept criticizing the ICC for being a neocolonial court (Han & Rosenberg, 2020). This is supported by literature where Bosco (2016) notes that the manner in which French forces and international peacekeepers assisted in pushing Laurent Gbagbo out of power, it should have pushed neocolonial rhetoric, but this wasn't shown in any AU communique. From another perspective, it can be argued that the AU pushes a neocolonial agenda only when proceedings are against those who are in power or their allies, but not when indictment proceedings are against their opponents as observed in Bemba's situation. This indeed shifts the attention of the ICC fostering unequal criminal accountability, to African leaders using the collective space of the AU to promote self-serving interest.

As observed, attention to time, agency, and structure processes helped identify how key political actors, Muammar Ghaddafi and William Ruto used the collective space of institutions and relative power dynamics within the AU to promote self-serving interest.

5.5.2 EXAMINING THE UNSC INVOLVEMENT IN ICC PROCESSES THROUGH HI PERSPECTIVE

The AU's proposal for an institutional modification to Article 16 at the ASP's eighth and ninth sessions demonstrates a question about the legitimacy of a few countries, the UNSC dictating and imposing their will on the rest of the world. On the one hand, the legitimacy problem highlights the question of why a political body, the UNSC should be involved in the ICC's operations; and on the other, while Art. 16 may serve as an instrument to maintain international peace and security, its skewed nature puts into doubt the provision's legitimacy and composition. Consequently, through the lens of the historical institutionalism model of path dependence, one can explain why the UNSC has a role in the ICC processes, how their relationship reflects a path-dependent dynamic, as well as why the call for amendment failed.

5.5.2.1 ANALYZING THE LEGITIMACY OF THE UNSC-ICC INTERFACE

From the standpoint of HI, institutions do not exist in isolation but come in a meaningful sense "from the past" because they do have mechanisms that reproduce historical configurations on political outcomes (Conran et al., 2016). Placing the ICC's institutional design under consideration, the Rome Statute is understood to be a product of a reactive sequence of pre-existing norms or events. In this context, the study, therefore, identified that the UNSC-ICC interface reflects historical understandings of the UNSC's role in global governance. The UN charter historically bestows considerable political and legal power to the UNSC, obligated to maintain International Peace and Security which entails International penal justice mechanisms in regions engulfed in heinous crimes.

Accordingly, interactions with respondents revealed that the current role of the ICC in global governance, with its referral and deferral processes through the UNSC (Article 13b and Article

16) serves as a reactive role of the UNSC's existing mechanisms in global politics. The UN Charter VII clearly reflects this position but well summarizes its function in Art.39: *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken…….to maintain or restore international peace and security"* (cited in De Galvan & Lourdes, 2011).

Respondents note that, by this provision, which has been characterized as the most important article of the UN Charter, the UNSC's dominance in deciding international peace and security matters is secured and maintained by this same provision. It can therefore be observed that the institutional configuration of the UNSC in 1945 has been reproduced in the institutional arrangement of the ICC in 1998 to take actions that are deemed necessary to safeguard international peace. Regardless the ICC is an independent institution from the UN and the fact that the UNSC did not establish the ICC, the ICC's establishment is nested within a broad regime complex of determining threats to international peace and adjudicating heinous crime; where the UNSC has already legitimized and locked in its role as the Icon of International Peace and Security over time. For instance, the ICC preamble, by affirming "that the most serious crimes of concern to the international community as a whole must not go unpunished" shows the court is already in the Jurisdictional territory of the UNSC where the SC can also establish ad hoc tribunals (Rome Statute, 1998).

The respondents again note that this establishes a form of hierarchical arrangement between the ICC and UNSC when it comes to evaluating where and when situations impede international peace and security as entrenched in the UN charter 39. Consequently, this has granted the UNSC the authority and jurisdiction in the ICC institutional design by referring and deferring

situation's that impact international peace and security, a reproduction of its power from its UN Charter. These findings are supported with literature whereby Olasoso (2010) contends that indeed during the deliberations of the Rome Statute, the ILC noted that the establishment of the Rome Statute would directly fall within the jurisdiction of the UNSC. Unsurprisingly, the ILC draft of the envisioned Court gave the UNSC a tripartite role: to refer situations, to decide if a situation merits an act of aggression, and then to stop proceedings if a situation impedes international peace (Bosco, 2016; Olasoso, 2010).

5.5.2.2 HOW THE UNSC-ICC INTERFACE REFLECT AN INCREASING RETURNS PATH-DEPENDENT DYNAMIC

The study identifies that the UNSC Permanent Five have long institutionalized and formalized its great power dominance and inequality in the UN and International Politics. "When the council is united, its members can wage war, impose blockades, unseat governments, and levy sanctions all in the name of the International community" (Rudolf, 2017). Through the lens of HI, the role of the UNSC in global governance is seen as a self-reinforcing process with positive feedback dynamics that make it difficult to change over time due to their locked-in nature.

