THE INTERNATIONAL CRIMINAL COURT: AN EXPLORATION OF THE POLITICS AT PLAY

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Abstract

This thesis examines the role that politics plays within the International Criminal Court. Specifically, the thesis will explore the role of politics as it pertains to the actors within the International Criminal Court and three specific case studies: the situation in Uganda, the situation in Kenya, and the situation in the Comoros Islands. Finally, the thesis will propose recommendations for the way the Court approaches politics in the future. The thesis ultimately concludes that politics are not necessarily harmful to the Court’s operations.
Chapter One

Introduction

This thesis explores the intersection between the politics and the law as they pertain to three case studies adjudicated by the International Criminal Court (ICC). For the purpose of this thesis, legal refers to a decision or action grounded in the law with a motivation of upholding the law. Politics, on the other hand, refers to decisions and actions influenced by a government and motivated by notions of power and reputation. This thesis examines how and why politics play a role in decisions and actions at the International Criminal Court. Drawing on three case studies, this paper will illustrate the ways in which actions and decisions of the ICC fall along the spectrum of interactions between law and politics. This thesis also considers the different academic perspectives towards the role politics should play in international courts of law. Some believe there is an absolute, sharp divide between law and politics; others see this relationship as a spectrum, while others see a complementary set of functions where both politics and law are essential to a living court. There are also those who believe that the International Criminal Court illegitimately substitutes national or personal biases for otherwise impersonal legal standards. There are a multitude of ways in which to view the relationship between law and politics with respect to the ICC.

The stance that one takes regarding this relationship between law and politics often depends on the context through which the controversy of the law/politics divide can occur. The creation of the International Criminal Court by member countries is itself a political act, though it ends with a treaty and a court bounded by the rule of law, rather than a set of countries making ad hoc choices. Additionally, there are foundational questions; for example, the Court must
select countries to investigate and choose the individuals it will put on trial. These decisions cannot be made with machine-like impartiality; however, at the same time, there are laws to guide choices the Court makes. Beyond this, there are practical limits built into the structure of the Court, which are political compromises, in order to allow the Court to conduct itself legally within its constraints. An additional dimension is the language of the Rome Statute. There are legal terms that are not self-applying that require some degree of discretion and interpretation. These moments, where actors inside of the Court must exercise discretion, cannot escape scrutiny from others in the system. This thesis will examine the law and politics dimension through the diverse contexts described.

This thesis takes the stance that law and politics need not be seen as mutually exclusive; the two can and do exist simultaneously in the living Court. The paper begins with an historical outline of the creation of the International Criminal Court, and highlights the fundamental principles upon which the Court functions. Next, the paper explores the important actors that operate within the Court. This includes the Prosecutor, the Office of the Registry, the Presidency, the Trial-Chambers, and non-governmental organizations (NGOs). This thesis will then focus on three case studies that illuminate how politics can play various roles regarding the proceedings and outcomes of legal cases adjudicated by the ICC. The first case study addressed examines an ICC case in which the Gambian-born head prosecutor, Fatou Bensouda, opened a case against members of the Lord’s Resistance Army in Uganda. The second case study examines government-related violence against members of the opposition party in Kenya, with a more in-depth exploration of the case against Deputy President William Ruto and Joshua Sang. The third
and final case study examines a case in the Comoros Islands that has been hamstrung by the broader conflict that exists in the Middle East between Israel and Palestine. Through the fundamental structure of the International Criminal Court and the three case studies mentioned, this thesis demonstrates how the Court is both a political and judicial entity. There are various aspects of the Court that can be shown to involve law, politics, or something in-between. In the paper’s Conclusions section, a summary of the paper will be provided with final reflections outlined. Rather than denying all political dimensions of the Court, this thesis argues that it may be in the ICC’s best interest to embrace the fact that the Court cannot escape the influence and pressure exerted on it by the political world.
Chapter Two

The Creation of the International Criminal Court

The International Criminal Court is a permanent autonomous court located in The Hague, The Netherlands. Following World War I, officials discussed the possibility of creating a special tribunal to prosecute and punish German leaders for inhumane acts against other nations. Though this was discussed, the idea never materialized. However, after WWII, two ad hoc—intended to serve a specific purpose—military tribunals, The International Criminal Tribunal for the Former Yugoslavia in 1993, and the International Tribunal for Rwanda in 1995 were created to prosecute those who violated international humanitarian law. The creation of these ad hoc tribunals highlighted the need for a permanent international criminal court. Prior to the creation of the International Criminal Court and the ad hoc tribunals, the international community had no way of prosecuting national and transnational crimes at the international level. On July 1, 2002, The Rome Statute, which sets out the rules and procedures for the ICC, came into force after years of negotiation. This statute resulted from the 1998 Rome Conference during which a number of international actors, including states, groupings of states (including the European Union and the Southern African Development Community), non-governmental organizations, criminal lawyers, and others came together to create this international treaty. Throughout the five-week conference, the entities discussed matters of jurisdiction, criminal procedure, and the role of the Security Council in the context of this future international Court. Committees determined that sixty states must sign on to become parties to the Statute before it could go into effect. This
happened much faster than expected, and the Court was officially established on July 1, 2002.\textsuperscript{1}

According to the Rome Statute, the Court was created “as a response to ‘unimaginable atrocities that deeply shock the conscience of humanity,’”\textsuperscript{2} such as genocide, war crimes, crimes against humanity, and crimes of aggression. It was established in order to “help end impunity for the perpetrators of the most serious crimes of concern to the international community.”\textsuperscript{3}

One of the most common criticisms of the ICC stems from the idea that the fair and impartial nature of the Court has been over-ridden by international politics. Critics such as Onan Acana and Baker Ochola, assert that a legal institution should operate on legal principles alone and be completely free from political influence. Moreover, these critics believe that the legitimacy of the Court is undermined due to the political machinations of actors and nations that play roles in various cases. However, in the context of the ICC, other scholars believe it is unreasonable to separate law from politics. For instance, David Bosco and Alex Whiting argue that politics and law do not work in opposition, and it makes more sense to view their existence simultaneously. In an attempt to strengthen the International Criminal Court’s image and legitimacy, the Court itself refuses to acknowledge its political aspects; however, the Court is, in fact, bound by politics in many respects. These various stances on the political aspects of the Court will be examined further in later chapters.


To fully illustrate the political aspects of the ICC, it is important to understand some of the Court’s most important principles that determine whether or not the Court can make the transition from a preliminary examination to opening an active investigation. When the Court receives a referral from a state to open an investigation, the Court almost always begins a preliminary examination into the situation requested. According to the factors set out in Article 53(1)(a)-(c), throughout the preliminary examination the Court considers jurisdiction, admissibility, including complementarity and gravity, and lastly, the interests of justice. Based on these elements, the Court makes a decision on whether or not it will move forward with an investigation.

A fundamental principle of the Court is the notion of complementarity. This principle states “the ICC is to assume jurisdiction only when States fail to do so.” That is, the ICC only has jurisdiction over a crime when the State in which the crime was committed does not have the capability or refuses to try its own members. A determination of admissibility is “not [only] a judgment or reflection on the national justice system” of a particular country as a whole, but also an assessment on whether an already functioning judiciary is investigating or prosecuting the relevant case. In the Office of the Prosecutor’s Policy Paper on Preliminary Examinations, this notion of whether a judicial institution is adequately addressing a particular case is further explained:

For the purpose of assessing unwillingness to investigate or prosecute genuinely in the context of a particular case, pursuant to article 17(2), the Office shall consider whether (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (b) there

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4 Cryer, Friman, Robinson, and Wilmshurst, 75.
has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice. In so doing, the Office may consider a number of factors.6

These factors that impact a determination of admissibility as outlined by this document include: the inability for a nation to collect the necessary evidence; the absence of security for witnesses, investigators, judges, and prosecutors; impartiality in court proceedings; an unjustified delay in proceedings; and a variety of other situations. If the ICC determines that the State has failed to assume jurisdiction over a particular crime, and the crime is admissible, it can step in and move forward with an investigation.

Essentially, the ICC is a “court of last resort,” 7 and it must consider jurisdiction and admissibility when determining whether to make the transition from an initial exploration to a formal investigation. There are three jurisdictional requirements: temporal qualifications, subject matter, and either territorial or personal jurisdiction. First, addressing the temporal bounded nature of cases, the ICC can only try individuals for crimes committed after the establishment of the Court. This means that few situations have been pursued, as the Court is not only relatively new, but also limited in the individuals it can investigate. Additionally, a state must sign onto the Rome Statute and officially become a State Party to the statute before the ICC can open an investigation. Any crime that the Court investigates must have occurred after the state officially became a member. Second, the ICC has jurisdiction only over “‘the most serious crimes of international concern’: genocide, crimes against humanity, war crimes and aggression.”8 It is

6 Ibid, 13.
7 Cryer, Friman, Robinson, and Wilmshurst, 153.
8 Ibid, 150.
useful to take a moment here to acknowledge that even though the gravity threshold is outlined within the Rome Statute, much still remains open to interpretation. The categories above act more as guidelines, as there are no numbers or specific acts listed in the statute that would constitute crimes grave enough to fall within the jurisdiction of the ICC. Third, the Court must ensure that it has territorial or personal jurisdiction over the crime(s). Based on Article 5 of the Rome Statute, the crime must be committed on the territory or by a national of a State Party or “a State not Party to the Statute which has lodged a declaration accepting the exercise of jurisdiction in relation to any territory or national where the Security Council refers a situation.”

According to Article 17 of the Rome Statute, the Court may have jurisdiction over a particular crime, though the case or situation may be inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court. 10

Another important aspect that creates limitations for the Court is the initiation of proceedings. There are multiple ways in which a situation can appear before the ICC. As mentioned earlier, only States that have signed on to the Rome Statute can refer situations to the

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Court. A state can refer itself or its own members. Additionally, the Security Council has the power to refer (and defer) a situation to the ICC, which some suggest contributes to the political aspect of the institution. Critics claim that the Security Council likely has its own interests and political concerns in mind when making referrals. Moreover, an alternative means of initiation is a referral by the Prosecutor herself with the Pre-Trial Chamber’s authorization.\textsuperscript{11} There are numerous other rules and restrictions in place to dictate ICC operations, though it is often through the initiation of proceedings and questions of jurisdiction where many political criticisms of the Court are focused. This coincides with the preliminary questions that the Court must ask when it determines which cases to take on and which individuals to put on trial. There is a legal framework within which the Court makes its decisions; however, it cannot operate completely impartially.

Though the Court may itself attempt to deny it is politically motivated in any of its actions, it is clear that the ICC is inherently political in some respects based on the way it was created and the way it currently functions. Firstly, the Court was created on the basis of a treaty, crafted by political figures and groups. It was “created by political decisions,”\textsuperscript{12} and it tries crimes that are often related to politics and have political motivations behind them. Often times, this entails a leader or group of leaders trying to acquire power or control over a particular resource. Nonetheless, the institution was created as a court, with a treaty and a managing body. Even though political forces impact cases addressed by the Court, in all proceedings inside of the

\textsuperscript{11} Cryer, Friman, Robinson, and Wilmshurst, 163-164.
courtroom there is a “presentation of the facts...organized around legal notions.”

Judges’ decisions are based on international law and have little flexibility for political influence. Yet, because the Court itself chooses which situations to investigate and prosecute, there is another outlet for politics to come into play. There are times when the Court is politically motivated when it makes these decisions. There are particular questions the Court must consider when making decisions about where to investigate and choosing which individuals to put on trial, but, as stated, these issues cannot be examined with robotic impartiality. Even so, all decisions that take place outside of the courtroom are guided by rules, criteria, guidelines, and policies. ICC Prosecution coordinator Alex Whiting addresses the political aspects of the Court well, and his ideas reflect the notion that politics is an essential component to the Court’s operation. He not only acknowledges the Court’s politically based decisions, but he also embraces them:

> We operate in a political world and all the cases we do are highly politically charged and our institution is politically charged. You can’t let those aspects govern your decisions but you can’t be oblivious to them either. We’re building an institution here. We’re not a national justice ministry, which has tons of authority through years of operation and acceptance in society. They can throw their weight around. We have no weight. We’re the Wizard of Oz behind the curtain. If we were purists about everything we did, we’d quickly run into trouble.\(^{14}\)

Whiting illuminates why the Court acts politically. He suggests that because the International Criminal Court is not universally accepted and is fairly new in operation, the institution has no “weight.” It does not have the capability to please everyone or to avoid

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political motives throughout the course of its actions. Through examining the actors at the Court and particular case studies, the various ways in which politics play a role will become clearer.
Chapter Three

Actors Within The International Criminal Court

To fully understand the political and legal elements of the International Criminal Court, one must first understand the Court’s composition and the actors who help it to function. The ICC is composed of four main organs: The Presidency, The Judicial Chambers, The Office of the Prosecutor, and the Registry. The four organs work both individually and collectively in order to ensure the Court is working to its fullest potential. Though the Court has an incentive to protect the interests of powerful states, it is by no means completely political in this way. Bosco notes, “[a]s the court’s activities develop and as its reputation grows, powerful states that imagined they could marginalize or control the court might instead find themselves adjusting to its activities.”

The Presidency is composed of the President, First Vice-President, and Second-Vice President. In order to be selected for one of these positions, an individual must have an absolute majority vote from the Judges of the Court. The Presidency holds a great deal of responsibility in maintaining relationships with states and raising public awareness about the Court’s goals and functions. Because the President is responsible for the Court’s relationships with States, which partially reflects the Court’s success (the Court relies on state cooperation in order to capture and pursue investigations of its citizens), she has a political incentive to please particular state governments and proceed with a certain degree of caution throughout her decision making process.

