Signature page

The International Criminal Court: Domesticating War in the Absence of Politics?

By
Matt Gaul

A Thesis Submitted to
Saint Mary's University, Halifax, Nova Scotia
in Partial Fulfillment of the Requirements for
the Degree of Bachelor of Arts (Hons.), Political Science.

April, 2016, Halifax, Nova Scotia

Approved: Dr. Marc Doucet
Chair, Dept. of Political Science

Date: April 27th, 2016

The International Criminal Court:
Domesticating War in the Absence of Politics?

By
Matt Gaul

A Thesis Submitted to
Saint Mary's University, Halifax, Nova Scotia
in Partial Fulfillment of the Requirements for
the Degree of Bachelor of Arts (Hons.), Political Science.

April, 2016, Halifax, Nova Scotia

Approved: Dr. Marc Doucet
Chair, Dept. of Political Science

Date: April 27th, 2016

The International Criminal Court: Domesticating War in the Absence of Politics?

by Matt Gaul

Abstract

The International Criminal Court (ICC), one of the world's most prominent judicial bodies, was created in a similar fashion as other international institutions, through diplomatic negotiation and collaboration. However, what sets the ICC apart from these other international institutions is its attempt to escape from the politics it faces in the international arena by focusing solely on the law and legal proceedings. This is done because of the negative perception that arises when politics mixes with the law as it attempts to remain unbiased. The Court has faced challenges in this regard since its inception and the investigations it leads often blend the two key components of justice, a legal focus, and peace, a political focus. This essay examines the paradoxical relationship between law and politics in practice through the lens of international relations theory, as well as the politics surrounding the Court in both its creation and its internal functioning. Ultimately, the essay argues that the best example of politics enmeshed in the Court is through a focus on cases and the resulting political effects of the Court's investigations are examined. The two cases studied are Uganda and Libya, chosen for their unique referral process and prominent examples of the political calculations of the ICC.

April 27th, 2016

Table of Contents

Introduction

The study of both law and politics, while being intertwined with one another for centuries, has developed into a unique relationship. In many respects, the unique character of this relationship is even more striking when one studies international politics and international law. As Reus-Smit (2004) points out, one only has to look at examples of the importance of understanding the legal right to resources in conflict zones, exemplified in the complex Israeli-Palestinian conflict and the resulting dispute of territorial access to water in the region, or the importance of juridical sovereignty on the international stage, to see the blend of these two disciplines (p.2). From the perspective of legal scholars and professionals, law and politics should be kept separate when it comes to the application of the law and the standards of legal justice. In order to further examine the character of this relationship, this paper will explore the inevitable politics that arise from judicial efforts in the international arena. It will do so by focusing on the International Criminal Court (ICC). As a legal institution that aspires to the highest recognized standards of international criminal justice, the Court's main goal is often considered to be the pursuit of justice rather than the achievement of peace. Justice is considered to be the central goal in an ideal criminal justice system. As this essay will seek to demonstrate, this is not always the case with the ICC, as evidenced in the cases of Uganda and Libya.

Typically, the study of law and politics are seen as two separate fields. Reus-Smit (2004) notes that law is often viewed as an impartial regulatory framework designed to ensure rules are upheld (p.1), while in a general sense politics are focused on the creation and implementation of those rules, allocation of resources, and the struggle for power between actors (p.12). He argues

that understanding and applying these methods of analysis will help understand the shifting balance of power between international institutions and state sovereignty, as well as how politics constitute law, and in turn how law structures and disciplines politics (p. 4) This essay will examine the relationship between law and politics, specifically within the context of the ICC. While this essay is not aimed at producing a strict definition of what politics are in relation to law, in this paper, drawing from the work of authors such as Reus-Smit, I understand politics to be a power struggle between the ICC and other actors, as well actions aimed at pursuing one's own political objectives over a general objective of international justice. Furthermore, I maintain that the ICC is connected to political outcomes due to its foundation and internal composition, but seeks to limit the effects of power politics in order to ensure justice as an ideal that can be put into practice on the international stage.

International humanitarian law (IHL) focuses on law to protect citizens from the effects of war, while also limiting the tools used by warring parties (Kalshoven and Zigfeld, 2011). IHL will be the body of international law examined in this essay due to the fact that it exemplifies the unique relationship between politics and the law. IHL, a set of legal rules and norms as outlined above, blends in with a political function of states: the ability to go to war. War is a political tool used by states to pursue power or protect their own civilians, and IHL seeks to constrain the rules of war through legal codification. As such, this paper explores IHL within the ICC's investigations into Uganda and Libya. Both cases were chosen due to the differences in the manner in which the process of referral to the Court unfolded. Uganda utilized a state referral, which was preferable for the Office of the Prosecutor (OTP) in order to avoid the appearance of violating sovereignty (Muller and Stegmiller, 2010, p.1269), while Libya, not party to the Court,

was referred on the basis of a binding Security Council resolution, Resolution 1970. Both of these cases will be examined more in depth in the essay.