From the theoretical perspective of Path Dependent, an institution reflects an increasing returns path-dependent dynamic when they involve in a positive feedback dynamics. Here the actors embedded in the institution and their earlier steps along a particular direction make it difficult to reverse preceding steps due to benefits accrued in such processes (Pierson, 2000). In the context of the study, the UNSC's relation with the ICC is also identified to reflect an increasing return dynamic as the UNSC's tremendous political and legal power in International politics continues to reflect positive feedback dynamics in the courts' processes.

Upon interactions with respondents, they argued that the ICC's referral mechanisms enshrined in Art 13 (b) to refer situations to the ICC reflect the perspective of Path dependent in institutional configuration. They contend that this provision extends the authority and jurisdiction of the Treaty-based Court to countries that are not state parties to the Rome Statute. This process allows the UNSC to refer heinous crime situations in third states to the Court when national jurisdictions lack the competence to prosecute. This would not have happened if the UNSC had not been incorporated in the ICC's structure, as treaties clearly are only binding between signatory parties, and not on third-party governments. In this respect, notwithstanding the idea that the Court is not officially founded as having Universal Jurisdiction, the Court can be considered as having universal jurisdiction due to the UNSC's extraordinary powers of referral.

By adopting this idea, Mahoney, (2013:132) structures a simple agent generated increasing returns dynamics, as: "an institution may initially empower a certain group at the expense of others; the advantaged group then uses its power to expand the institution further; the expansion of the institution, in turn, increases the power of the advantaged group; and the process then repeats itself". Situating the ICC-UNSC interface into this particular sequence, the study identified that indeed the Rome Statute institutional design has increased the legal and political power of the UNSC in Art 13 as evidenced in the referral cases of "Sudan and Libya", which were third states to the Rome Statute (Stan, 2015). More crucially, these countries had failed the complementarity test of effectively prosecuting core culprits as such; their third state's status was not an impediment. In turn, the UNSC power also expands the reach, authority, and legitimacy of the ICC by having a unique form of "Universal jurisdiction"; and in turn, this

relationship increases the power of the UNSC to defer situations that may come on the ICC's radar, but only when it impedes international peace in Art 16.

However, this provision may be subjected to self-serving interest as witnessed in Resolutions 1422, 1487, 1593, and 1970 by giving blanket immunity to some officials. This can also be observed in the Syria situation, where China and Russia vetoed the proposed referral of the situation to the Court in 2014 (Ainsley, 2015; Webb, 2014). In the words of the USA delegate "Sadly, because of the decision of the Russian Federation to back the Syrian regime no matter what it does, the Syrian people will not see justice today. They will see crime but not punishment" (UN, 2014). This statement reflects the dynamic nature of the UNSC, where if the UNSC P5 members are not united with the support of some non-permanent members to refer a situation, there will be no prosecution as their united will and policies serve as gatekeepers in International Criminal Prosecutions through the ICC. On the basis of contrasting policies, it looks very unlikely a referral and deferral may be made through and from the ICC.

As observed, the drafters of the UN Charter at San Francisco in 1945 didn't conceive the idea that a Permanent International Court would be established for the political nature of UNSC to manifest strongly in the fully-fledged court upholding the principles of equality. However, the enduring nature of institutions like Art.39 has locked in the power dynamics of the ICC-UNSC interface making it difficult to reverse. This data from respondents has indeed answered how the ICC-UNSC interface reflects an increasing return dynamic and unfortunately does provide a basis why some African countries believe the court is being political by granting few states such enormous powers. Nevertheless, some African countries like South Africa, Kenya, and Nigeria have all expressed interest in holding a permanent seat in the UNSC because of the positive returns that come with it.

5.5.2.3 WHY THE AU CALL FOR INSTITUTIONAL MODIFICATION FAILED TO TAKE EFFECT

The preceding points have answered the legitimacy problem of the UNSC involvement in the ICC process, and how their relationship reflects an increasing path-dependent dynamic. The tone has therefore been set to explain why the AU could not modify the deferral mechanisms of the Court through the lens of path dependence.

The study identified that, consequent to the failed deferral attempt in the Omar Al-Bashir situation and the resulting decision of non-cooperation, the AU through South Africa strategically demanded an institutional change to readdress the ICC power disparity problem. Stating that, the existing institutional rules stated in UNGA 377 A be included in Court's framework, in that: "*in any case where the UNSC because of lack of unanimity among its five permanent members, fails to act as required to maintain International Peace and Security, the UNGA shall consider the matter immediately and may issue appropriate recommendations*" (Cited in Clarke, 2019). To the AU the UNGA's involvement in the ICC processes offers a more politically expedient and legitimate role of the International Community deciding when a criminal prosecution would impede international peace and security, rather than the UNSC alone deciding on this issue. Considering this, the AU calls for Art. 16 reforms represent an unsuccessful reform of the UNSC's role in international politics as a result of the UNSC authority and role depicting an increasing returns path-dependent dynamic.