\(^{15}\) Ibid, 16.
Another important branch of the Court is the Office of the Prosecutor. The Court’s first Prosecutor, Luis Moreno-Ocampo, led the office until 2012. At that time, the current head, Fatou Bensouda, took office. The Office of the Prosecutor is in charge of investigating and prosecuting some of the gravest crimes, including genocide, crimes against humanity, and war crimes. In order to fully understand the Office of the Prosecutor’s role and examine whether or not it acts politically (and if it does, whether these acts are problematic), one must remember that the Prosecutor can only prosecute crimes “committed by nationals of a State Party or on the territory of a State Party” after that State has signed onto the Rome Statute. At the same time, however, the Prosecutor of the International Criminal Court has “‘broad discretionary power’— much broader than other international and some domestic prosecutors— to choose situations to investigate and individuals to indict.” This provides skeptics who see law and politics as opposites with the opportunity to make criticisms regarding the political aspect of the Court and deny that it functions in a just and lawful manner. Critics argue that the Prosecutor only investigates and prosecutes situations in Africa. This critique is partially based on fact; in its sixteen years of existence, all of the Court’s prosecutions have concerned situations in Africa: Uganda, Democratic Republic of Congo, the Central African Republic, Sudan, Kenya, Libya, Côte d’Ivoire and Mali. Though this is the case, only once has the Court invoked its proprio motu powers to open its own investigations without a referral from someone outside of the Court. All other situations have been referred to the Court by State Parties, themselves, or by the Security Council. Additionally, the ICC notes that the number of African countries that are state

17 Bosco, 17.
parties to the ICC is quite high relative to other continents. To date, one-hundred-twenty-three countries have ratified the Rome Statute of the ICC. Out of all of the countries that have ratified, and are thus under the jurisdiction of the Court, nearly one third of these countries are African states. Additionally, because much of the violence takes place in high-resource areas, the ICC is more likely to intervene here. In a country with more resources, the Court has an easier time successfully executing its arrest warrants. Yale University Professor Kamari Maxine Clarke put it well:

African submission to ICC jurisdiction exists within political and “structural” inequalities in the global arena, meaning that the ICC’s involvement in Africa is not simply a question of the ICC’s targeting of Africa. Nor is it a matter of whether African states themselves participated in referring particular cases. Rather, it has to do with which crimes can be pursued, which agents can be held responsible, whether Africa’s violence can be managed by African countries, and whether the crimes of the Rome Statute are sufficient to address the root causes of violence in Africa’s political landscape.\(^\text{18}\)

In some respects, it is the structural violence in place and political structures in place that determine where the ICC intervenes, and which cases it takes on. The Court can only take actions that are humanly possible and reasonable. The Prosecutor cannot choose to move forward with an investigation in a particular country if some of the world’s strongest powers will oppose those actions. Such opposition would likely have a dire impact on the ICC and its public image. Moreover, if any of the permanent five members of the Security Council of the UN votes against referring a case to the ICC, the Court cannot take action as a result of the UN request. Realistically, it makes no sense for the ICC to open an investigation in a particular country if the United Nations Security Council would simply halt any progress the Court began to make. Also,

considering how the International Criminal Court is a young international institution, it is too early to judge what the Court’s intention is, and whether it will be able to effectively deliver justice and end impunity beyond Africa.

Though some may argue that the Court does indeed target Africa, the inherent structure of the ICC makes it quite challenging to do anything different. This can be problematic in some sense, as the some of the world’s greatest powers have no incentive to obey international criminal laws; they know they will not be held accountable. On the other hand, is the ICC really to blame for such unfairness and inequality? The answer is clearly no. The actors at the International Criminal Court, and the Prosecutor specifically, are acting with the tools with which they have been given. It is the structure and rules in place that promote and enforce targeting countries in Africa. Though it seems easy and reasonable to blame the structures in place for some of the political decisions and actions the Court has made, this does not necessarily mean that actors within the Court and the Court itself can completely escape responsibility. Simply allowing the structures in place to continue to promote politically based decisions that are not solely grounded in the rule of law, some argue, should not be tolerated. The Prosecutor must work with the Court and other institutions to implement change. This change must allow for greater ease in opening investigations in non-African states so that our International Criminal Court truly promotes worldwide justice. Implementing this change, though, will be quite difficult. Changing the inherent structure of the Court and how it operates is a daunting task that will take time and much international cooperation.
The Office of the Prosecutor is not only in charge of prosecuting cases inside the courtroom, but she is also responsible for conducting preliminary examinations and formal investigations. Whenever a situation is referred to the ICC, the Prosecutor is obliged to open a preliminary examination. Once this examination begins, the OTP will consider the factors set out in Article 53(1)(a)-(c) whether: “(a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under article 17, and (c) an investigation would serve the interests of justice.”

The preliminary examination of a situation can be initiated when the OTP takes into account information on crimes that are within the jurisdiction of the Court. This account of information can happen in one of three ways: information on crimes that is provided by individuals, groups, States, intergovernmental or non-governmental organizations, or other reliable sources; a referral from States Parties or the Security Council; or a declaration accepting the exercise of jurisdiction of the Court based on Article 12(3) by a State which is not a party to the Rome Statute. Additionally, the Prosecutor can only use her *proprio motu* powers under Article 15 of the statute if the Court has jurisdiction over the crimes committed. The Prosecutor cannot act on information “concerning crimes allegedly committed outside of these parameters unless the Security Council has referred the situation.”

If the Office of the Prosecutor assesses that there is a reasonable basis to believe that crimes were committed, and that the crimes committed are admissible and fall within the jurisdiction of the Court, it requests authorization to the Pre-Trial Chamber to begin a formal

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investigation. Before doing so, however, the Office informs the relevant State(s) with jurisdiction of its conclusion. The Office will inquire as to whether the State(s) wishes to refer the situation to the Court itself. If the State(s) elects not to refer the situation to the ICC, the Prosecutor “will remain prepared to proceed proprio motu.”21 Ultimately, this procedure is meant to illustrate transparency and predictability with the States that would normally exercise jurisdiction over the crimes committed. Additionally, the procedure is meant to “encourage national ownership and engagement with the judicial process” and to “promote future cooperation.”22 This process “ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice.”23 The principle of complementarity is meant to encourage States to carry out their own investigations and prosecutions of international crimes. States should “bear the primary responsibility for preventing and punishing crimes, while proceedings before the ICC should remain an exception to the norm.”24

If the OTP determines that there is a reasonable basis to open a formal investigation, it must work with the judicial branch of the Court, which plays an equally important role. The judicial branch consists of the Pre-Trial Division, the Trial Division, and the Appeals Division. Among the three divisions, there are eighteen judges who are each responsible for leading the proceedings that take place inside of the courtroom. Judges are assigned to their division based

21 Ibid, 23.
22 Ibid.
23 Ibid.
24 Ibid, 23.
on their “qualifications and experience”\(^{25}\) in both criminal law and international law. The Judges come from various regions and countries in order to ensure diversity inside the courtroom. Currently, there are judges representing the Republic of Korea, Botswana, Italy, Ghana, Finland, Latvia, Kenya, Japan, Trinidad and Tobago, and various other countries around the world. This diversity among the judges is intended to create variation in beliefs and experiences and eliminate politically based decisions. Both the Trial and the Pre-Trial Division judges have a great deal of criminal trial experience before assignment to these divisions. Their terms last three years, though they continue on until any case that has already begun has been completed. In each of the Trial and Pre-Trial Chamber, there are three judges, though a single judge can carry out a great deal of the Pre-Trial’s duties. The Appeals Chamber consists of five judges, one of which is the President of the Court. Additionally, the Appeals Chamber chooses a Presiding Judge for every appeal. The judicial branch helps ensure that the rule of law and the rules set forth by the Rome Statute are followed. Even though the Prosecutor may be politically motivated outside of the courtroom, the judges ensure these incentives do not affect proceedings inside of the courtroom.

Once the Office of the Prosecutor conducts an initial examination, it must work closely with the Pre-Trial Chamber to continue a more formal investigation into the State(s) and crime(s) committed. If the OTP wishes to open an official investigation beyond the preliminary examination, the Pre-Trial Chamber must grant the Office the authority to do so. Once the Pre-

Trial Chamber grants the Prosecutor the authority to do so, the OTP can begin to open a more formal investigation into the crime(s) committed and move forward with a case.

In addition to the actors that operate inside of the Courtroom, the Registry also plays an important role. The Registry is responsible for all non-judicial aspects of the Court. The Registrar is the primary administrative officer and leads the Registry. He or she is elected by the judges for a five year term, and runs under the authority of the President of the Court. According to the International Criminal Court’s website (which is completely run by the Registry),

The work of the Registry is characterized by the fact that it must remain a neutral organ at all times so as to ensure the support of all Court’s functions equally. The Registry is conscious that the quality, efficiency, transparency and timeliness of its activities impact on the achievement of the Court-wide goals. The Registry is guided by its statutory framework and by international standards and is forward-looking, particularly when it comes to information and communication technology.\(^\text{26}\)

The Registry claims that the Court is not politically motivated in any respect, and strives to portray a positive, rather than a “neutral” image of the Court. It worries deeply about its criticisms and becomes quite defensive and cautious in addressing such critiques. The Registry recognizes that support for the Court is crucial and rather than working to paint a “neutral,” unbiased, and accurate image of the ICC, it seeks support, regardless of how it achieves this. It is politically motivated in its attempt to portray a positive image of the Court, as it aims to gain the support of the international community and improve its reputation. Ultimately, the Court does need support to survive, and the criticism it faces is not all justifiable. As addressed, the Court does not have its own police force; it relies on states themselves to cooperate in apprehending criminals. For this reason, the Court must gain state support. In addition, the Court relies heavily

\(^{26}\) Ibid.
on state funding to keep itself running. It is funded primarily by its member states. The Court also receives funding from voluntary government contributions, individuals who choose to donate, international organizations, and corporations. Essentially, the Court would have no money to function without support.

The Registry also works to portray a more accurate image of the Court and to give the public a better understanding of what the Court does. Based on the principles of complementarity and jurisdiction, the Court does not have authority to intervene in all types of international crime. There are specific rules and guidelines laid out by the Rome Statute that give the Court its right to take action. These rules play a large role in which crimes the Court decides to investigate; however, the general public is often not aware of this fact. As a result, the Registry works to educate the public about these principles so that we can have a better understanding of the motivation behind many court decisions and rulings. Because of these misunderstandings and the need for court support, it is crucial to erase biases and negative stereotypes that surround the Court. However, in doing so, it would be wise for the Court to recognize is political nature and embrace it, rather than ignore it altogether. Attempting to hide the Court’s political nature can actually provoke further criticism of ICC actions, and work against the goals towards which the Court aims to achieve.

Beyond the four main branches of the Court, there are various other offices including the Office of Public Counsel for Victims and the Office of Public Counsel for Defense. The Office of Public Counsel for Victims actually works on the ground in the locations where crimes have occurred. The office works directly with victims in helping the group/country recover from the
damage encountered. Though some argue that the Court has no sense of what is best for victims throughout the process of investigation, trial, and sentencing, Court officials do indeed work as closely with victims as possible in order to ensure security and safety. Various other departments within the Court work towards relaying accurate and timely information to the public.

Though not a direct branch of the International Criminal Court itself, Non-Governmental Organizations (NGOs) also play an important role in court proceedings. NGOs (especially the Coalition for the International Criminal Court and Amnesty International) advocate for a fair and effective ICC. Additionally, these NGOs help ensure that justice is delivered to victims.

**The Women’s Initiatives for Gender Justice:**

The Women’s Caucus for Gender Justice is one example of an NGO that has played an important role in the Court’s progression. This NGO is a group of human rights activists who advocate for women’s rights within the scope of the International Criminal Court. These activists are from all over the world, and they represent more than 200 international women’s organizations and countries such as Cameroon, Germany, India, Japan, Georgia, Sri Lanka, South Africa, and the United States. The Women’s Caucus was established in 1997, after realizing that “without an organized caucus, women’s concerns would not be appropriately defended and promoted.”27 It functions as its own organization, though the Caucus is a part of the Coalition for the International Criminal Court. The Women’s Caucus was established “to incorporate gender perspectives in the ongoing process of setting up the International Criminal Court, and other mechanisms through the involvement of women worldwide in the process,” and

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“to help enable these institutions and instruments to effectively protect and promote gender justice.”

Even in the 1990s, members of the Women’s Caucus noticed the “vital role that women judges” play in international criminal jurisprudence.”

The Women’s Caucus for Gender Justice, now the Women’s Initiatives for Gender Justice (WIGJ), helps illustrate a new dimension of the relationship between law and politics. In one sense, the WIGJ addresses the idea of legal evolution and legal change. The organization helps bring the law closer to many of the functions the Court and the law itself are capable of fulfilling. NGOs, and the WIGJ in particular, help shape the language of human rights, and the way in which human rights are addressed within the context of the International Criminal Court. Some question whether the result of such change is political or legal, though many academics argue that it can be both, and the tradeoff between the two is unnecessary. A change in the law can be a reflection of the political forces, while also an act that works to foster virtuous law.

One example in which the political forces of the International Criminal Court can help foster virtuous law is the notion of rape within the context of international jurisprudence. It is a relatively recent development that rape has been included in the category of crimes of sexual violence under international criminal law. In 1949, the Fourth Geneva Convention Relating to the Protection of Civilian Persons in Time of War included (in Article 27) that women were to be protected from any “attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault;” however, acts of sexual violence were not included as a breach of the

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28 Ibid.
29 Ibid.
Geneva Convention. Even by 1994, after the establishment of the tribunals for the former Yugoslavia and Rwanda, statutes for the tribunals included rape as a crime against humanity, but failed to include sexual violence as a breach of the Geneva Conventions. Essentially, these laws indicated that “rape was not deemed to be a violation of the laws of war.” Once the formation of the ICC began, the Women’s Caucus recognized a perfect opportunity to bring women’s rights and gender issues to the forefront of international law.

Going into the Rome Conference (the Conference that established the ICC), the Caucus had several objectives. First, the Caucus aimed to have the term “gender,” rather than “sex” included throughout the Rome Statute, as “sex” solely incorporates biological differences, whereas “gender” also incorporates “the differences that arise from…socially constructed roles.” Additionally, members of the Women’s Caucus preferred and advocated for the term “gender crimes” instead of “sexual violence,” as the former included crimes that were targeted against a specific sex as a result of that individual’s assigned gender roles. Additionally, advocates recognized the effects of armed conflict on women, and they hoped to gain international legal recognition of these effects by pushing for gender-based violence to be included in the categories of genocide, war crimes, and crimes against humanity. The Women’s Caucus focused on the rights of individual women and wanted to “de-link gender-based crimes from notions of honor.” Many of the situations the ICC investigates include acts of rape, sexual slavery, forced pregnancy, and other forms of heinous gender-based violence.

30 Ibid.  
31 Ibid.  
32 Ibid.  
33 Ibid.
In order to ensure that the goal of equal rights of women was and is met, the Women’s Caucus also worked to ensure equal female representation within the ICC. At the time of the Rome Conference, women were drastically underrepresented within the international legal community. Out of the one-hundred-seventy-three judges throughout international and regional courts, only twenty-six were women. Both the International Court of Justice and the International Tribunal for the Former Yugoslavia had only one female judge out of a total fifteen and sixteen, respectively. Members of the international legal community themselves recognized the importance of having female representatives within the courts. South African Judge Navanethem Pillay, who served as the United Nations High Commissioner for Human Rights from 2008-2014 observed:

Who interprets the law is at least as important as who makes the law, if not more so…. I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.  

Without females represented inside the courtroom, crimes committed on the basis of gender or as a result of one’s gender had little chance of fair recognition. As a result, the Women’s Caucus created a quota system. Ultimately, “[i]f no quota procedure exists, based on past experience, states will not nominate women because their national procedures for selecting judges favor men.” Because of this, the Women’s Caucus helped achieve the adoption of Article 36(8) of the Rome State. According to this article, in the election of judges, States were required to account for the need for a “fair representation of female and male judges,” and the

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34 Ibid.
need for legal experts on violence against women.\textsuperscript{36} With the creation of the quota system, states had an incentive to nominate female candidates for a role within the Court, as the likelihood of having a person from their country representing the Court would increase if they nominated a female. On the other hand, some worried that the quotas would compromise the integrity of the Court, as they feared the quality of judges would suffer because there were not as many women with the same credentials as men. Additionally, opposers argued that male judges could be just as sensitive to crimes against women as women could be, and having a quota system is discriminatory. Moreover, some feared that pushing women’s rights too heavily could have led to diminished support for the establishment of the Court, and as a new institution that relied on States to succeed, the Court needed all of the support it could get.