The ICC was created to prosecute individuals rather than states for gross violations of IHL. With the creation of the Court through the Rome Statute, the highest standards of international law were to be upheld by the ICC. These standards include but are not limited to, the irrelevance of official capacity, the non-applicability of the statute of limitations, and individual criminal responsibility. These standards and legal justice as a whole are meant to ensure that political calculations do not invade the impartiality of justice and the application of the law. Politics should serve the legal process in order to avoid the perception that politics is hindering the applicability of justice and its core principles, such as fairness and due process. International humanitarian law, which as mentioned above seeks to constrain what is and is not allowable during war and conflict, has continued to expand since its inception in the early 19th century. The questions that this essay seeks to address are what are the limits and challenges of this attempt to constrain politics within the context of the ICC? What do the ICC cases of Uganda and Libya reveal in terms of the continued presence of politics and political calculations that surround the Court? These questions offer a particular insight into the unique relationship between politics and the law on the international stage, with a particular focus on IHL. By examining the cases of Uganda and Libya, as well as developing an analysis of how they relate to International Relations (IR) theory, this paper will argue that the International Criminal Court is a political institution in both its structure and function. While recognizing the inherent nature of the Court as a judicial body, the paper will further argue that the ICC, while created by legal

experts and politicians alike, is ultimately unable to escape or fully evacuate its involvement in the politics of the inter-state system, including the role played by non-state actors.

The content of the essay will first begin with an analysis of the ICC using three IR theories, followed by an examination of various scholarly perspectives on the politics of the ICC. Next it will, examine the developing relationship between law and politics more closely, which is followed by a focus on the internal power dynamics of the Court itself. Finally, the paper will focus on the cases of Uganda and Libya and the political effects the Court produced in those states.

Examining the Politics of the ICC Through Various IR Theories

International Relations scholars have developed various theories and used them to apply ideas about how international actors such as states and institutions effect one another in various capacities. In many ways, the ICC is an ideal case to illustrate how theories of International Relations understand the relationship between law and politics in a general sense, as well as through a focus on international humanitarian law. While there are many different theoretical approaches one could take in order to best understand the politics of the ICC, this paper will focus on three.

To offer a perspective outside of the realm of international law, Cronin (2002) utilizes the example of the United Nations to explore two key concepts: intergovernmentalism and transnationalism. He draws the distinction that intergovernmentalism focuses on the overlapping

interests of member states such as security, while transnationalism focuses on humanitarian issues and human rights on the international stage, beyond simply inter-state relations. He argues that the UN is a balance of both, and that this focus shapes the future of global politics by allowing for a framework in which to further view international institutions, such as the International Criminal Court (pp. 53-54). IR theories offer useful analytical tools to help examine the politics enmeshed in the ICC, but on their own, they do not provide enough concrete evidence of the politics of the Court in practice. As a result it must be combined with cases to showcase the theories in specific states. To provide a foundational basis, a state-centric or realist approach will be examined first, as well as a constructivist lens, and finally an examination focusing on neoliberal institutionalism.

Realism

Realism focuses on world politics with states as the key actors. States, according to realists, are constantly trying to maximize their own self-interest and power. The international arena observed through a realist lens is anarchic with a focus on surviving primarily through military capabilities. A realist scholar examining the International Criminal Court would adopt a state-oriented perspective, namely how individual states use the Court to pursue internationally their own interests and power. The most prominent example of a state attempting to use the institution of the ICC to pursue its own interests is the United States. This was evident when, during the creation of the Rome Statute, the US pushed for a Court subordinate to the Security Council where they retain political power. Under a realist perspective, states wish to maintain their own freedom and are reluctant to cede control to an international body. With the United

States, their veto power in the Security Council allows them to maintain that freedom and power, as well as the ability to more actively influence the aims and objectives on the international stage through its veto but also its ability to execute a referral or through its own domestic policy and rhetoric on the institution. Specifically, when the Security Council is examining a situation that the United States has an interest in or resources devoted to, the US can protect its own citizens and policies in the international arena through the use of the veto. With the ICC, the US does not have that same level of power to protect itself due to the composition of the Court. Furthermore, while other states remain bound to the ICC, the United States retains the freedom to act on its own accord (Krisch, 2009, p.399). While the Rome Statute was originally signed by President Bill Clinton, the Bush administration 'unsigned' the Statute and did not consider themselves bound by the previous administrations signature (Bravin, 2008). The United States, as of writing this, still has not signed the Rome Statute.

However, when examining US action in the Ugandan case, the United States seemingly gave the Court legitimacy in 2006 when Jendayi Frazer, Assistant Secretary of State for African Affairs, said that the Lords Resistance Army (LRA) must, as ICC indicted war criminals, be captured and sent to The Hague. However, a realist perspective would argue that this was done by the United States for two reasons, the first being that the LRA began targeting Americans and the United States wanted to protect their nationals abroad. The second thing that realists could point to would be that during that time Britain had called for action from its neighbors, and that the United States was responding to the call from their ally in order to continue the hegemony of a Western-led response to African conflicts (Krisch, 2005, pp. 397-398).