Upon interactions with respondents, they agreed that, while the UNGA role in the ICC framework may have been a politically expedient thing to do than have the interest of the UNSC always being the gatekeepers of international peace and security, the locked-in nature of the UNSC role in global governance, though suboptimal, is at a state of non-reversibility which is in line with HI

expectations (Pierson, 2000). Following HI principles, the respondents noted that this proposition did not only affect the UN-ICC relation but also UNGA-UNSC relations which indeed made it difficult to reverse earlier decisions. They argue that the UNGA does not have binding power in the UN Charter and to alter and confer such an institutional power on the UNGA therefore would require a change of UN charter which will allow the UNGA to have binding powers that will in effect be binding on the OTP and PTC, as well as the UNSC. while indeed the UNGA may have powers of making international peace and security decisions in the UN Charter Art.12, this authority is only subsidiary to the UNSC which has 'primary responsibility in international security and peace (UN, 2021). Accordingly, amending art. 16 would also involve amending the UN charter in art. 12. in which the UNGA would not only make recommendations but having binding powers in art.12 (UN, 2021).

That said, calling on merely African governments to make such a change was insufficient because the cost of changing such an international political dynamic is high. Article 121 (4) requires that the seventh-eighth of ASP to ratify an amendment in other to take effect. This would have required 114 ASP at that time to amend Art. 16. Obviously, such an institutional change would not take place without some powerful UNSC-ASP members compromising their interest in supporting the proposition. Certainly, there was no interest on the part of the UNSC to shrink its powers as it has always reiterated that its powers in the ICC design are limited.

Finally, the ICC as an Institution was not willing to overly politicize the judicial function of the Court, which is a core reason why the ICC was established.

5.5.3 EXAMINING THE STATE OF IMMUNITY IN ICL THROUGH THE LENS OF PATH-DEPENDENT

From the study, it emerged that immunity emanates from a well-defined and well-ordered concept of sovereign equality of states. In International Law, it is codified in Art. 2(1) of the UN Charter which denotes, states are juridical equals as such no country can interfere in the business operations of the other (non-domestic intervention) (Rosenberg & Han, 2020; United Nations, 1945). As a result, the representatives of these states are also accorded such same respect and dignity by not interfering in their duties. For instance, a representative of the state inherently enjoys this principle because there is an identification between the office and the state as sovereigns in international relations. This is mainly because, while sovereign states possess the immunity, they do not in essence partake in government business. As such the representatives of the state possess these forms of immunity so that no other entity can interfere in the daily government business of another country. Thereby issuing indictment proceedings against state officials, heads of states, foreign ministers and diplomats, and any other state agent was viewed as an infringement or violation of the juridical equal principles.

The respondents however note that the acts of governments officials or even heads of states are not wholly regarded as acts of state. Instead, there are private acts and official acts which are protected by personal and functional immunity. Functional immunity protect state agents for official acts done in the name of the state. As such when in or out of office they are not indicted for actions attributed to the state. Conversely, personal immunity pertains to both private acts and official acts of a state agent inviolable before and during office but ceases when out of office. Nevertheless, the growth and direction of Individual criminal responsibility and Human rights accountability through HRL, ICL, and IHL have shrunk the authoritative nature of immunity of states depicting a

significant move from sovereign equality to principles of Individual criminal accountability. They argue that while the immunity of the state may be one of the prerogative authorities and may not necessarily bar individual criminal accountability, ICL regards crimes such as peremptory norms as high-level crimes permitting no derogatory. Accordingly, the relevance of the official capacity of a state agent is inapplicable before criminal proceedings.

While retracing the development of ICL over time, the study revealed that International Criminal processes dating as far back as 1919, after World War 1 denied immunities for high-level government officials. The Versailles Treaty, in Art 277, mandated "Germany to try Wilhelm II, the former German emperor for initiating the war" (Bassiouni, 1999; Cakmak, 2017; Levie, 1979). Even though Germany had opposed this development, it is regarded as the earliest step to curtail and limit the immunities of Heads of state. Following this event, the London agreement and the IMT charter established international tribunals in 1945 and 1946 to try war criminals (Nuremberg Charter, 1945). Here, the London and IMT charters Art. 7 and Art.8 institutionalized and implemented individual criminal responsibility for all individuals while declaring the irrelevance of superior's orders and official capacity (Gaeta, 1999; Nuremberg Tribunal, 1945). This can be evidenced in the indictment of German officials in the IMT and Ambassador Hiroshi Oshima in IMT Tokyo referenced on Article 6 and 7 of the charter which showed the inapplicability of immunities (Clark, 2007; Rhea, 2008).