Though the Caucus received much support from state delegations in attendance at the Rome Conference, others strongly opposed. States where religious practices supported discriminatory treatment of women resisted the Caucus’ goals. Due to the “ever-multiplying Vatican priests”\textsuperscript{37} and anti-feminist NGOs, it was difficult to bolster up enough government support for the Women’s Caucus’ objectives. Eventually, however, a compromise was reached, and the Rome Statute represented “the most extensive codification of gender issues in any international treaty in history.”\textsuperscript{38} The term “gender” was included in the Statute and Articles 7 and 8 specifically provided a list of gender-based crimes that included rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. Additionally, this list of

\textsuperscript{36} Ibid, 12.
\textsuperscript{37} Ibid, 11.
\textsuperscript{38} Ibid, 12.
crimes was followed by, “or any other form of sexual violence of comparable gravity.”39 This language, especially the words “comparable gravity,” is not clearly defined. Who determines which gender-based crimes are or are not of comparable gravity to those of rape and forced pregnancy? This open-ended and imprecise language opens an outlet for politics to play a role in ICC proceedings, as the players inside of the courtroom must use their own judgment to interpret the law set forth in the Rome Statute. However, it is important to acknowledge that this is an inevitable feature of such a new Court. There is not a great deal of caselaw, so members of the Court can only use the general rules and guidelines laid out in the jurisprudence.

Regardless of the political facets at play, the work of the Women’s Caucus was successful, and they did make a great deal of progress. On October 26, 2002, there were only four women nominated for the Court; however, by November 30, 2002, ten out of the forty-four total judicial nominations were women, and they represented countries from all over the world. In March of 2003, the first judges were sworn into the International Criminal Court. Of the eighteen individuals, seven were women. This was the highest percentage of women in any international or regional court.

The Women’s Initiatives for Gender Justice continues to make strides today. On December 7th, 2014, the first policy on sexual and gender-based crimes came to be. Fatou Bensouda, the current ICC Prosecutor, was the first prosecutor to “call for and prioritise such a

policy.” She delivered on this promise within her first two years as Prosecutor. Bensouda recognized that out of the millions of people victimized by sexual and gender-based crimes, only 16% of individuals accused of war crimes, genocide, and crimes against humanity, were convicted of sexual violence. Though advancing accountability for these crimes is necessary, it is not easy, as women have only been partially integrated into the structure of justice. Because men wrote the first legal systems in place, this is not surprising. Men had an incentive to keep women in their relatively weak position in society by limiting their rights in order to maintain their own power. “Systemic ‘blind spots’” exist within the legal system that result in gender-based discrimination. These ‘blind spots’ lead to “an insufficient assessment of the evidence, unintended invisibility of gender issues in the adjudication and interpretation of the law, and an impunity gap on sexual violence that emboldens perpetrators and betrays victims of these crimes.” Though this does not necessarily excuse the fact that gender-based violence was not previously addressed, it does help account for the reasoning behind such absence.

The policy launched encouraged changing legal norms and gender perceptions in order to address the “gender debt” that exists. There is such a great deal of conscious and subconscious biases that exist surrounding sexual violence. Changing the mindsets of thousands of individuals in order to rework the way in which gender-based violence is seen within international law would not be easy. With Bensouda leading the way, the policy presented can act as a

41 Ibid.
42 Ibid.
“framework for implementation” and a “road map for gender justice.” However, because gender-based crimes have been occurring for decades, it is curious why it took the ICC over sixteen years to address the issue. At the same time, it is useful to consider Whiting’s argument in which he acknowledged the importance of a political focus as the Court worked to establish its credibility. In its early years, the Court remained politically motivated in order to gain support and accomplish its goals. With its reputation on the line, the Court could not risk putting more progressive issues, such as gender-based violence, at the forefront of its goals.

Once the Court progressed in the legal framework regarding rape and other forms of gender-based violence, other issues arose. With rape in particular, the definition is defined quite differently in various countries. Due to cultural concerns, political agendas and historical legislation, different practices and ideas are in place around the notion of rape. While most countries agree that forcible penetration constitutes rape, other ideas are less clearly defined. For example, both Eritrea and Ethiopia confine the definition of rape to sexual violence against women that takes place outside of marriage. The Eritrean Transitional Penal Code states:

1) force or violence must be present,
2) the victim must be a woman,
3) the intercourse must be between unmarried persons, and
4) force may be implied where the woman is unconscious or incapable of resisting rape.

These constrained definitions of rape allow many perpetrators to go unpunished and many victims without a sense of justice. Countries like Botswana and South Africa on the other hand have much more comprehensive and progressive definitions of rape. These countries’ penal

\[^{43}Ibid.\]
\[^{44}Ibid.\]
codes use broader and more inclusive language with terms like “sexual organ or instrument…of whatever nature…into the person of another” and “[a]ny act which causes penetration to any extent whatsoever…” As a result of this variance in the definition of rape, it was difficult for the ICC to create its own definition of the word, as the definition it used would apply to citizens of countries all over the world where ideas of what constitutes rape widely vary. How could the International Criminal Court please everyone? Realistically, there was no way it could. By issuing its own definition of what constitutes rape, the ICC was bound to upset some of its members. Ultimately, the Court had to do what it felt was best as it considered its own interests and the interests of its most powerful members. Generally speaking, the ICC’s most powerful members come from more democratized systems with greater rights for females and broader definitions of rape. As a result of this and the general principles for which the ICC stands, the ICC defined rape quite broadly. According to Article 7(1)(g)-1 of the Rome Statute, an act constitutes rape if:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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45 Ibid.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.\textsuperscript{46}

Even if some question the current procedures in place for dealing with cases of rape and sexual violence, we must acknowledge that Fatou Bensouda is working to make changes. In the past, much emphasis has been placed on witness testimony. This is an extremely limiting approach that makes it difficult to convict people for gender-based crimes. In October of 2013, the OTP released a new investigations strategy, where the primary focus was working to go beyond witness testimony. Bensouda said, “[w]e have decided to change [the strategy of focusing on witness testimony] by not only looking at witness statements but also documentary evidence such as hospital records and using forensic investigation strategies as a new way of collecting the evidence that we need.”\textsuperscript{47} This is a notable change, yet it does not solve the problem that many victims will refuse to come forward. Because of the stigma surrounding rape and sexual violence in the conflict zones, most victims will not come forward at all, and if they do, it would be much later on. At that point, collecting evidence would be quite challenging, and the OTP would again be stuck with only using witness testimony.

Regardless of the difficulty in making changes to the way in which the International Criminal Court addresses sexual and gender based crimes, some progress has been made. To see this, it is useful to examine the International Criminal Court’s case against Bosco Ntaganda. The March 23 Movement (M23), also known as the Congolese Revolutionary Army, was a rebel


military group based in the Democratic Republic of the Congo. The group was formed in April of 2012 and mostly operated in rebellion against the DRC government and is responsible for the displacement of large numbers of people. Bosco Ntaganda launched and guided the group until he began to lose support and eventually surrendered at the US embassy in Kigali, Rwanda where he was transferred to the ICC. Even before forming M23, Ntaganda was implicated in many abuses against civilians dating as far back as 2002. Ntaganda moved from one rebel group to another in the DRC. Even once Ntaganda left rebel groups and served as a Congolese army general, the abuses continued.

According to the evidence, beginning in August 2002, the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (the UPC/FPLC) adopted an organizational policy to attack particular members of the civilian population who belonged to any ethnic group other than the Hema and “to expel them from the Ituri Province” in the DRC. Members of the UPC/FPLC were instructed to “consider the non-Hema, in particular the Lendu, as the enemies and, thus, to kill them. For example, before attacking Lendu inhabited areas, UPC/FPLC soldiers ‘never warned them, [they] just […] attacked them […] because the war was between the Lendu and Hema.’” Ntaganda regularly raised awareness among the troops that were a part of the UPC/FPLC of the “need to exterminate the Lendu and chase them away from the territory under the control of the UPC/FPLC.” During some of these attacks, soldiers not only destroyed many of the civilians’ property and pillaged the villages, but they also “raped and


\[49\] Ibid.

\[50\] Ibid.
kept women as sex slaves.” Gender-based crimes constituted a large part of many of the attacks, and they were crimes committed based on instructions from higher authorities, particularly, Bosco Ntaganda.

On June 9, 2014, Pre-Trial Chamber II confirmed charges (consisting of 13 counts of war crimes and 5 counts of crimes against humanity) against Bosco Ntaganda for crimes he allegedly committed in 2002-2003 in the Democratic Republic of the Congo. The alleged war crimes consisted of murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy’s property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities. The alleged crimes against humanity included murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of population. The Chamber concluded that Ntaganda played a coordinating role in many of the attacks and that his “contribution was intentional.”

The case against Ntaganda is the third case to arise from the situation in the DRC, but it is only the second of these cases to include charges for sexual and gender-based crimes. Even more significant, though, is the fact that this is the first ICC case in which a Pre-Trial Chamber “has unanimously confirmed all charges for sexual and gender-based crimes sought by the Prosecution.” Even though Ntaganda’s initial arrest warrant that Pre-Trial Chamber I issued on August 22, 2006 did not include charges for sexual and gender-based crimes, on July 13 2012,

51 Ibid.
52 Ibid.
Pre-Trial Chamber II issued another warrant of arrest that added nine charges to the ones that were previously announced, which included both rape and sexual slavery as war crimes and crimes against humanity.

On June 9, 2014, when the Pre-Trial Chamber II confirmed all of the charges brought against Bosco Ntaganda, they committed his case to trial. On June 16, 2014, the Defense wanted to appeal the confirmation of charges decision that had been issued days prior, though the Pre-Trial Chmaber dismissed the Defense application on the grounds that the arguments presented “did not constitute appealable issues under Article 82(1)(d) of the Statute.”

The case against Ntaganda is especially notable in regards to women’s rights. At the end of the hearing, the Women’s Initiatives for Gender Justice issued a statement that emphasized “the significance of the case given that ‘for the first time in international criminal law, the ICC has charged a senior military figure with acts of rape and sexual slavery committed against child soldiers within his own militia group and under his command.’” This is a significant accomplishment for the Court itself and for women’s rights as a whole.

Even though it will become clear through the following case studies that the Court has political components that can be viewed in various ways, some representatives deny that politics play any role in the realm of the Court’s actions. The President of the Court assured states that “‘[t]here’s not a shred of evidence after three-and-a-half years that the court has done anything political. The court is operating purely judicially.’” This aligns well with those who juxtapose law and politics, and see a sharp divide between the two.— specifically, those who believe that

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54 Ibid.
55 Ibid.
56 Nouwen and Werner, 942.
the two cannot exist together. Organs of the Court claim that it is an entirely apolitical entity, where the law is applied “without political considerations.” Additionally, former ICC Prosecutor Luis Moreno Ocampo holds a similar position. He “described his role,

I shall not be involved in political considerations… It is the only way to build a judicial institution, to help the political actors to perceive the legal limits. To facilitate the work and planning of political actors, I inform them in advance of my next steps, and ensure that my Office be transparent and predictable. However, my duty is to apply the law without political considerations. Other actors have to adjust to the law.”

Ocampo claimed that he “will present evidence to the Judges and they will decide on the merits of such evidence.” It is here where an important distinction must be made, and that is the difference between the Court itself (consisting of the trial-chambers), and the Prosecutor. Additionally, we must make a distinction between actions that take place inside of the courtroom and decisions that are made outside of the courtroom. Often, the Prosecutor makes politically based decisions in determining which situations to investigate. The Court must act strategically in order to survive, and ultimately, the Court believed it needed to do so in order to gain initial support. The Court needed approval to prosper, and it felt without making these strategic decisions, it would not gain such approval. The Court could not function without considering this particular facet. As discussed, the Court relies on states themselves to achieve justice and end impunity. Without this support, the Court is not able to function. Inside the courtroom, on the other hand, the rule of law is key. Rulings are grounded in the law and free from political factors.

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57 Ibid.
It is here where the view that law and politics are not opposites becomes clearer. A legal institution need not be apolitical. Both can exist along a spectrum.

Though most actors inside of the International Criminal Court deny and “shred” of political motivation or action, some have admitted that politics do play a role. This can particularly be seen through representatives to the Assembly of States Parties. Based on Article 112 of the Rome Statute, the Assembly of States Parties to the Court is in charge of management oversight for the Prosecutor, the Presidency, and the Registrar. It is also helps to manage the Court’s budget and is in charge of electing the judges, the Prosecutor, and Deputy Prosecutors. Each State Party has one representative and one vote in court proceedings. Beyond administrative duties, the Assembly of States Parties address current issues.60 Christian Wenaweser, president of the Court’s Assembly of State Parties from 2008-2011 did admit to some political factors affecting ICC proceedings in a speech directed towards ICC members:

We as States Parties will have to think about the relationship between the Security Council and the Court…We have had two referrals of situation by the Council, one of them by consensus. This was essential in giving the Court the place it currently has. In the future, we thus no longer have to look at the referrals from the point of view of acceptance of the Court—we have achieved that acceptance—but rather from the best interest of international criminal justice. This means in concrete terms a genuine commitment to ensure that justice is done, by providing the necessary diplomatic and financial support.61

Wenaweser noted the importance of gaining support for the relatively new institution. He recognized that without such “acceptance,” the Court would not be successful in achieving

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61 Bosco, 172.
international criminal justice. Establishing support for the Court was an essential first step to work towards the Court’s goal of ending impunity.

Whiting adopted a controversial, but logical perspective. He noted how the International Criminal Court could not immediately become an effective institution that would successfully bring justice to victims and end impunity without first establishing support. The Court essentially needed to prove itself to the world. Without accounting for political factors, the Court would have indeed “run into trouble.”

Essentially, the actors of the court help it function in a legal and political manner. While inside the courtroom, court officials act apolitically, guided by the rule of law, these same actors also “us[e] their authority to build the institution’s credibility, expand its freedom of action, and generate support from states.”62 This notion that political goals and the law can coexist will further be explored through three case studies in the following chapters.

62 Ibid, 17.
Chapter Four

An Exploration of the Situation in Uganda

When examining the political and legal aspects of the situation in Uganda concerning the Lord’s Resistance Army (LRA), it is first useful to understand the background behind such violence. Even before the militia group known as the LRA came to power in Uganda, Uganda and Sudan had a history of war and mass forced displacements. Both countries were devastated from the acts of adventurers and armed traders, and the violence continued when soldiers arrived. Instability continued until the Ugandan Protectorate and Anglo-Egyptian Condominium of the Sudan intervened. During this time (around World War I), local chiefs were appointed as agents to work towards greater stability. British officers moved populations for administrative convenience. As a result, many tribes were divided into separate groups. With the area now under British rule, there was a relative degree of peace on both sides of the border. However, with indirect rule and local languages dividing the groups, each group began to develop a particular ethnic and tribal character. When Sudan finally gained independence in 1956, the violence did not end. Tensions between the North and South rose, and a civil war broke out in 1983. Rick Machar became vice-president of southern Sudan and acted as a militia commander of Khartoum. During this time he helped recruit the LRA to fight against the Sudan People’s Liberation Army (SPLA).