These judgments from the Nuremberg Trials were properly adopted by ILC and later UNGA in Resolution 95 stating the inapplicability of immunity as a head of state or government in International Law against criminal responsibility (UN, 1950). These positions were subsequently adopted in the Eichmann case, Blaskic case, and Arrest warrant case.

The study also identified that in the of Augusto Pinochet, his official capacity as a former head of state was revoked by the House of Lords in a six to one decision. The Chamber argued that his crimes as preemptory crimes prohibited the applicability of the immunity defense (UK Parliament, 1998). These antecedents or earlier decisions are again reaffirmed and entrenched in regional-based Tribunals of ICTY and ICTR where in Art. 7(2) and Art.6 (2), the idea that immunities of official capacity and act should not be applied to International Prosecutions, thus such immunities are irrelevant to international crimes (ICTY, 2000). This is also be evidenced in the lack of protest on indictment proceedings against Slobodan Milosevic of Serbia (Needham, 2011).

In the trenches of Africa, the SCSL, applied Art 6 (2) which is analogous to the ICTY and ICTR, as a result, reiterated the no consideration of defense of head of government or state immunity when it comes to International Criminal Prosecutions (SCSL, 2004). This is evidenced in the denial of Former President Charles Taylor's appeal for the head of state immunity at the SCSL (Nkansah, 2021). Likewise, the ICC founding document, the Rome Statute also adopts these pre-existing norms in article 27 to waive all forms of personal or functional immunities enjoyed by state agents in the discharge of the duties. These International Tribunals and constitutive statutes established at different moments and times, having different legal structures and jurisdictions, however, all at their core, agree to end impunity by stating the irrelevance of immunity for international crimes.

Given this historical development, individual criminal accountability reflects HI perspective of institutional rules and development. By this, the study observed in the preceding discussions that the patterns of International criminal accountability do follow a particular trajectory where immunity as a defensive mechanism is barred. Even though the irrelevance of immunities before a tribunal is still a highly contestable act, path dependence makes one understand that the importance given to peremptory norms in ICL for decades now in tribunals constitutive statute, far

exceeds the weight placed on immunities. Nevertheless, immunity is not inapplicable before all courts but becomes inapplicable based on the constitutive statute of the Court and the manner in which the Court was established.

5.5.4 EXAMINING ARTICLE 98(1) AND 27 (2) OF THE ROME STATUTE

Following the preceding discussions in the state of Immunity in ICL Article 27(2) of the Rome Statute seeks to embody such mechanisms by renouncing the use of personal immunity and all other forms of special procedures that heads of states, foreign ministers, and special state envoys or missions may possess by virtue of their position or status. As observed from the examples, it prohibits those who have the ultimate responsibilities in states' international relations activities from using their official capacity to constitute a jurisdictional bar. However, the ICC statute makes an exception in Article 98 (1) by prohibiting states from taking actions that may conflict with their international obligations with respect to a third state.

From the study, it emerged that Article 98 (1) implies what the Court is not supposed to do, leaving less responsibility on states that have signed the Rome Statute. To the respondents, it sets a blocking mechanism to prevent the court from demanding cooperation, in a form of surrender of the suspect or judicial assistance, from state parties that have international obligations with the third state. By doing so, the statute expressly or implied grants immunity to a suspect from a third state, while the state party cannot violate international laws or obligations “unless the Court can obtain a waiver of immunity from the third state” (ICC FORUM, 1995; Rome Statute, 1998).

On the other hand, the respondents also argued that Art. 98 usage of the verb ‘May’ instead of the verb, ‘Shall’ implies; there can be Judicial discretional processes instead of mandatory judicial processes which is impervious to discretion. This points to the very fact that the ICC holds the first

say in such situations. That is, it is the duty of the Court to determine at what point Judicial processes contradict international law and when it does not as stated in Article 119 of the Rome Statute (ICC, 1998). Moreover, the Rules of procedure in 195 (1), insist on state parties to inform the ICC of challenges in the surrender or assistance in article 98 (1), rather than resorting to non-compliance. Therefore, the court will first and always focus on the pillars of the Rome Statute (Art. 27) by forgoing state privileges that continue to entrench impunity and employ principles that promote equal individual criminal accountability.

However, all respondents disagree with the institutional configuration of the Court to decide when a state party's cooperation for judicial assistance may or may not conflict with international obligations. They note that the Court in explaining and deciding on every other CIL agreement between states and non-state parties will be subjected to too little knowledge and understanding of states' international obligations. They all attest to the fact that the Court is a custodian of the Rome Statute as such must interpret and apply the statute as what it is; but the court is not a custodian of all International obligations, in the state to state relations that pre-existed for before the formation of the Court. In other words, the Court has no given express statutory power to interpret a state's obligations unless the domestic court of the state determines that the state indeed needs to cooperate with ICC's judicial assistance just like the case of South Africa.

In this context, the respondents conclude that state sovereign equality of state and for that matter immunity is as important as International Criminal accountability, for this reason, the ICC cannot force states to surrender a suspect from a third state without waiver of immunity from the third state as enshrined in Article 98(1).

5.5.4.1 ANALYZING MALAWI AND JORDAN STATE PREFERENCE THROUGH THE LENS OF HI

Through the lens of Historical Institutionalism, scholars such as Hall & Lamont (2013), contend that political actors are not just atomistic individuals who make decisions, but rather, they are relational actors, whose actions and inactions are deeply rooted in organizational structures, common structures, and practices they find themselves. Accordingly, their preferences and strategies are deeply embedded in Institutional practices, network relations, and shared cognitive frameworks they find themselves in (Conrad et. al, 2016).

In this context, the study identified why the Hashemite Kingdom Jordan, as a signatory to the Rome Statute decided to forgo the ICC directives and respect the personal immunities of Omar Al-Bashir (Elagab, 2009; ICC, 2017). Similarly, this theoretical perspective also explains why Malawi, whose situation was analogous to Chad and other African countries decided to cede to the Sirte decision at the expense of the ICC directives. Whilst these may not be the only reasons which influenced these countries' decisions, the study accepts that Historical institutionalism solves only a part of the puzzle in the politics in institutions where the timing of temporal events and the structure of institutions influenced their preferences and strategies.

5.5.4.1.1 THE HASHEMITE KINGDOM OF JORDAN

In Jordan's decision not to fulfill its obligation in Art.87 of the Rome Statute, Jordan together with the Arab league notified the PTC that Omar Al-Bashir did enjoy immunity as a Head of State as such arresting him would have been a violation of the CIL and International Law (Akande, 2019; ICC, 2017). More specifically, "Jordan submits that Omar Al-Bashir enjoyed immunity from the criminal jurisdiction of Jordan during his attendance of the Arab League Summit under the 1953 Convention" (ICC, 2017).

Upon interactions with respondents, the study identified that Jordan's preference for honoring the immunity of heads of state of Omar Al Bashir goes beyond a personal choice of state officials just deciding to prevent Sudan's President from prosecution. Rather, the long practices and respect for Heads of states in the Arab world for many years before the advent of the ICC statute inherently constrained the preferences and strategies of Jordan state officials. Respondents buttress this argument by citing Art. 14 of the Pact of Arab League: *"members of the Council of the League, the members of its Committees and such of its officials as shall be designated in the internal organization, shall enjoy, in the exercise of their duties, diplomatic privileges, and immunities* (ICC, 2018; Ireland, 1945; Yale Law School, 2008).

Also, citing Art. 11 of the 1953 convention, persons representing member states of the Arab League "while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities: (a) Immunity from personal arrest or detention and seizure of their personal effects"; not for the state representatives per se but because of the independence of the function (ICC, 2018). Further in Art.14 of the 1953 convention Pact, member states may first waive immunities of such state representation when such immunities impede on international justice, which has been the long practice since 1953 and 1973 when Sudan joined (ICC, 2018)

Recalling history, the respondents noted that the Arab world well respects and preserves the sovereignty of its member states. They contend that this principle is derived from the natural preference of ruling elites to maintain their power and decision-making prowess. Accordingly, with Jordan being a key leader in the formation of the Arab League in 1945 and joining the Convention of the Privileges and Immunities of the Arab league in 1953 it only became natural that these norms and institutions influenced the preferences of the Jordan state. Through this angle of path-dependent, it is identified that the honor of immunity of heads of states vis-à-vis other states

relations irrespective of indictment proceedings is a consistent practice of states in the Arab world, and obviously states repeat and sustain such practice because of increasing returns or benefits all states accrue. It would have therefore been a political blunder to change the path and extradite the then Sudanese President since these institutions created a "political and legal" binding obligation on the hosting state, Jordan to respect the immunity of Omar Al-Bashir under the regional CIL. This creates less obligation on the part of the Jordan government to surrender Omar Al-Bashir because the Sudanese government hasn't waived his immunity status.

5.5.4.2 THE CASE OF MALAWI

In the case of Malawi, it emerged from the study that its preference for non-compliance is summarized in two arguments. First, that Omar-Bashir is a sitting President, and per the "Immunities and Privileges Act of Malawi" he was free from arrest and Prosecution within the territory of Malawi (ICC, 2011). On the second reason of non-cooperation, the government of Malawi argued that as a member state to the AU, it regarded the directives of the institution in high esteem, therefore, Malawi cannot arrest Omar Al-Bashir (ICC, 2011).