Once Uganda became independent, the nation was divided between the Bantu-speaking people of the South and the Nilotie and Sudanic-speaking peoples in the North. Idi Amin was a Muslim from the northwest part of the country. His army overthrew the leader at the time,
Milton Obote. During Amin’s leadership, he murdered many Langi and Acholi soldiers in the army. Though he originally received support for these actions from members of the south, his approval quickly diluted, as the “brutality of his regime became increasingly apparent.” In 1979, Amin was overthrown and Obote returned to power. Many were unhappy with this change in leadership, including Yuweri Museveni.

Throughout the beginning of the 1980s, Museveni waged a guerilla campaign against Obote with the support of the southwest and the central-south. Fighting broke out between Museveni’s National Resistance Army (NRA) and the government’s Ugandan National Liberation Army (UNLA). Many citizens were displaced and forced into camps, or became refugees in southern Sudan and Zaire (now the Democratic Republic of the Congo). As frustration rose within the UNLA, soldiers took their violence out on the citizens and an estimated 300,000 people were killed. The tension between Langi and Acholi tribes was palpable. The Acholi tribe was defeated and Museveni asserted his control over all Acholi dominated areas within Uganda. With such violence surrounding many in Africa, some became affected by Pentecostal Christianity, where healers would mix “Christian and local ideas in their seances.”

One of these figures was Alice Auma, who had become possessed by spirits. Alice’s cult “rapidly grew in importance,” and began to campaign against President Museveni’s government and other “‘bad people.’” Alice formed a strong army, claiming to have 18,000 soldiers. In October of 1987, Alice left Acholiland with many of her followers and led them to the south.

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64 Ibid, 8.
65 Ibid.
Eventually, her group was defeated, though Alice managed to escape to Kenya and lived in a refugee camp until she died in 2007.

Joseph Kony, a man who often claimed to be Alice’s cousin, formed his own group that was inspired by Alice Auma’s example. Kony was born in the early 1960s and dropped out of school after only six years of primary education. During Kony’s campaign, he claimed to specialize in healing and divining. He created a group known as the Uganda People’s Democratic Liberation Army, which was later known as the Lord’s Resistance Army. Kony created a guerilla campaign against the government and frequently engaged in terror tactics. The LRA began practices of forced recruitment and abductions. Kony’s army grew while Kony continued to promote the group’s political agenda and military strategies. According to Museveni, members of the LRA were involved in peace negotiations “only in order to build up their military capacity.” Kony and the LRA also gained support from the Sudan government, which decided to assist the LRA “in retaliation for the Ugandan government’s barely disguised support for the SPLA.” With the LRA as strong as ever, Kony directed attacks where hundreds of women and children were killed at a time. Kony and his army continued to gain ground in Uganda, and by 2004, the LRA had taken over numerous villages throughout the country. In May of that year, a group of women with their babies were taken from their homes in Pagak. They were brought to a nearby bush where their skulls were smashed. This atrocity, however, was the last major LRA attack within Uganda’s borders, as a new actor was about to become involved.

66 Ibid, 12.
67 Ibid.
Shortly after the International Criminal Court became functional in 2003, it began to consider where to open its initial investigation. The Office of the Prosecutor soon received information about the crimes being committed in northern Uganda, and the situation quickly became a place of focus. Between July 2002 and June 2004, the LRA was allegedly responsible for over 850 attacks that included more than 2,200 killings and 3,200 abductions, many of which were of children. The group also allegedly is responsible for many sexual crimes, including sexual enslavement and rape.

On December 16 of 2003 the President of Uganda, Yoweri Museveni, decided to refer the situation concerning the Lord’s Resistance Army (LRA) to the Prosecutor of the ICC. After referral, the President and Prosecutor met to discuss how to further proceed. In order for the Court to take action and open a formal investigation, the Prosecutor must first open an initial examination in which he confirms that there is a reasonable basis to believe that crimes have been committed, and that the crimes fall within the jurisdiction of the International Criminal Court.

By July 29th, 2004, the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, determined that there was enough evidence to open an investigation concerning the situation of the LRA in Northern Uganda. Additionally, the Prosecutor ensured that all requirements of the Rome Statute were met before beginning an investigation. The Pre-Trial Chamber was of the opinion that there were reasonable grounds to believe that the LRA had committed various crimes and “carried out an insurgency”68 against the Government of Uganda and the Ugandan Army (known as the

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Uganda People’s Defense Force). That month, Moreno-Ocampo notified States Parties to the
ICC of his intent to open a formal investigation, in accordance with Article 18 of the Rome Statute.

On May 6, 2005, the Prosecutor submitted his request for the warrants of arrest for five
members of the LRA: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and
Dominic Ongwen. However, without an international police force, capturing members of the
Lord’s Resistance Army would require a great deal of cooperation from Uganda and its officials.
This inherently suggests that in order for the ICC (or at least the Prosecutor of the ICC) to be
successful, the Ugandan government would need to work together with the ICC and therefore be
on the same “side.”

By July of 2005, the Prosecutor had the support of Pre-Trial Chamber II, and the
Chamber pushed along apprehension of members of the LRA. On September 27, 2005, Pre-Trial
Chamber II requested that the Democratic Republic of the Congo (DRC) search for, arrest,
detain, and surrender to the Court the five members of the army named above. Joseph Kony was
charged with twelve counts of crimes against humanity and twenty-one counts of war crimes.
Vincent Otti was charged with eleven counts of crimes against humanity and twenty-one counts
of war crimes. Okot Odhiambo was charged with two counts of crimes against humanity and
eight counts of war crimes. Finally, Dominic Ongwen was charged with three counts of crimes
against humanity and four counts of war crimes. On July 11, 2007, the proceedings against
Raska Lukwiya, whose arrest warrant was issued on July 8, 2008, were terminated after he died.
The counts against these men ranged from murder, sexual enslavement and inflicting serious bodily injury and suffering, to pillaging, inducing rape, and forced enlisting of children.

In September of 2005, Pre-Trial Chamber II requested help from the Democratic Republic of the Congo and the Republic of Sudan in their quest to arrest and detain members of the LRA. By asking for help from these countries, the ICC essentially made the DRC and Republic of Sudan its allies. It is here where one can see the friend-enemy dichotomy beginning to unfold. In order to pursue its prosecution of the members of the LRA, the ICC needed full cooperation from the Ugandan government. Throughout the investigation, the Prosecutor and Pre-Trial Chamber II requested information and documents regarding agreements made between the LRA and the Ugandan government.

In the ICC’s selection of Uganda as a situation to investigate, it received much criticism from the public. Its decision to move forward with a prosecution of members of the LRA, some have argued, was “quintessentially political.”\(^6^9\) Because this investigation began just after the Rome Statue entered into force, ICC supporters “expected the ICC to prove its right to exist.”\(^7^0\) Essentially, the first case the ICC chose to pursue would be “a test for the new institution.”\(^7^1\) This test would determine whether or not the ICC would be able to function effectively and whether this new notion of international justice could work successfully. Some have argued that the Court felt that in order to prove it could function, it must convince skeptics of its “success and usefulness.”\(^7^2\) The Ugandan situation was perfect for this, as there was no violation of state

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\(^6^9\) Hoover, 267.
\(^7^0\) Nouwen and Werner, 953.
\(^7^1\) Hoover, 281.
\(^7^2\) Ibid.
sovereignty and most other states also opposed LRA actions. The ICC felt pressure to prove its legitimacy, and knew that choosing leaders of the LRA as some of its first targets to investigate would politically be a wise decision. Because both the Ugandan government and the United States supported an ICC investigation, selecting the LRA as the first situation to investigate was a thoughtful ICC decision. By selecting this Ugandan rebel group, where the “atrocities were shocking”\textsuperscript{73} and well known, the Court could pursue its mission without much critique from others.

Although some have argued that the choice of Uganda was a deeply political decision, this may not have actually been the case. Others have taken a different approach and noted how, by definition, the practical circumstances of a new court meant that there had to be a first case. Critics could have attacked any choice as political. Additionally, as Whiting noted, the Court is acting in a political world; it must operate within that world. The International Criminal Court cannot be expected to isolate itself from the forces surrounding it. As time passes and more situations are opened, the Court’s choice to begin with Uganda may actually be seen as natural, rather than political.

Those who argue that the ICC’s decision was in fact political, view the choice differently. These individuals assert that in choosing which case to investigate first, the ICC had many cases to choose from, as many states referred cases to the Court very quickly after it was established. Upon selecting a case, the ICC needed to consider whether the case was “sufficiently grave to warrant their investigation” and “distinguish between perpetrators who are more or less

\textsuperscript{73} Ibid, 282.
There are not clear guidelines in place to help the ICC arrive at these decisions. Ultimately, the Court must make decisions that go beyond the law; this does not mean, however, that the Court does not follow the rule of law, nor does it mean that the political aspects of the Court are problematic. Most decisions, whether inside or outside of the courtroom are not black and white. Within ICC actions in particular, there is a large gray area that leaves room for politics to enter the picture. This notion aligns well with those who see a spectrum of law and politics.

Politics did not play a role only in the decision to pursue a case against members of the Lord’s Resistance Army, but also in other respects of the fight against the LRA. Once the ICC proceeded with its investigation, it essentially led a campaign “to isolate, ostracize, and apprehend Kony and his senior commanders.” The ICC worked with the United Nations to capture Kony, and ultimately relied on the UN to make progress.

In November of 2006, Jan Egeland, senior UN official, met with Kony, attempting to negotiate a solution. Kony agreed to “ent[e]r into formal talks” if the ICC warrants were lifted. Ugandan officials were willing to negotiate the arrest warrants for the sake of peace. They were willing to negotiate with the ICC and with Kony, and try Kony domestically; however, this created even more political tension. Moreno-Ocampo did not want to act as an obstacle to peace negotiations, though he “felt compelled to defend the court’s arrest warrants.” It was the government of Uganda itself that referred the situation concerning the LRA to the ICC in 2003;

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74 Ibid.
75 Bosco, 129.
76 Ibid.
77 Ibid.
“[t]hey [were] now under obligation and made a commitment.”

Court officials were “furious.” They “risk[ed] seeing their historic first case reduced to farce.” The ICC did not want to compromise legality, especially on its first case when it had so much to prove. Richard Goldstone, a former prosecutor for the International Criminal Tribunal for the Former Yugoslavia “warned that the court faced a real risk of being turned into a political instrument.”

He stated:

I just don’t accept that Museveni has any right to use the international criminal court like this. If you have a system of international justice you’ve got to follow through on it. If in some cases that’s going to make peace negotiations difficult that may be the price that has to be paid. The international community must keep a firm line and say are we going to have a better world because of the international court or not.

Though the search for peace was at the forefront of the International Criminal Court’s mind, justice was just as crucial. At this pivotal moment in the Court’s history, it could not begin to play a game, so to speak, with international war criminals. Even though the ICC did allow certain political factors to play a role in its decisions, it could not let some of the world’s worst criminals control court proceedings. After this controversy, the Prosecutor “insisted that ‘there can be no political compromise on legality and accountability.’” He continued, “Dealing with the new legal reality is not easy. It needs political commitment; it needs hard and costly operational decisions: arresting criminals in the context of ongoing conflicts is a difficult endeavor…If States Parties do not actively support the Court, in this area as in others, then they are actively undermining it.” Though politics affected court proceedings, compromising legality was not an

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78 Ibid.
79 Ibid.
80 Ibid, 130.
81 Ibid.
option. The politically based decisions were made in order to aid the enforcement of legality, rather than acting as an attempt to hinder it. The debate concerning peace talks and whether or not to unseal the arrest warrants for LRA officials is a debate that many now see as a tradeoff between peace and justice. It was in the interests of justice for the ICC to prosecute members of the LRA, though this arguably contributed to continued violence. Critics have asserted that the ICC was not helpful and was a “belligerent intrusion that risked undermining ongoing attempts to end the conflict peacefully.”\(^{82}\) Some have argued that this was a time when the ICC should have acted more politically, with less focus on legality. Local religious and civil society figures felt that if prosecution was necessary, “it should be properly sequenced with ongoing efforts to achieve a mediated political solution to the war: peace first, justice later.”\(^{83}\) Peace, in this case, may have been greater than legality. The Prosecutor’s statement regarding support for the Court begins to illustrate another element of the friend-enemy dichotomy.

After peace talks in Juba collapsed, some began to see a new relationship between the International Criminal Court, the LRA, and the Ugandan government. By pursuing a case against LRA officials, some believe that the Court established the Ugandan government as its “friend,” and the LRA and all actors fighting the Ugandan government as its “enemies”. This also meant that states that are parties to and support the ICC now saw the LRA as the enemy, and the Ugandan government as legitimate. With the Lord’s Resistance Army labeled as a terrorist group, the government of Uganda “could present itself as a partner in America’s global war on


\(^{83}\) Ibid.
terror.\textsuperscript{84} This greatly benefitted the Ugandan government, as the US provided both political and material support to the UPDF and the government itself. The referral by the Ugandan government characterized it as “a champion of international criminal justice” and gave “credibility” to the ICC for its arrest of LRA officials.\textsuperscript{85} However, this also contributed to the “silenc[ing] of international criticisms of the UPDF.”\textsuperscript{86} Disapproval for the LRA and support for the UPDF seemed to be directly related; as one grew, the other did, too. In Adam Branch’s \textit{Displacing Human Rights: War and Intervention in Northern Uganda}, he brings light to the problems that arise from this; support for the Ugandan government may not be best, as the government, too, has committed atrocities against its citizens. The ICC (though even more so, the Prosecutor) has become so focused with stopping atrocities committed by the LRA, that it has completely ignored crimes committed by the Ugandan government itself. Threats by the government to remove its referral of the LRA keep the Court politically motivated to support the Ugandan government and avoid investigating its leaders. Many Ugandans see the ICC as “captured by the Ugandan government,”\textsuperscript{87} as the government is essentially controlling the ICC’s actions. These Ugandans argue that the ICC is making decisions that are not legally motivated and unfair to those oppressed by the Ugandan government itself. Their beliefs align with the claim that the ICC illegitimately substitutes personal biases for legal standards and the idea that law and politics contradict each other. By prosecuting the LRA leaders and not members of the

\textsuperscript{84} Nouwen and Werner, 964.
\textsuperscript{85} \textit{Ibid}, 951.
\textsuperscript{86} \textit{Ibid}.
Ugandan government, “the rule of law is compromised because it is applied unequally.” If the rule of law is not applied equally to all, is that truly just? Is the Court acting legally if it strategizes which individuals to investigate?