In accordance with the "Immunities and Privileges Act of Malawi", the respondents argued that indeed the constitutive Act does bind on legislatures, executives, and other state officials to comply with the sovereign laws of Malawi. This justifies Malawi's decision of no cooperation given that the executive (Ministry of Foreign affairs and the President) is to respect the sovereign laws of the land if they are to continue to exist. Clearly, Malawi, a dualist state had not domesticated the ICC statute despite the fact it was a signatory to the statute. The respondents note that the Immunity and Privileges Act of Malawi, its Penal Code, and the Extradition Act did constrain and influence the preferences of the President.

In the second reason of non-cooperation, the respondents noted that indeed the institutional design of the AU contributed to the strategies and preferences of the Malawian government. They noted that Art. 23 (2) of AU Constitutive Act demands member states or signatories to the treaty "to comply with the decisions and policies of the Union" where failure to do so is tantamount to sanctions of non-cooperation and breaking of ties with other AU states (AU, 2002). The respondents argue that while the AU decisions are collectively addressed to all member states, they are categorized into three main forms in the Rules of Procedure rule 33. First, regulations demand member states to take necessary measures to implement decisions. Second, directives are binding on all member states and power is giving to such states to choose the way they wish to apply the binding decisions. Last, recommendations, declarations, and resolutions are not binding but just to harmonize the opinion of the body (AU, 2002). By this note, they contend that the Sirte decision was a directive binding on member states immediately the AU Chair, Muammar Al-Ghaddafi, and chairperson of the commission authenticated the decision giving less room for member states to forgo the AU decision.

Kayange (2014), contributes to this strand of argument from the HI perspective on how institutional and cognitive practices, and network relations in which leaders find themselves influence their preferences. Kayange (2014), contend that Malawi's decision of non-compliance is indicative of the Pan Africanism philosophical principles that the then President, Bingu wa Mutharika was deeply embedded in. Here Pan-Africanism ideas were defined as fostering solidarity and unity of all Africans everywhere. As such, the ICC requesting an arrest warrant for Omar-Al Bashir was indicative of betraying such solidarity and unity principles where Sudan is seen as "one of our own", one of the countries in Africa.

Kayange (2014) again contends that, through the Pan African principle, such mechanisms promoted ideas of the traditional sovereignty of an African state. In this context, the independence, self-reliance, and self-determination of a country are important due to the entrenched nature of sovereignty. Accordingly, the ICC by requesting judicial assistance to impeach a sitting President impedes the principles of traditional sovereignty reflective of the pan- African ideas. In other words, the ICC is interfering too much in the affairs of another country especially when the institution is just a treaty-based institution that Sudan had not ceded authority to revoke its international immunities and privileges.

From another angle, respondents also argued that A Pan-African leader mindful of historical activities of colonization and apartheid may be mindful of his cognitive practices and normative belief of assisting in the extradition of African sitting President to the ICC. They further note that while indictment processes may not be wrong, resolution 1593 (2005) questions why the UNSC of which three of the P5 are not state parties to the ICC statute would call for indictment processes against another non-state party. In this context, indicting an African sitting President may be indicative of a new form of colonialism to a Western institution whose powerful political coalition and allies cannot be subjected to the authority of the court, but an African country can be forced to fulfill such a course. From this angle, the reality is that perception matters, and often times it matters even more than reality as evidenced in the UNSC-ICC-Sudan situation.

Whilst the institutional design of the AU may not be fully found on Pan-African principles, HI contends that institutions have a way of reproducing earlier historical configurations. As such the transformation of OAU to AU is observed to have maintained some forms of Pan African principles such as African solution to African problems mechanisms. This in turn influenced the

decision of the Malawi President, who at the time of the decision of non-compliance had just ended his term as the AU chair.

Accordingly, the political actors were constrained to disregard the ICC's directives, as the President's institutional and cognitive practices which he is deeply embedded in influenced his decisions.

From this analysis, the study identified the impact and interplay of long-standing institutional practices, network relations, and cognitive practices between ICC-Jordan-Sudan Interface and ICC-Malawi-Sudan Interface. Clearly, the institutional practice of member states to the Pact of the Arab League and the 1953 convention influenced Jordan's decision of non-compliance with the ICC. Whilst at the same time, in the case of Malawi, the cognitive practice of the President as a Pan Africanist, the dualist nature of Malawi's constitution, the timing of the President as the immediate former AU chair, after Succeeding Al-Bashir impacted his preferences which are all in line with HI expectations.

5.5.5 CONCLUSION

This chapter has examined the role of the ICC in global governance which serves as an international framework for implementing an anti-impunity norm at the highest level by revoking all forms of immunity that may render international prosecutions ineffective. The ICC-AU interface has also been examined through the reactive path dependence to explicate the causal and trigger mechanisms in this historical narrative. More importantly, in the sequential analysis certain dynamics of politics were examined in this historical event which has reflected the dynamics of institutional institutions and frameworks from HI and increasing path-dependent perspective.

CHAPTER SIX

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS.

6.1 INTRODUCTION

The final chapter of the study involves a synopsis of the research findings, the conclusion of the study and recommendations on the ICC's indictment processes on the African continent, and further recommendations on future research works.

6.2 SUMMARY OF FINDINGS

The main objective of the study was to examine and explore the temporal and political chains of events in the ICC-AU interface through the lens of path-dependent institutional concept. It sought to understand the causal mechanisms of how the ICC relations with the AU and some key African states have moved from many phases: from a continent with unflinching support for the establishment of the ICC to tensions between the Court and Africa's arch political institution, and now, what I call the 'silent phase' between both institutions. This study was triggered by the fact that the institutional design of the ICC and its operations on the African Continent has become a central issue of discussion in academia and within political circles. Accordingly, whilst the legal structure of the court is not underrated in this study, the focus has been on highlighting the politics of institutions through the lens of path dependence. In an attempt to expand and deepen the understanding of the central phenomenon, the study sought to answer the following questions:

- What is the role of the ICC in global governance?

- Through the lens of reactive path-dependent, why and how did the AU's support for the ICC shift?
- How legitimate is the ICC-UNSC interface and how does it reflect a path-dependent dynamic?
- Is there a change in the state of Immunity in ICL?

On the role of the ICC in global governance, interactions with academicians in Politics and International Criminal law revealed that the institutional design of the ICC provides a unique structure and jurisdiction, which confronts pre-existing international institutions of state sovereignty. The Court seeks to redress the monopolized nature of individual criminal accountability whereby national jurisdictions have always had the final say in international criminal processes. Here the court takes power away from national jurisdictions in deciding when criminal proceedings should take place, how they should take place, and more importantly, the kinds of people that should fall within the radar of domestic courts.

Within this strand of argument, the experts claimed that the Rome Statute entrenches the highest form of anti-impunity norm and the idea of individual equality before the law where all persons are accorded the same attention when it comes to criminal prosecutions. Accordingly, the Court inherently revokes all forms of immunities, personal or functional, enjoyed by state officials, which in most cases bars criminal accountability due to the embedded nature of such institutions. In sum, the Court's role in global governance is to try core International Crimes of "Genocide, Crimes against Humanity, War Crimes and Crime of Aggression" by according domestic courts the primary role in such prosecutions; but, steps in when national jurisdictions are unwilling or unable to apply the Rome statutes standardized rules for international prosecutions.

The study while examining the AU-ICC historical narrative through a reactive path-dependent sequence identified that the chains of events in this narrative are a reaction to antecedent events and a cause to subsequent events. By examining document sources and interactions with experts knowledgeable in the field, it emerged that causal processes in this interface were sensitive to the specific event of a constant refusal of the UNSC to either act negatively or positively to the AU request for deferral in the Omar Al Bashir indictment processes. This series of UNSC non-compliance provided permissive conditions to change the popular AU-ICC narrative from a continent with unflinching support for the ICC to an infamous relationship. While these antecedent events in 2008, were providing conditions to change the historical narrative, the issuance of the arrest warrant in 2009 served as the historical contingent event and provided a specific opening or juncture in the Assembly Session in Sirte, for the 'arch political body to declare a non-cooperation policy against the ICC'.

At the core of this non-cooperation policy is the AU concern of power inequalities in the institutional design of the Rome Statute, the inequity in international criminal prosecutions, and more importantly, the interest of Key African states whose preferences have undoubtedly shaped the AU relations with the ICC over the years. The study identified that the repudiation of the UNSC triggered the AU through South Africa in a series of requests to amend the court's processes of deferring situations. While calling the UNSC role in the deferral processes politically motivated, the AU through South Africa saw the UNGA role to be more politically expedient. From the analysis, an increasing path-dependent was used to provide a vivid explanation as to why it failed to take place. Moreover, whereas the AU criticized the ICC for being politically motivated, at the other end of the spectrum,

interactions with experts revealed that the perceived AU relations with the ICC are not an AU or an African problem, but a few powerful nations using their locked-in historical advantages and power asymmetries to drive the ICC-AU interface. While Sudan's situation was driven by law and state sovereignty, the critical agency role of Libya under the administration of Muammar Ghaddafi helped keep the path of non-cooperation. Also, Kenya's position as a regional hegemon helped Uhuru Kenyatta and William Ruto, to galvanize African support to institutionalize immunities of Heads of States Immunity which went a long way to keep Omar Al-Bashir from extradition. In brief, the ICC-African problem was more of a political issue than a legal matter.