Many are dissatisfied with the ICC’s work in Uganda. More specifically, they recognize how justice has been compromised and the law “applied unequally.” Vice President of the Acholi Religious Leaders’ Peace Initiative in Uganda, Baker Ochola noted:

The ICC will not be a solution. We want the whole story to be told…If they just investigate the LRA, it will be an injustice to society – The ICC cannot impose itself on people. The government is inviting it, so it has already lost its impartiality. It is an injustice…We have not invited it. They are already biased. It is an abuse…The ICC is just full of corruption…The government has killed. They have all killed. The LRA has done bad things, so has the government. We need to investigate everything…The ICC is an enticement for individuals to oppose individuals…

Onan Acana, the Paramount Chief Elect shares similar views on the ICC’s choice to investigate the LRA and not the Ugandan government:

How can the ICC be impartial if it is only working on one side of the conflict? There should be justice, administered impartially…We have had soldiers raping men. We have had people thrown in pits…Where government soldiers have committed crimes, should we just ignore it? The ICC says that if the government atrocities are as bad as LRA atrocities they will investigate. I will wait and see…

Now, in 2015, the ICC still has yet to open an investigation into the UPDF, even though there have been accusations that the government has committed crimes against humanity, including the conscription of children and forced displacement of civilians. Some wonder if they ever will open an investigation. Some believe that President Museveni was using the Court as a means of deflection; he wanted to take attention away from the illegal activities the Ugandan

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88 Hoover, 283.
90 Allen, 98.
army committed in the Congo and within Uganda itself. It is possible that Museveni used his referral of the LRA to the ICC as a form of protection against himself and his government. Even so, the ICC needed to begin its investigation somewhere, and when choosing where to begin, it was politically wise to pick a situation that was a referral, rather than begin its work using its proprio motu powers and open its own investigation. What some may find more frustrating is that even after the Court gained credibility and moved forward with investigating other cases, there was still no plan to move forward with examining accusations that the Ugandan army committed its own international war crimes. To date, the International Criminal Court has issued arrest warrants only for LRA members, and none have been issued for members of the Ugandan government or army.

Legal analysts have noted that it would be possible for the ICC to prosecute both the LRA and the UPDF simultaneously. If the ICC were to take on such a challenge, it would inevitably sacrifice its support from Ugandan officials. Without such support, it would be nearly impossible for the Court to convict members of the LRA. The Court essentially had no choice but to choose between the two sides. Ultimately, the Court needed to weigh the likelihood of support and the gravity of the crimes committed. Choosing to prosecute members of the LRA was a politically intelligent decision. Though the Court may be politically motivated, this does not necessarily mean that it is not functioning within its legal boundaries. Its decision was not only politically smart, but also legally wise. In this case, scholars who see a spectrum of law and politics give credible explanations for the Court’s actions.
Although the politics are ingrained in the structure of the Court, the politics involved are not inherently problematic or illegitimate. Academics such as Werner, Nouwen, and Branch note how law and politics are not necessarily opposites and often, especially in the context of the ICC, coexist. The fact that the Court has political aspects does not mean it “betrays justice or the rule of law.”\textsuperscript{91} Additionally, they address the flaws in associating law with apolitical actions; “[t]here is no reason to assume that the law always belongs to the [non-political] category.”\textsuperscript{92} Though it is important for the Court to use caution in its politically based decisions, it cannot operate effectively or pursue its legal purpose without some element of politics. For example, the Court needs support to exist and relies on state cooperation. The office of the prosecutor “depends heavily”\textsuperscript{93} on government cooperation. The ICC must consider the politics behind its relationships in order to successfully carry out its goals. The Court (but more specifically the Prosecutor) can make politically motivated decisions in order to achieve its goals of bringing the world’s worst criminals to justice.

Though Nouwen and Werner successfully justify the politics involved in ICC proceedings, analyzing their work using Branch as a lens illuminates an important point Nouwen and Werner fail to consider. Nouwen and Werner discuss the friend-enemy dichotomy and establish how by pursuing a case against LRA officials, the Court established the Ugandan government as its “friend,” and the LRA and all actors fighting the Ugandan government as its “enemies”. This also meant that states that are parties to and support the ICC now saw the LRA as the enemy, and the Ugandan government as legitimate. The referral by the Ugandan

\textsuperscript{91} Nouwen and Werner, 964.  
\textsuperscript{92} Ibid.  
\textsuperscript{93} Ibid.
government characterized it as “a champion of international criminal justice” and gave “credibility” to the ICC for its arrest of LRA officials.\textsuperscript{94} However, this also contributed to the “silenc[ing] of international criticisms of the UPDF.”\textsuperscript{95} Branch brings light to the problems that arise from this; support for the Ugandan government may not be best, as the government, too, has committed atrocities against its citizens. He notes how the Ugandan government has been committing atrocities for years, though there have been no adverse consequences for the UPDF. The ICC (though even more so, the Prosecutor) has become so focused with stopping atrocities committed by the LRA, that it has completely ignored crimes committed by the Ugandan government itself. Threats by the government to remove its referral of the LRA keep the Court politically motivated to support the Ugandan government and avoid investigating its leaders. Many Ugandans see the ICC as “captured by the Ugandan government,”\textsuperscript{96} as the government is essentially controlling the ICC’s actions.

Though the International Criminal Court may not have intentionally aided in the process of ending the violence from Ugandan Security forces, it did play a role. Because ICC investigators were located in northern Uganda and there was much external monitoring, the behavior of Ugandan security forces significantly improved. With Court officials on the ground, potential consequences were clear. Ugandan officials worried that they, too, might be brought to the ICC and put on trial for their own acts of violence.

\textsuperscript{94} Ibid, 951.
\textsuperscript{95} Ibid.
The United States, too, plays a role in supporting this friend-enemy dichotomy. Since September 11, 2001, funds to support the UFPD and eliminate the LRA supplied by the US have greatly increased.

Though Werner and Nouwen do not account for this weakness in the political aspect of the ICC, the Prosecutor’s “pragmatic selection” can be justified. Firstly, the ICC claimed that the Ugandan government had the capacity to try its own officials in national courts. This means that the ICC did not have jurisdiction over crimes committed by the Ugandan government. Regardless of the accuracy of this claim, though, selective justice is ultimately a step towards universal justice. It is unreasonable to expect such a new Court to bring all of the world’s worst criminals to justice in such a short period of time. Additionally, the Prosecutor and Court’s selectivity does not question the validity of the situations the ICC does choose to investigate. Even if the ICC is political in certain respects, prosecuting the LRA leaders is “still justice and still a worthy goal to be pursued;” ultimately, some justice is better than no justice. Branch notes that waiting until a time when all can be held responsible for the atrocities they have committed is illogical. To have any success and to be able to function, the Court and Prosecutor must both be selective.

In justifying the political aspect of the ICC, one must consider where and how such politics come into play. Essentially, as the Prosecutor correctly asserted, inside the courtroom, all decisions are based on law. It is ultimately outside of the courtroom (in press releases,

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97 Ibid.
98 Branch, 188.
99 Ibid.
commentaries, and proceeding initiations) where politics play a significant role. In Nouwen and Werner’s piece, they address the politics behind the friend-enemy dichotomy, where the ICC “brand[s]”\textsuperscript{100} certain governments as enemies of the international community solely by their initiation or lack of initiation of a proceeding. They realize, though, that even if the Court catalyzes friend-enemy distinctions, it does not mean that it denounces or ignores the law.\textsuperscript{101} The “Prosecutor himself has argued, ‘[t]he law makes the difference between a soldier or a terrorist, a policeman or a criminal.’”\textsuperscript{102} Yes, the Prosecutor may make politically based decisions in determining which situations to investigate; however, when it comes to judges issuing their rulings, the law will determine the outcome. Simpson captures this notion when he notes, “law is ‘a specific social technique for the achievement of ends prescribed by politics.’”\textsuperscript{103} As previously noted, law cannot be put in opposition with politics; “[l]aw is politics transformed.”\textsuperscript{104} Simpson not only agrees with Werner, Nouwen, and Branch in arguing that law and politics coexist, but also effectively argues that law is a tool for conducting politics and furthering political objectives. It is a means by which leaders can promote change and implement specific social practices. Law is a way to further develop and possibly liberalize society. This implies that it fundamentally makes sense and is useful for politics to play a role in legal structures.

Moreover, it is important to note that the ICC has no international police force standing behind it. This means that it relies on a “magical political will”\textsuperscript{105} to enforce its legal decisions.

\textsuperscript{100} Nouwen and Werner, 955
\textsuperscript{101} Nouwen and Werner, 964
\textsuperscript{102} Nouwen and Werner, 962
\textsuperscript{104} Ibid.
\textsuperscript{105} Nouwen and Werner, 943.
In Bosco’s *Rough Justice*, he notes how the average military spending for nonmember countries in 2012 was $27,980. On the other hand, ICC member countries only spent $5,562 on average.\(^{106}\) ICC member countries are less likely to have the resources of larger, non-member countries. As a result, the Court must rely on support from various governments. After the post-election violence in Uganda, the United States provided Uganda with much support. The US Africa Command supplied officers in Uganda with satellite phones, intelligence, and fuel, as the government fought against the LRA and executed Operation Lightening Thunder. On December 14\(^{th}\), a helicopter struck Joseph Kony’s suspected headquarters, though it just missed the target. The Ugandan operation not only put added pressure on the LRA, but it also “heightened the difficulty of conducting effective operations with only limited support from major military powers.”\(^{107}\) Ultimately, the Ugandan government was not able to fight against the LRA with its own countries relatively scarce military resources. Even with aid from the United States, including financial help, logistical support, and intelligence, the Ugandan military struggled. Some analysts concluded, “‘[t]here seems to be very little appetite in Western capitals for fully owning such an operation at this time.’”\(^{108}\) Because the West had little desire to further help Ugandan officials in their quest to demolish the LRA, the Ugandan government has been unsuccessful. Essentially, the Court often relies on a government’s cooperation to accomplish its

\(^{106}\) Bosco, 134.


goals, and must succumb to political power, rather than challenge it. As a result, politics seem to be a necessary component of successful ICC operations.

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109 Branch, 183.
Chapter Five

An Exploration of the Situation in Kenya

The International Criminal Court’s fifth investigation focused on the post-election violence that began in Kenya in December of 2007. After Kenya’s 2007 presidential election, much violence erupted; over twelve thousand people were killed and sixty thousand people displaced. Similar disruptions broke out in 1991 following the establishment of the multi-party system. The violence in 2007 and 2008 was originally ignited after allegations of fraud. During the election, the Orange Democratic Movement, the primary opposition party was quite successful in the parliamentary vote. Towards the end of the vote count, the Party’s presidential candidate, Raila Odinga had a lead of one million votes. However, during the last few hours of vote counting, it was announced that President Kibaki of the Party of National Unity had apparently won the election. After the announcement, violence erupted in various regions throughout Kenya.

Following the post-election violence, the Prosecutor of the International Criminal Court used his “‘propriu motu’ powers to initiate an investigation” without having received a referral from either the United Nations Security Counsel or a state party. Even though the Prosecutor used propriu motu powers, the “Kenya inquiry was as uncontroversial a use of [the] power as could be designed,” with much international support.\(^{110}\)

Kenya ratified the Rome Statute on March 15, 2005, which gave the ICC jurisdiction over war crimes, crimes against humanity, and genocide committed by Kenyan nationals or on Kenyan territory any time after July 1, 2002, as this was the date when the Statute officially went

\(^{110}\) Bosco, 160.
into effect. As noted before, however, the ICC only has jurisdiction over crimes where the
government is unwilling or unable to prosecute those crimes themselves. In February of 2008,
the Kenyan government established an international Commission of Inquiry on Post Election
Violence (CIPEV), which later became known as the Waki Commission. The Commission
recommended that the Kenyan government create a special tribunal composed of national and
international judges that would investigate and prosecute individuals involved in the post-
election violence. It was also made clear that if the tribunal was not created within a certain time
period, all of the information that the Waki Commission had collected would be passed along to
the ICC. In February of 2009, the Kenyan parliament voted against establishing the special
tribunal, with no further action taken by the government. As a result, the ICC Prosecutor was
given all the documentation the Waki Commission had gathered in July of 2009.

Once the Prosecutor had thoroughly examined all of the documentation, he requested
permission from the Court to open an investigation into crimes against humanity that had
allegedly been committed in relation to the post-election violence. On March 31, 2010, the Pre-
Trial Chamber granted the Prosecutor authorization to open the investigation.

In December of 2010, the Prosecutor of the ICC requested that six individuals be
summoned to appear before the court in two separate cases, and all individuals appeared at the
Court voluntarily. On January 23, 2012, Pre-Trial Chamber II rejected the charges against two of
the individuals, Henry Kiprono Kogsey and Muhammed Hussein Ali. The Chamber found that
the prosecutor’s evidence “failed to satisfy the evidentiary threshold” the Rome Statute requires
to bring Kosgey and Ali to trial.\textsuperscript{111} Essentially, the Court could not gather enough evidence to pursue a case against Kosgey and Ali. The Chamber found that with regards to Kosgey, the prosecutor had relied solely on one “anonymous and insufficiently corroborated witness.”\textsuperscript{112} With regards to Ali, Pre-Trial Chamber II found that there was not enough evidence to connect the attacks that took place in the areas where ODM supporters resided with the Kenya Police. Without sufficient evidence of some police involvement, the Chamber declined confirming charges.

The remaining four individuals were divided into two separate cases. The first case involves William Ruto and Joshua Sang who are members of the Orange Democratic Movement (ODM) during the post-election violence. The ODM was the opposition party during the time of the elections. The second case involves Francis Muthaura and Uhuru Kenyatta who are members of the Party of National Unity (PNU), the incumbent party during the time the violence first erupted. Kenyatta is the fourth and current President of Kenya, and he took office on April 9, 2013. Before Kenyatta was the President, he served in the Government of Kenya as Minister for the Local Government from 2001 to 2002. He later became the Deputy Prime Minister, serving from 2008 to 2013. In 2013 Kenyatta’s party, the National Alliance, joined William Ruto’s United Republican Party, along with the Republican Congress Party and the National Rainbow Coalition party to form the Jubilee Alliance coalition. Though there was some controversy after the election, and voters doubted Kenyatta truly had a majority of the votes, the Supreme Court judges upheld the election of Kenyatta. Additionally, in March of 2013 the charges against

\textsuperscript{112} \textit{Ibid.}
Muthaura were withdrawn, and in December of 2014, the charges against Kenyatta were withdrawn, terminating both cases.

The Office of the Prosecutor announced its decision to drop all charges against Muthaura on March 11, 2013, explaining how it had “insufficient evidence to have a reasonable hope of a conviction.”\(^{113}\) One primary reason for this stemmed from the loss of a key witness who recanted testimony on the grounds that defendants had bribed this individual to testify. Additionally, there were multiple deaths of potential witnesses in 2007 and 2008, and a lack of cooperation from the Kenyan government in attempt to gather testimony.

Even though the International Criminal Court also attempted to bring a case forward against Kenya’s President Kenyatta, due to political pressure, they have been unsuccessful in their attempt. Kenyatta was accused of five counts of crimes against humanity, including murder, deportation or forcible transfer, rape, persecution, and other inhumane acts. Additionally, President Kenyatta was allegedly partially responsible for tampering with evidence that the Court had requested. With frustrations growing inside the ICC, in 2014, the Prosecutor asked the Court to hold off on trying Kenyatta until they could acquire their requested evidence. The ICC was faced with a challenging decision, and ultimately, on December 5 2014, the Prosecutor filed a notice to withdraw charges against President Kenyatta, in order to obtain important evidence for other Kenyan leaders. Kenyatta said that he was “‘excited and relieved’ at the dropping of charges.”\(^{114}\) He also stated that his “‘…conscience is absolutely clear.’”\(^{115}\) He believed that his case had been “‘rushed [to the ICC] without proper investigation’” and that “‘The Prosecutor

\(^{113}\) Ibid.