Noticeably, the study also identified how the politics of international institutions reflected on the ICC-AU interface. For instance, whilst ICL is identified as a core legal matter, situating these laws under the radar of path dependence helped explain why the ICC institutional design inherently revokes the immunities of government officials. The study traced the evolution of international tribunals and ICL on the subject of revoking Heads of state immunity from 1919 until today. Again, through the lens of historical institutionalism and path dependency, it emerged that the institutions within which certain actors were embedded, influenced their choice when faced with a conundrum of ceding to the authority of the ICC or its regional institutions in the case of Malawi and Jordan.

6.3 CONCLUSION

The study sought to examine the ICC's relationship with the AU through the lens of the Historical Institutionalism model of path dependence. Accordingly, it emerged that the nature of temporal events in this historical narrative reflects a reactive path-dependent sequence where specific chains of events in the narrative are sensitive to antecedent events

and these earlier events set the path of the Court's relations with Africa and further influenced subsequent events and decisions in this trajectory. Through the lens of increasing returns dynamics in institutions, it emerged that some key African countries used their historical advantages, power inequalities, and interests to shape the foreign policies of the AU towards the ICC which nullifies the conception that all African states are against the ICC.

Moreover, through this same research tradition, the study explained the legitimacy of the UNSC involvement in the ICC processes as characterizing a reaction of the former's role of global governance as a determinative decision-maker of in international peace and security matters. Accordingly, it emerged that the UNSC-ICC relationship reflects an increasing path-dependent dynamic where the former and latter's relationship will continue to be in a locked-in state as the Court extends the power of the UNSC and at the same time draws power from the UNSC by having a unique form of 'Universal Jurisdiction' where third states can be referred to the court when any of the four tangent international crimes are committed in these countries. Yet, the institutional design of the court gives the UNSC power to defer a situation for a period of 12 months with unlimited renewals.

The study has indeed highlighted the relevance of Historical Institutionalism and path dependence in explaining the dynamics of politics in international institutions by paying attention to the temporal processes in this historical narrative.

6.4. RECOMMENDATIONS IN THE CONTEXT OF STUDY

- The ICC was established by political actors, adjudicates more political situations than legal situations, and depends on state cooperation to work effectively.

Accordingly, the ICC must acknowledge the political side of its institutional design and how it is enmeshed in politics despite being a fully-fledged court with legal responsibilities. Acknowledging this will go in a long way to structure the court's relations with state actors such as adopting better diplomatic processes in the indictment of political actors or non-state actors.

- Whereas the ICC-AU seemingly tensions have been driven by the self-serving interests of some African political leaders, it is an undeniable fact that arrest warrants have been issued against only Africans, and if any continent were to face the same situation indictment processes will be turbulent. It is about time the ICC promotes equity in International criminal processes by investigating crimes in other countries to cancel out the selective bias claims of self-serving African leaders. While this is not to please the critics of the Court, it should be the long-standing goal of the ICC to promote equality of individual accountability.
- Whilst the ICC-UNSC interface has become locked in due to do a reproduction of historical power dynamics, it is important that the self-serving interests of UNSC P5 need not interfere with the core judicial function of the Court.
- There also needs to be a clear definition of the Immunities of Heads of States question. Whereas Path dependency has helped explain the irrelevance of immunities in ICL, mostly functional immunities before a tribunal for international crimes; there needs to be a clear International Instrument or law in determining if hosting States can or should revoke the immunity of a head of state or government.

6.5 RECOMMENDATION ON FUTURE RESEARCH WORKS

- As a result of the sensitive nature of this research topic and the theory through which the analysis was grounded, some political actors decided not to participate in this research. Accordingly, the first call for future research works is to get political actors who matter on the central phenomenon of the study to answer some of the pertinent political questions of the AU-ICC interface. If taken seriously, this future research work will provide better results than the current one.

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APPENDIXES

Appendix One: (Interview Protocol)

The research questions are to only assist the researcher to make an objective political analysis on the topic "The Politics of International Institutions: A Path Dependent Analysis of The International Criminal Court-African Union Interface". You are kindly required to provide responses to these semi-structured, open-ended questionnaires. Any information that will be provided will remain confidential and will be disclosed only with your permission. Your participation in this study is voluntary and if you decide not to be a participant, you are free to withdraw from this study at any point in time. kindly provide your signature in the space below as a form of your consent to participate in this study.

……. ……..

Respondents Name Date and Signature

1.Is there a space for punitive global governance in a world of power politics?

2.How is the ICC different to Nuremberg/Tokyo trials, ICTY/ICTR?

3.What kinds of international orders does the ICC reinforce, revise or challenge?

4.How will you describe the complementarity role of the ICC so far?

5.When was the first time Article 16 of the Rome Statue was invoked?

6.How will you describe the ICC-UNSC interface and how legitimate is this relationship?

7.Does the ICC have authority to interpret all International Obligations?

8.Does asymmetrical power relationship exist in the AU?

9.Why did tensions exist between the ICC and AU and what caused the change?

10.What are the kinds of immunity and is it a legitimate concern not to bar immunity of state?