\(^{115}\) Ibid.
opted to selectively pursue cases in a blatantly biased manner that served vested interests and undermined justice.”\textsuperscript{116} This announcement was terrible news for prosecutors. For an institution that was still relatively new, and one that was still working towards proving itself and gaining support, this was certainly not a decision that would help the Court reach these goals. Ultimately, “[m]any observers had seen the case against Mr. Kenyatta as the biggest test in the court’s history.”\textsuperscript{117} The Court, unfortunately, failed the test.

It is through its struggles with President Kenyatta where the justification behind the Court’s political decisions becomes clearer. Evidently, many outsiders judge the Court on its ability to apprehend and prosecute citizens and successfully gather the evidence they need to do so. With the cases in Kenya, the Court proved unsuccessful. The ICC was unable to follow through with President Kenyatta’s trial, and they could not gather enough of the evidence they needed to prove his guilt. The Court lost many supporters as a result.

William Ruto and Joshua Sang are currently on trial at the International Criminal Court on multiple charges of crimes against humanity. Ruto was elected deputy President of Kenya in March of 2013. Before becoming president, Ruto held various ministerial positions within the Kenyan government. Joshua Sang is the head of operations at Kass FM, a radio station in Nairobi. Both Ruto and Sang are members of the Orange Democratic Movement. They are alleged to have established a network with aims at gaining power in Kenya’s Rift Valley Province. In order to gain such power, Ruto and Sang committed atrocities against supporters of President Mwai Kibaki’s Party of National Unity.

\textsuperscript{116} Ibid.  
\textsuperscript{117} Ibid.
The Prosecutor sought authorization from Pre-Trial Chamber II to open an investigation in November of 2009, and by March of 2010, Pre-Trial Chamber II authorized the Prosecutor to open a formal investigation in Kenya regarding alleged crimes against humanity after Moreno-Ocampo proved the existence of several criteria.

First, Moreno-Ocampo needed to prove that the ICC had jurisdiction over the crimes committed in Kenya. He did this by providing evidence that the crimes fit the definitions of murder, rape, deportation, and other inhumane acts that constitute crimes against humanity defined in Article 5 of the Rome Statute. Moreno-Ocampo also noted that because the events occurred after the Rome Statute went into effect in Kenya on June 1, 2005 and occurred on Kenyan territory, both Article 11 and Article 12 of the Statute were satisfied.

Next, Moreno-Ocampo asserted that the situations were admissible before the ICC because Kenya was both unwilling and unable to prosecute the crimes itself, as required by Article 17(1)(a)-(c). He noted how no investigation had been conducted by Kenyan officials, and none was likely to be undertaken by the authorities. This claim was quite reasonable, as the Kenyan Parliament had recently defeated a motion to establish a special tribunal “to investigate the violence and also refused to refer the matter to the ICC.” Moreno-Ocampo also established that the crimes met the gravity threshold outlined in Article 17(1)(d). Though Moreno-Ocampo did not initially establish the way in which an investigation into the post-election violence was in the interests of justice, he did state that “no such conflict [was] apparent from available evidence,

so the request should be accepted.”

As a result of the reasons laid out by the Prosecutor and the reasonable basis to believe that William Ruto and Joshua Sang were involved in the post-election violence, the Pre-Trial Chamber II issued summonses for the two citizens to appear in Court.

In order to prosecute Ruto and Sang, the ICC needed to ensure both cases were admissible in court. If a case is “being investigated or prosecuted by a State with jurisdiction,” it will be inadmissible in the International Criminal Court; that is, the Court cannot pursue an investigation or trial. However, if a State is unable or unwilling to investigate or prosecute a case itself, the ICC can then move forward with an investigation. Even though the ICC did not believe the Kenyan government was actively pursuing an investigation of the post-election violence, the Kenyan government “challenged the admissibility of the cases before the Court.” The government argued that because with the adoption of a new Constitution, Kenya could now conduct its own investigations, the cases against Ruto and Sang were not admissible before the ICC. Though the Kenyan government challenged the admissibility of these cases, in May of 2011, Pre-Trial Chamber II rejected the government’s challenges.

Even though William Ruto and Joshua Sang both faced the same three charges—murder, deportation or forcible transfer of populations, and persecution, the modes of liability (the roles they are believed to have played in the perpetration of these crimes) differed. Originally, Ruto

\[119\] Ibid.

\[120\] “About the Court.” International Criminal Court.

was charged under “indirect co-perpetrator” while Sang was charged under the “having otherwise contributed mode” of liability. In Ruto’s case, however, the OTP worked to change his mode of liability to include three others in addition to “indirect co-perpetrator.” Apart from the “indirect co-perpetrator” mode of liability, the OTP also worked to change Ruto’s criminal responsibility to include Article 25(3), (b), (c), or (d). According to Article 25(3), “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional…”

Regulation 55 essentially grants the Court the ability to change the mode of liability for a particular case at the ICC. It says that a “Chamber may change the legal characterization of facts to accord with the crimes […] or to accord with the form of participation of the accused […] without exceeding the facts and circumstances described in the charges and any amendments to the charges.” The regulation is meant to “promote judicial efficiency and allow the trial chamber to fill impunity gaps that might arise if the prosecution’s charges do not match the facts heard at trial.” It is also meant to avoid situations where an accused person is acquitted even though there is “proof beyond a reasonable doubt” that he has committed a crime that is within

122 “Rome Statute of the International Criminal Court.”
the jurisdiction of the Court. However, critics claim that the regulation allows judges to
“improperly play the role of prosecutor” and distributes power in a way that does not comport
with other parts of the Rome Statute. Critics also assert that this violates individuals’ right to a
fair trial.

Unlike the situation in Uganda, in Kenya, the government did not want the ICC to
intervene in their country’s political conflicts and perpetual violence and disruption. Based on
the principle of complementarity, the Kenyan government requested that the Security Council
ask the ICC to defer the cases against its leaders. Government officials noted that under Article
19 of the Rome Statue (“challenges to the jurisdiction of the Court or the admissibility of a
case”), they could appeal the case. They argued that the ICC is only able to exercise its
jurisdiction if a state party is “unable” or “unwilling” to prosecute the crime itself; it is
essentially a Court of last resort. The government asked for time to prove it would take care of
matters on its own, but after the Kenyan government failed to prove it was actively investigating
the post-election violence, Kenyan lawmakers attempted to “withdraw” from the Rome
Statute.125 Many lawmakers strongly opposed the Court and hoped to end Kenya’s relationship
with the institution. Kenya went as far as to “[launch] a political campaign against the Court in
order to have the cases against its leaders deferred.”126 The Kenyan government felt that
charging its leaders with various war crimes and crimes against humanity makes it impossible

to achieve peace and security within the country. It accused the Court of acting “imperialistically” and specifically “targeting African states and their leaders.”

Though Kenya had previously cooperated with the Court, its government began to tamper with evidence by “threatening and bribing witnesses” and “refusing to hand over evidence.”

Although some lawmakers fought against the Court and its goals, members of Kenya’s civil society actively “call[ed] for justice for victims of Kenya’s post-election violence,” and greatly supported the goals of the ICC.

The ICC’s proprio motu powers played an important role in the case against member’s of the Kenyan government. To date, the International Criminal Court has implemented its proprio motu powers only twice, and both of these instances have involved situations in Africa. This has drawn much criticism. In order to analyze the Court’s use of its proprio motu powers, it is useful to first consider under what circumstances the Prosecutor can initiate investigations proprio motu.

In order to initiate a proprio motu investigation, the Prosecutor must first conduct a preliminary examination regarding the alleged crimes. Under Article 15(2) of the Rome Statute, the Prosecutor can request information from any reliable source including United Nations organs, States, and NGOs. Once the Prosecutor has analyzed all of the information available and concluded that there is a “reasonable basis to commence an investigation,” he or she can make a

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127 Ibid.
128 Ibid.
129 “Cases and Situations: Kenya.”
request to the Pre-Trial Chamber to launch an investigation.\textsuperscript{130} In order to determine whether or not there is a reasonable basis to proceed with an investigation, the Rome Statute has a reasonable basis standard.

The reasonable basis standard is quite open-ended, and there is a “relatively low evidentiary standard.”\textsuperscript{131} The information that the Prosecutor presents to the Pre-Trial Chamber need not eliminate other possible interpretations of the evidence nor reach a particular conclusion. Rather, all that is necessary to proceed with an investigation is some degree of satisfaction that there is a reasonable interpretation of the evidence that would point to a crime. Once the reasonable basis standard is met, the Pre-Trial Chamber must determine whether the Court has jurisdiction over the crimes in questions. In order for this condition to be met, the alleged crimes must:

1. Fall within either the definition of war crimes, crimes against humanity and/or genocide (jurisdiction \textit{ratione materiae});
2. Have been committed by a national of a State party (jurisdiction \textit{ratione personae}) or on the territory of a State party (jurisdiction \textit{ratione loci});
3. Have been committed after 1 July 2002 or after the date upon which the Rome Statute entered into force for the aforementioned State (jurisdiction \textit{ratione temporis}).\textsuperscript{132}

Beyond meeting the jurisdictional requirements, the crime(s) must also meet the complementarity principle and the gravity threshold. According to the ICC Prosecutor, Kenya was not conducting its own investigation of the crimes; therefore, the ICC had jurisdiction. Additionally, the crimes were of “sufficient gravity to justify ICC action.”\textsuperscript{133} Again, one can see

\textsuperscript{131} \textit{Ibid}.
\textsuperscript{132} \textit{Ibid}.
\textsuperscript{133} \textit{Ibid}.
the prevalence of ambiguous language. Though most would agree that the death of 12,000
people and displacement of 60,000 people is quite grave, there are not specific numbers to
indicate whether or not the gravity threshold has been reached. This, in combination with the fact
that the ICC Prosecutor has only used proprio motu powers to initiate investigations into crimes
in Africa, lead many to believe that the Court is acting politically. Does the Court choose to
define African crimes as more grave than crimes in the Middle East? Is the ICC politically
motivated to focus on Africa? The Court cited the gravity threshold with recent developments in
the Comoros Islands; however, in this case, the Court determined that the threshold was not met.
The situation in the Comoros Islands will be examined further in Chapter Six, though it is useful
to compare the way in which the gravity threshold played a role in each situation. In Kenya, the
Court claimed it had a right to step in and take action. On the other hand, the Court did not
believe it could take action regarding the situation in the Comoros Islands, as the gravity
threshold was not met. Critics note how this follows the ICC’s track record of focusing solely on
countries within Africa. Though this criticism may have some validity, the decisions were rooted
in the rule of law, and there is no denying that the death toll in Kenya was drastically higher than
the death toll on board the flotilla in the Comoros Islands.

Some critics fear that proprio motu investigations by the Prosecutor risk “politicizing the
Court and thereby undermining its ‘credibility.’” In particular, [these critics] feared that providing
the Prosecutor with such ‘excessive powers’ to trigger the jurisdiction of the Court might result
in its abuse." Though leaving some investigation decisions in the hands of the Prosecutor herself may reveal some political facets of the Court’s operations, it is important to remember the distinction between actions inside of the courtroom and actions outside of the courtroom when analyzing the use of *proprio motu* powers. The Prosecutor’s use of this kind of power takes place outside of the courtroom. She makes her decision without support from organs acting inside of the courtroom. However, in determining whether the Prosecutor has the right to move forward with a formal investigation and issue warrants of arrest, she must have the support of the Pre-Trial Chamber. This support is granted only after a careful consideration of the law and analysis of the Rome Statute takes place. This dynamic makes it difficult to justify the claim that initiating the Prosecutor’s *proprio motu* powers “undermin[es]” the Court’s credibility.

Throughout Ruto and Sang’s trial, Prosecutors at the Court “struggle[ed] to maintain their case against” the pair, as evidence continued to “dribble away.” Halfway through the trial, the defense plans to ask for an acquittal, arguing that there was not enough evidence to hold Ruto and Sang accountable for their actions. Originally, Prosecutor Fatou Bensoda hoped to bring in individuals who “believed to have knowledge of Ruto’s alleged role” in the post-election violence. These individuals “gave details of meetings” where attacks were allegedly planned. They were crucial witnesses for the case. As time passed, these witnesses refused to testify. As a result, Bensouda asked for help from Kenyan authorities, as she hoped to gain access to the

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witnesses and their testimonies. However, Kenya argued that they were under no obligation to help the ICC, and the witnesses could only appear at the Court at their own will.

As time passed, five witnesses agreed to take the stand via video from Nairobi, Kenya. All five of the summoned witnesses “admitted to lying.” According to witness 604 who testified about a rally that the vice president attended, “[w]e made up the meeting to fix Ruto...It was all made up.” Witness 604 admitted to completely making up the details about Ruto’s speech and that 600 people had attended the meeting. Other witnesses, too, admitted to telling lies.

Witnesses claimed that they made false statements about Ruto and Sang because “they were promised money and a new life in another country by unnamed persons identified in court as working on behalf of prosecution investigators. Some witnesses have alleged that they were told what to tell the court.” If these accusations are true, it is evident in this case how law and politics can be juxtaposed. If the Prosecutor did promise “money and a new life” to some of the witnesses (which is incredibly unlikely), it is likely she was politically motivated. With a lack of evidence, pressure for the OTP rose quickly. If the Prosecutor wanted to be successful, a greater amount of reliable evidence was crucial. Not attaining a conviction would have significant implications for what the Court was capable of doing, and if the Court was unsuccessful, it risked losing much support from the international community and many of Kenya’s victims.

Bribery, however, is clearly unacceptable behavior for the OTP and goes against the law. In this

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137 Ibid.
138 Ibid.
particular instance, law and politics do work in opposition. When asked to make a statement about such accusations, the Office of the Prosecutor declined to comment.

Accusations that the Office of the Prosecutor has taken inappropriate politically based decisions have continued. In January of 2015, the International Criminal Court confirmed that a Kenyan man who was recently killed in Kenya was at one time under the Court’s protection, but he was not on the prosecution’s witness list. According to the Office of the Prosecutor and the Registrar, Meshak Yebei was relocated under the Court’s protection program, but he had left it. Yebei’s body was found on January 2, 2015 in Nandi County and Kenya. His family members reported that the last time they saw him alive was on December 28, 2014 when he left them to buy water in Uasin Gishu County. Yebei’s family reportedly believes that he was abducted and killed sometime after this. The Court expressed its “‘profound condolences to the family’” and stated that it “‘is profoundly concerned by this grave reported incident. It stands ready to provide the local authorities with any assistance, if required, in their investigations. Ensuring the safety and security of witnesses is a cornerstone of fair trials.’”139 Even though the OTP denies any unlawful actions, some in Kenya remain skeptical. The International Justice Monitor reported:

Yebei’s death has generated some political heat in Kenya. Some leaders of the Jubilee coalition of President Uhuru Muigai Kenyatta and Ruto claimed this week that the OTP is involved in Yebei’s death. These politicians were led by the Majority Leader in the National Assembly, Aden Duale, who is a member of Ruto’s United Republican Party (URP). The party forms the Jubilee coalition with Kenyatta’s The National Alliance (TNA) party.140

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In response to such allegations, the OTP responded, “‘The Office of the Prosecutor wishes to categorically state that any suggestion that the Office of the Prosecutor was involved in Mr. Yebei’s alleged abduction and murder is both outrageous and utterly false. Nothing could be further from the truth.’” 141 Would the OTP, an essential organ of the International Criminal Court that works towards ending impunity and bringing justice to victims go so far as to kill someone in order to help their case? This seems quite difficult to believe, as it simply goes against the law, which the Court works to uphold.

The Jubilee politicians made other allegations regarding Yebei’s killing and claimed that Ken Wafula, a human rights defender was a prime suspect in Yebei’s killing. It is no surprise that Wafula, who manages the Centre for Human Rights and Democracy, has denied the accusations. Regardless, the prosecution stands by its theory that the killing took place as a “scheme to compromise witnesses and undermine its case.” 142

Mabassa Fall, an International Federation for Human Rights (FIDH) representative to the African Union, recognized the detrimental effect that politics could have on the Ruto and Sang trials:

“The politicization and media coverage of these trials will be exhausting for victims who have already suffered serious crimes. In such a hostile context, institutions such as the African Union have the responsibility to show full support and solidarity with them. This implies a public stand for Kenya’s unconditional cooperation with the ICC and for effective national proceedings.” 143

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141 Ibid.
142 Ibid.
It is through Fall’s statement where the importance of state cooperation becomes even clearer. Without Kenya’s support, it would incredibly difficult for the International Criminal Court to have success in the Ruto and Sang trials. With such lack of cooperation, the case essentially became a situation of Kenya versus the ICC. Those who chose to support the ICC were by default enemies of the Kenyan government, while those who chose to support Kenya were naturally foes of the Court.

In addition to the testimonies of the five summoned witnesses, there have been more recent setbacks for the prosecution. Originally, some individuals claimed that Joshua Sang’s broadcasts “spread hatred.”144 However, later on, these witnesses could not verify that they had even listened to Sang’s radio show. This underlying theme of dishonesty raises questions about politics playing a role from not only within the ICC, but also in regards to witnesses and government officials in Kenya. If the witnesses were originally telling the truth, did someone in Kenya threaten or bribe them in order to protect Ruto and Sang? This is quite possible, as Ruto and Sang hold much political clout in Kenya, and they presumably wanted to avoid conviction at all costs. If the witnesses were threatened or bribed, these actions likely played a role in prolonging the trial against Ruto and Sang.

Even though the Court lost much support through its struggles with the situations in Kenya, some organizations blamed the Kenyan government itself and remained supportive of the Court and its goals. Human Rights Watch accused the Kenyan government of “acting as a

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144 Duerr.
roadblock and ‘impairing the search for truth.’”

Fergal Gaynor, a lawyer who represents victims of the violence in Kenya said that there was a “well-organised and systematic effort to undermine the ICC justice process and much of the blame for that can be laid with President Kenyatta’s government.”

Though the Court’s decision to intervene in Kenya may have originally been politically based, the violence that had been ongoing since the 2007 elections greatly improved once the ICC began its investigation. The Court has workers actually located throughout the villages to help local citizens. Ultimately, the ICC has been successful to some degree in ending the violence and bringing justice to victims (the primary goals of the International Criminal Court).

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146 Ibid.
Chapter Six

An Exploration of the Situation in Comoros Islands

Recent developments involving the Palestinian-Israeli conflict further illustrate the ways in which politics can play a role in International Criminal Court proceedings. At the same time, however, many decisions are in fact grounded in the rule of law. Through analyzing this Middle Eastern conflict, it becomes clearer how law and politics can coexist.

On January 3, 2009, Israel imposed a naval blockade off the coast of Gaza in an effort to restrict trade, travel, and all flow of goods in and out of Gaza. After this restriction, the Free Gaza Movement was formed in order to deliver aid to the Gaza strip. The Movement created a flotilla consisting of eight boats and over seven-hundred passengers, all working to “break the Israeli blockade,” “draw international attention” to the situation in the Gaza strip, and deliver supplies. This attempt to deliver aid was unsuccessful. On May 31, 2010, the Israeli Defense Forces intercepted the flotilla so that neither the flotilla nor the supplies could reach the Gaza strip. As a result of the operation, ten passengers, all of whom were of Turkish decent, were killed.

On May 14, 2013 the Union of the Comoros referred the situation to the International Criminal Court regarding this 2010 Israeli interception of a humanitarian aid flotilla that was sent to Gaza. Based on a “thorough legal and factual analysis” of Article 17(1)(d) from the Rome Statute, the Prosecutor determined that there was not a “reasonable basis to proceed with an

investigation of the situation on the registered vessels of Comoros, Greece, and Cambodia that arose from the Israeli interception on May 31, 2010.”

She issued this decision based on the grounds that the situation in question did not meet the specifications set out in the Statute in regard to gravity.

Though the Prosecutor ultimately decided not to move forward with an investigation, she did conclude that there was “reasonable basis to believe that war crimes were committed on board the Comorian-registered vessel…during the interception of the flotilla.”

Even though the Prosecutor found that war crimes were committed on board the flotilla, she could not immediately move forward with an investigation, as it was necessary for her to consider other criteria.

In order to determine whether the Prosecutor moves forward with an investigation, she must consider three main categories: the interests of justice, jurisdiction (including temporal, material, and territorial elements), and admissibility (gravity and complementarity). In regard to jurisdiction, the Prosecutor found that some of the crimes committed were in fact in the International Criminal Court’s jurisdiction. Three out of the eight vessels of the flotilla were “registered in State Parties.”

Under Article 12(2)(a), “The Court has jurisdiction…over conduct committed on board the vessels” registered in Comoros, Cambodia, and Greece. Even though Israel is not a State Party to the ICC, the Court “can exercise its jurisdiction in relation to the conduct of non-Party State nationals alleged to have committed Rome Statue crimes on the territory of, or on vessels ad aircraft registered in, an ICC State Party” according to Article 149.

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149 Ibid.
150 “Situation on Registered Vessels of Comoros, Greece, and Cambodia.” 2.
151 Ibid, 5.
152 Ibid.
Additionally, the “Court has jurisdiction over Rome Statute crimes committed on the territory of, or on vessels and aircraft registered in, the Comoros or by its nationals” for crimes committed on or after November 1, 2006. The Prosecutor used the legal framework in place to reach a decision regarding jurisdiction. Decisions were grounded on articles in the Rome Statute itself rather than on political notions.

Once the Prosecutor confirmed the crimes committed were indeed within the International Criminal Court’s jurisdiction, she next needed to consider admissibility. Even though the ICC concluded that the situation in Comoros met the legal requirements for falling within the Court’s jurisdiction, the Prosecutor found that the crimes did not meet the gravity threshold required to prosecute a crime. Based on regulation 29(2) of the Regulations of the Office of the Prosecutor, an assessment of gravity includes factors such as “scale, nature, manner of commission of the crimes, and their impact,” including a consideration of potential cases that could result from a further investigation of the situation. Even if a particular act does not meet the gravity threshold set forth in the statute, Article 8(1) provides that “the Court shall have jurisdiction in respect to war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” Based on both Article 8(1) and 17(1)(d), a “careful[ly] assess[ment]” led the Officer of the Prosecutor to conclude that the flotilla

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153 Ibid.
154 Ibid.
155 Ibid. 7.
157 "Situation on Registered Vessels of Comoros, Greece, and Cambodia." 7.
incident was not of “sufficient gravity” to warrant a further Court investigation. Though many of the individual acts relating to the flotilla incident were arguably quite grave, Article 12(2)(a) of the Rome Statute provides that the Court only has territorial jurisdiction over events that actually took place on the three vessels in the flotilla and not over any events that occurred “after passengers were taken off those vessels.” These direct crimes, the Court ruled, were not grave enough due to the “small number of victims” involved.

Although the flotilla interception was part of a larger scale conflict (between Israel and Palestine), the International Criminal Court did not have jurisdiction over crimes committed as a part of the Israeli-Palestinian conflict itself, as neither Israel nor Palestine had signed onto the Rome Statute. While investigating what action to take, the Prosecutor concluded that because the “gravity of the crimes allegedly committed by Israeli forces on board the vessels” did not meet the ICC’s requirements, she could not move forward with an investigation. She recognized that the situation was and is a matter of international concern, though a matter that one must distinguish from the broader conflict in the Middle East. Considered as an isolated incident, separate from other Israeli-Palestinian conflicts, Israel’s flotilla interception and acts committed onboard the three vessels did not meet the gravity threshold. Ultimately, the ICC was established in order to prosecute “the worst atrocities in the world,” and though tragic, this isolated incident does not by any means constitute one of the worst criminal acts in the world. Although

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this may seem political, the Prosecutor’s conclusion is realistic given the Court’s constraints, guidelines, and goals.

Though these concepts have all been set forth by the legal framework in Article 53(1) (a)-(c) of the Rome Statute, indicating they are grounded in the law, the language used in the Statute is quite vague and leaves much up to interpretation. This element of interpretation allows political factors to fog notions of law and factor into prosecutorial decisions. In the recent Court ruling regarding the Comoros Islands, the International Criminal Court ruled that the incident in the Islands was not serious enough; it did not meet the gravity threshold set forth in the Statute that was necessary to move forward with a formal investigation.

Even though the ruling was grounded in the law and the framework set forth during the International Criminal Court’s establishment, politics have played a role in the conflict even years before this direct flotilla incident. After the Palestinian-Israeli conflict escalated in 2009, the prosecutor faced a difficult decision on whether or not to initiate an investigation in Palestine. Prosecutor Moreno-Ocampo commented on the decision to proceed with an investigation, stating, “‘It is a very important decision that I cannot decide without being completely certain.’”162 However, the threshold of ‘complete certainty” was “unattainable.”163 By September, after the publication of the Goldstone Report, there was increased pressure on the Prosecutor to take action. The Report accused Israel of “‘deliberately attacking civilian infrastructure in Gaza, abusing detainees, using Palestinians as human shields, and arbitrarily depriving wounded civilians of medical care.”164 It effectively increased political pressure. As a

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162 Bosco, 161.
163 Ibid.
164 Ibid.
result, Israeli officials began to discuss the matter with United States officials, and they were assured by US ambassador to the UN Susan Rice that the U.S. was “commit[ted] not to allow the issue to move from the Security Council to the International Criminal Court.”\textsuperscript{165} Though the Israelis sought guidance from the United States, this was not all that they wanted. Israelis wanted “direct American political pressure on the Court…the senior Israeli military lawyer, Avichai Mandelblit, pressed US officials to make public their opposition to an ICC investigation:

Mandelblit said the [Israeli government] was troubled that the ICC issue was not yet off the table and that it appeared to be a political decision for Ocampo, with much pressure coming from the Arab League for the ICC to deal with Western countries rather than “just Africa.”…[another Israeli official] noted that the ICC was the most dangerous issue for Israel and wondered whether the U.S. could simply state publicly its position that the ICC has no jurisdiction over Israel regarding the Gaza operation.\textsuperscript{166}

This implies that the Court can be politically influenced. Because it relies on support from states, it has an incentive to please one of the world’s greatest powers: the United States. This political pressure was multidimensional. First, the ICC felt pressure to expand its investigations into other continents in order to disprove the sentiment that it “is a court for European states to put African leaders on trial.”\textsuperscript{167} Additionally, though, if the Prosecutor expressed any intention of moving forward with an investigation into Israel’s violence, it risked losing support from the United States.

Looking forward, it is useful to consider the recent developments with Palestine. In 2009 the Palestinian Authority requested that the ICC extend its jurisdiction to Palestinian territories and investigate crimes that Israel had allegedly committed in the 2008-2009 Gaza war. During

\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid.
\textsuperscript{167} Hoover, 280.
this time Palestine was a non-member of the ICC, and it had no status in the United Nations.

After quite a long period of inactivity, the request was denied, as the Palestinian Authority did not hold the required status with the Court for such action to be taken. However, in November of 2012, the Palestinian Authority was granted the status of a UN non-member-state. Even though Palestine could have considered acceding to the Rome Treaty at this time, they refrained from doing so “due to US and Israeli pressure, as well as internal considerations.”

After peace talks were unsuccessful, Palestine sought to set an official deadline for Israel to end occupation of the territories it had captured in 1967. This resolution failed to pass, and the PA now looked toward the ICC.

On January 1, 2015, Palestine’s President Mahmoud Abbas officially signed onto the Rome Statute. This means that once the Statute entered into force, the International Criminal Court had jurisdiction over war crimes, crimes of aggression, crimes against humanity, and genocide that involve Palestine. Even though the Israeli-Palestinian conflict has been ongoing for decades, the ICC previously had no right to intervene. Now, the Court can prosecute individuals for any of the crimes listed as long as they took place in or after June of 2014.

Though the Rome Statute does not usually enter into force until months after a state has signed on, Article 11(2) allows a new member to adjust the start date of which the Court has jurisdiction

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backwards. In this case and pursuant to Article 12(3), the Palestinian Authority authorized jurisdiction to go back to June 13 of 2014.

As a result of this recent development, the Prosecutor opened a preliminary examination into the situation in Palestine on January 16, 2015, following the Palestinian government’s accession to the Rome Statute. Once the Prosecutor receives a referral, she is required, in accordance with Regulation 25(1)(c) of the Regulations of the Office of the Prosecutor, to open a preliminary examination of the situation in question. A preliminary examination does not necessarily mean that the Prosecutor will open a formal investigation in Palestine, but rather, it is a process of “examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation” based on the criteria set forth in the Rome Statute.\(^{169}\) According to Article 53(1) of the Rome Statute, the Prosecutor must consider issues of admissibility, jurisdiction, and the interests of justice in determining whether to proceed with an investigation.

This recent development can provide interesting insight into the political debate surrounding the ICC’s role in the Middle East. With the Court’s announcement to open a preliminary examination into the situation in Palestine, one concern is the possibility of backlash from the Palestinian perspective, especially for non-state actors, as the Court has been more successful in its attempts to go after non-state actors than going after government officials. These developments illustrate “that the involvement of international criminal law is not a replacement of politics; it is a continuation of politics by other means. It’s an example of ‘lawfare,’ where

\(^{169}\) "The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine."
you continue your war on legal grounds, or in the language of international law.”

Politics play a central role in the Middle Eastern conflict, so it is inevitable that politics will play a role at the ICC if it is to deal with the conflict. However, this does not mean that the Court would be acting outside the boundaries of law. Intervening in this religious and territorial conflict that has a long history will not come without excess baggage, so to speak. As noted in Chapter Four, issuing arrest warrants against particular individuals brands those as the Court’s enemies, and the opposing individuals as the Court’s friends. The implications behind such arrests go even further. By arresting someone for crimes against humanity, the Court not only labels that person as an enemy of the Court, but also an “enemy of mankind.” This is an extremely powerful political tool that the Court has at its fingertips. Though some may worry that this “political weapon” could be dangerous, it is essentially “inescapable.”

Yes, the Court does act politically, but it is unreasonable to expect it not to. What is more important is whether the Court is able to reach the outcome the community wants it to achieve. This in itself can cause political tension, as different communities have conflicting opinions on what the Court should achieve, and how it should achieve those goals. Those states with the greatest power will likely have the most significant impact on Court investigations and proceedings.

Because the Court relies on states for enforcement, it has an incentive to keep powerful nations and state governments pleased. Analyzing the role of the United States can be useful to

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171 Ibid.
172 Ibid.
see how political incentives play a role, as it is usually “in favor of the court when it suits its foreign policy.”

As discussed earlier, the ICC received much support with respect to capturing members of the Lord’s Resistance Army in Uganda. The U.S. was in favor of destroying the LRA, and as a result, the Court proceeded with its prosecution of LRA leaders. On the other hand, the U.S. has opposed the ICC’s intervention in the Israeli-Palestinian conflict. Israel, too, is not likely to cooperate, and history has shown that without much support, a successful investigation will be challenging.

The United States has also argued that because Palestine is not a state, it is not eligible to be a party to the ICC. According to the Rome Statute, only States can elect to become members of the ICC. If the Court makes its decisions based on the law, how can Palestine become a State Party to the Court? Israeli Prime Minister Bejamin Netanyahu addressed the situation as “‘an outrage.’” He explained, “‘Israel completely rejects the ICC prosecutor’s announcement about opening a preliminary examination on the basis of the outrageous request by the Palestinian Authority…The Palestinian Authority is not a country and therefore it is not the court’s place, also according to its own rules, to carry out an examination like this.’”

Though some are dissatisfied with the fact that Palestine is now a state party to the Rome Statute, actions on the side of the ICC were purely legal. On January 22, 2009, the Palestinian National Authority sent a request to the Office of the Prosecutor to investigate crimes committed in Palestine. In April of 2012, after a thorough analysis of all of the legal arguments and facts,

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173 Ibid.
175 Ibid.
the Office concluded that Palestine’s “status at the United Nations as an ‘observer entity’ was determinative, since entry into the Rome Statute system is through the UN Secretary-General.”176 Because Palestine was an “observer entity” rather than a “non-member state,” at that time, it could not sign or ratify the Rome Statute. Without being a party to the Statute, the International Criminal Court had no authority to intervene in the Middle Eastern conflict.

However, just a few years later, this all changed. On November 29, 2012, the General Assembly of the United Nations adopted Resolution 67/19, which granted Palestine “‘non-member observer State’ status in the UN with a majority of 138 votes in favour, 9 votes against and 41 abstentions.”177 The Office of the Prosecutor examined the legal implications of this decision and concluded that even though this development did not invalidate the Court’s 2009 decision concerning Palestine, it did change matters moving forward. The ICC determined that Palestine would be able to “accept jurisdiction of the Court” from November 29, 2012 onward, based on articles 12 and 125 of the Rome Statute.178 Though Palestine was still not a “member state” of the United Nations, it was a state, and for that reason, it could accept the jurisdiction of the International Criminal Court because the Rome Statute is “open to accession by ‘all States,’” as defined by the United Nations General Assembly.179

On the other hand, if the International Criminal Court is desperate for support and “vulnerable to political pressure and opposition from non-members,” such as the United States, China, and Russia, why would it upset these powerful countries by accepting Palestine as a State

177 Ibid.
178 Ibid.
179 Ibid.
Party? One could argue that the ICC was focused on its goals of peace and justice, rather than any political incentives in its recent decision. Additionally, because the United Nations recognizes Palestine as a State, it seems reasonable and legally consistent to allow Palestine member status to the ICC.

Janet H. Anderson’s International Justice Tribune article, “States must not treat ICC ‘as a dustbin for political has-beens, says expert.” addressed this potentially problematic political aspect of the Court. In her interview with defense lawyer and academic Guénaël Mettraux Anderson asked whether Mettraux believes that the problems within the ICC are structural and related to the Court’s reliance on states for cooperation. Mettraux responded:

What I believe is that once the ICC performs internally at the level of quality, competence and effectiveness expected of it, it will have more weight and credibility to make more demands on states and find itself a place in the overall international architecture – the way the ICTY and ICTR had to build their places in the framework of the international community. Right now, the ICC’s internal weakness and inefficiencies affect its credibility and affect its political weight. The effort to make the court better is a combined effort: there will need to be improvements within the court and changes in the way states treat the court. They can’t treat it as a lackey or as a dustbin for political has-beens. They have to treat it as an independent judicial body and provide it with the support and the cooperation that it’s entitled to receive from the states. If states don’t do that, the court will be a failure.180

Essentially, in order for the Court to function most effectively, it must gain some political power by acting, at times, politically. Though somewhat ironic, acting politically can help the ICC “build its place” and gain the credibility it needs.

The launch of a preliminary examination has provoked some undesirable results. For example, the move has sparked threats of retaliation from Israel. Just after the ratification, Israel

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delayed the transfer of $127 million in tax money that it collects for Palestinians to retaliate for its attempt to press charges against Israel. It is also strongly opposed by the United States, and it is seen as an obstacle to reaching a peace deal between Israel and Palestine. Ultimately, the United States has branded the ICC’s move as “counterproductive.”\textsuperscript{181} It, too, has announced that it will review its annual $440 million aid package to the Palestinians, and it will immediately cease any financial help it has provided to Palestine under American Law if the Palestinian Authority applies any case against Israel to the International Criminal Court.

Additionally, Israel has put political pressure on NGOs to gain their support and pursue complaints against Palestinians in the ICC. Shortly after Palestine signed onto the Rome Statute, Shurat HaDin, an Israeli human rights group, formally asked the ICC to investigate war crimes allegedly committed by Palestinian leaders.

If the International Criminal Court makes the transition from a preliminary examination to a more formal investigation into crimes committed by Israel on Palestinian territory, there will be significant implications and “very high risk for the court.”\textsuperscript{182} Some legal commentators suggest that if the Court does get involved in the Middle Eastern conflict, it would “open itself up to charges of politicization and set itself up for another damaging failure.”\textsuperscript{183} However, others suggest that this could “be a chance to restore credibility to the court, which has recently suffered serious setbacks.”\textsuperscript{184} In December of 2014, the Court dropped charges against Kenyan President


\textsuperscript{183} \textit{Ibid.}

\textsuperscript{184} \textit{Ibid.}
Uhuru Kenyatta for his alleged orchestration of violence after a Kenyan presidential election.

Additionally, the Court recently ended its war crimes investigation in Sudan’s Darfur region, as the Court lacked support from the United Nations Security Council. As a result of these recent setbacks, some have questioned the Court’s effectiveness and clout in the international community. Taking action in the Middle East, some argue, could actually improve the Court’s image and improve its reputation.
Chapter Seven
Recommendations and Conclusions

Regardless of whether the politics play a harmful role with regard to the International Criminal Court, it is important to acknowledge that their influence is present, at least to some degree. Rather than attempting to disprove this fact, the Court’s image and overall approval would likely improve if it accepted this notion, rather than completely denying it. Joseph Hoover has noted, “[t]he agnostic character [of international criminal law] suggests that the law never escapes politics and that failing to embrace the political role of the ICC is damaging to this important institution, because disavowing politics lends itself to naivety and a lack of self-criticism.”¹⁸⁵ The Court’s stance on this matter is problematic in and of itself. No institution functions perfectly. Even so, acting with some political motivation behind its decisions is not necessarily problematic. It is actually quite logical. Regardless, some see this political motivation as harmful. Acknowledging criticisms and addressing them directly gives an element of humility to the Court. Scholars have commented on this,

Yet politics is central to the court’s actions; It must choose whom to prosecute, draw distinctions between worthy victims, and distinguish the most culpable perpetrators. The court will inevitably make compromises and exert its power in potentially violent ways, and it must also seek favor with other interested actors, such as the United States or the UNSC. Therefore, the ICC’s disavowal of politics is potentially limiting¹⁸⁶

One must reconsider the distinction made earlier about actions inside of the courtroom versus actions outside of the courtroom. Inside of the courtroom, the actors of the ICC are bound by the rule of law, and they strictly follow the jurisprudence set forth in the Rome Statute. On the

¹⁸⁵ Hoover, 267.
¹⁸⁶ Ibid, 281.
other hand, outside of the courtroom this is not necessarily the case. Of course, the Court is bound by the rule of law and follows guidelines, statutes, criteria, and policies. However, the Court also must choose which cases and situations to formally investigate and which individuals to prosecute. As a relatively new institution, the Court does not have the resources to actively pursue cases against all individuals who have committed crimes that fall within the jurisdiction of the ICC. The Court, like all other institutions must make compromises. Ignoring the influence of political decisions would in fact be detrimental to the Court’s current and future success.

The attitude of workers in the Public Information office aligns well with Nouwen and Werner’s claim that “ICC officials…den[y] that the Court is in any sense political.” Members of the office not only ignore the political aspect of the Court, but also become quite defensive about the topic. Overheard during a visit to the Court, someone explained “[i]t is problematic to see the ICC as politically motivated. Support for the Court is essential; [it] cannot function without it.” It is clear that a primary goal of the ICC, specifically the Public Information Office, is to gain the public’s approval. In its public outreach proposal work, some seem to address a primary goal as “promot[ing] support for the Court,” rather than simply educating the public about the Court. Yes, the Public Information Office does work to portray an accurate and highly informative image of the Court and its duties; however, instead of acknowledging the politics at play, the Court adamantly asserts its legitimacy, and believes that this legitimacy cannot exist unless the Court is entirely apolitical. How can the public support the Court when the institution itself is cautious in standing behind what it does? Regardless of the Court’s view of itself, it is

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187 Nouwen and Werner, 961.
clear that law and politics are not opposites. There is a more gradual scale where both can exist simultaneously. Essentially, “[d]efining away the ICC’s political dimensions eventually undermines the Court by making it look either hypocritical or utopian.”¹⁸⁸ All institutions are flawed and critiqued in some regard, and failing to acknowledge these weaknesses only creates a loss of respect for the organization. The most effective way for the Court to gain support is for it to tell its own story, rather than letting other organizations and scholars tell its story instead. The importance of transparency becomes clear. Illustrating the everyday challenges institutions face fosters this transparent image and helps the Court gain support and respect. This helps the group create a more realistic picture of its work, where members of the public are inspired to further educate themselves and fully understand the organization. Moving forward, “unrealistic expectations of what this judicial institution can and should be buried.”¹⁸⁹ We cannot successful analyze an institution without reasonable expectations of its capabilities and a clear understanding of the rules and guidelines within which the Court operates. It is “unreasonable” to expect the Court to function apolitically in all dimensions, and a new perspective would be wise.

By acknowledging that the Court can in fact be politically motivated, the Court will not only gain respect from the public, but it also opens an outlet for improvement. If the Court’s goal is to end impunity, as it claims it is, it has a long way to go. This is to be expected, though, as the Court is a new institution. Even so, it has been quite successful thus far. Expecting the institution

¹⁸⁸ Ibid, 946.
¹⁸⁹ Creutz, 8.
to function perfectly and to have the ability to immediately accomplish its goals, however, is beyond unreasonable. All institutions take time to develop and to work through any initial challenges. The International Criminal Court is no different. The Court does not and likely will not ever be able to function perfectly and please everyone in the international community. Regardless, it can improve. By increasing its transparency and educating others about its functions, the Court can gain support by presenting a more accurate picture of its goals and daily struggles.

**Concluding Thoughts**

Through examining the role actors within the International Criminal Court play and the three case studies above, it becomes clear that the Court does in fact act politically. In both the prosecution’s choices, and the actions once a case has begun, the political elements are clear. However, any politically motivated decisions are grounded in rules, criteria, guidelines, and policies that are laid out in the Rome Statute and doctrines of international law.

In Uganda, the Court strategically picked a situation that was particularly grave where the government of the country would help the Court throughout its investigation and apprehension of members of the Lord’s Resistance Army. With its failure to pursue an investigation of the Uganda People’s Defense Force, the Court further illustrated the political motivation behind many of its decisions. It effectively branded the LRA as an enemy of the international community, and by default, labeled the Uganda People’s Defense Force as a friend of the Court, as it helped the Court apprehend its suspects.

In Kenya, the Court displayed its political elements by using its own inherent (proprio motu) powers to open an investigation into members of the Kenyan government and those
working for the President without the support of Kenyan officials. Many believe that the Court has preoccupied itself with and failed to investigate equally severe crimes in other locations, and believe that the Court is abusing its power by intervening where its help is unwanted by many. Accusations involving the killing of prime witnesses added new political dimensions to the case that made it even more difficult for the Court to convict William Ruto and Joshua Sang. Regardless of critics’ claims, the Court intervened on grounds of gravity and the interests of justice, and the Court has received much support for its intervention from both victims in Kenya and Western countries.

The lack of an investigation into the situation in the Comoros Islands may be an illustration of the Court’s fear to lose support from some of its most powerful members. Because the Court has a great deal of discretion in interpreting legal terminology, it can be influenced by political factors when making decisions. Even so, it is easy to view the situation in the Comoros Islands in a completely different light, where politics do not play a role in important decisions. The Court did ground each decision in legal documentation, and it claimed on grounds of gravity and on grounds of jurisdiction, that it could not prosecute individuals for the incident in the Comoros Islands.

Though the political arguments are clear, law and politics are not opposites; they need not be juxtaposed, rather, they can coexist. Just because the Court is a legal institution, acting within the rule of law does not mean that it is also an apolitical institution. Though some actors within the Court deny politics play a role, the political elements are not necessarily problematic, but more importantly, they by no means indicate that the Court obstructs the rule of law.
Even though many scholars address how it is not inherently problematic that politics are involved in proceedings at the ICC, it is important to consider that some problems can arise from the political decisions. Branch illustrates this, illuminating how political interventions can sometimes make the conflicts worse and fail to promote peace. Branch notes how when a political actor calls upon the ICC, “they are not simply asking for legal remedy, but…they are trying to enlist overwhelming external strength to their political cause.”  

This is where the friend-enemy dichotomy plays an important role. By branding the ICC or the Prosecutor as the savior that involves itself in problematic situations, the Court inherently increases international support for political leaders it supports. Moreover, the notion that the ICC can intervene at any time can create uncertainty and actually cause political conflicts and controversies to worsen. This works in opposition to the principle that the law and legal systems create certainty and foster stability. Additionally, the political nature of the ICC creates a situation where the Court presents itself as the savior, intervening to rid the world of evil and protect innocent victims from malicious rulers. This is problematic, though, as “[s]aving the victim requires victims who are willing to be saved and who define justice in the same way as the ICC does.”  

Justice for victims is a crucial element of the Court; however, problems arise when the ICC fails to acknowledge that they do not always know what the victims want or what justice may potentially mean to others. Failure to fully understand victims’ points of view can cause greater tension and worsen the original conflict.

190 Branch, 204.
191 Ibid, 182.
Bibliography


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