Neoliberal Institutionalism

While neoliberal institutionalism is similar to realism in the sense that states are the central actors involved, it does have a few notable differences that allow the International Criminal Court to be examined through a different lens. Reus-Smit (2004) notes that while realists view international institutions as a way to achieve objectives for themselves in the pursuit of state power, neoliberal institutionalists understand institutions as having the ability to influence states even though they are ultimately the creation of states and the inter-state system (p. 18). He further argues that states try to achieve utility maximization through collective action (p. 18). I argue that this can be illustrated in the Rome Statute insofar as states believed that an international rule of law would help solidify international political and legal tensions and would align with their own self-interest.

Similarly, neoliberals argue that institutions could change states' perspectives on what is in their self-interest. Governments are thought to achieve this interest through political influence. This political influence, evident during the Rome Statute negotiations, plays a key role in understanding why the International Criminal Court is not solely a legal body, but also one that emerges from a complex political configuration, involving states but also non-state actors, existing international institutions, established norms, principles and decision making procedures. While an international rule of law may or may not have been in the self-interest of some states at the time of the drafting of the Rome Statute, the newfound institution of the ICC and its ability to pursue international justice allowed states to realize that this did line up with their ideas of utility maximization.

Constructivism

Constructivism in International Relations has at its core a focus on normative ideas and identities and how they translate into material structures. Furthermore, constructivists argue that context must be taken into account, specifically the interactions between states that result in modified behavior and patterns. Much emphasis is put on understanding the motives for each actor involved, specifically what material structure, such as an international institution, they hope to achieve or create through normative ideas or identities and why they want to pursue that specific material structure (Reus-Smit, 2004, p. 22). As Reus-Smit (2004) further notes, constructivist scholars argue that these material structures are created by shared ideas between states, as well as the interests of states (pp. 21-23). Much of the knowledge created from structures and international institutions is done through interaction between states, as well as understanding the origin of state interests. A constructivist approach is best understood as international law being viewed as a social norm, and the ICC can be seen from this perspective as expanding out of this social constructed norm of justice.

Fehl (2004) argues that the developing human rights discourse as a result of the end of the Cold War, the Rwandan conflict, and the Balkans war played a large role in how states understand the role of prosecution and deterrence through an international court. She also notes that states desiring to be in line with the human rights movements focused on having themselves viewed as such, which led to the collective ideas of international justice and the development of the Court (pp. 358-359). As a result, a constructivist ontology could be used in conjunction with

a liberal institutionalist perspective in order to understand how rational state actors pursue utility maximization in line with other state actors. States could develop their interests based on the interaction with other state actors through the sharing of ideas and the creation of structures to maximize the respective utility of all states involved.

The overview of the three broad International Relations theories discussed allows for the placement of the ICC as an international institution within contemporary IR thought. Although not the approach taken here, a more careful examination of these theories would allow for a comparison between the ICC and other international institutions within this context. Instead, what follows will examine six commonly held academic perspectives on the Court, which ultimately leads to the selection of the method that best exemplifies the politics surrounding the ICC.

Understanding the Politics of the ICC: Six Scholarly Perspectives

A survey of the literature on international law reveals five approaches, as well as the usage of multiple cases, that highlight some of the political effects of the International Criminal Court (ICC). The first and second schools of thought encompass the foundational structure and power relations within the Court. Adherents of the first school put forth the argument that the political nature of the ICC can be traced back to its creation (Gallarotti and Preis 1999; Chesterman 2008; Schabas 2007), and proponents of the second school focus on the jockeying for power within the Court by its various internal offices (Schiff 2008; Economides 2003). As examined at the start of the essay, the third school of thought approaches the question through more abstract lenses by analyzing the applicability of International Relations theory and argues

that these various theories best show the political implications of the ICC (Reus-Smit 2004; Cronin 2002). The fourth school argues that states use the Court to pursue their own interests (Cakmak 2006; Hurd 2014; Irving 2014), while the fifth school explores the influence and effect that states' domestic legal systems have on international law (Krever 2013; Franceshet 2004). Finally, the sixth school examines the politics of the ICC through analyses of individual court cases. Branch (2004) for instance, argues that the case of the Lord's Resistance Army in Uganda best shows the political dimensions the Court has (pp. 22-23), while Dunne and Gifkins (2011) focus on the political nature surrounding the Security Council referral to the ICC in Libya (pp. 524-525). While each of these arguments are strong, this essay maintains that the case based approaches, notably those that focus on the Ugandan and Libyan cases, are most convincing. This is due to the contemporary nature of the cases, their ability to demonstrate multiple political functions of the Court, and the political effects the cases have had both within their respective borders, as well as on the international stage.

Like any scholar who hopes to understand the workings of an institution, many academics that study international law and the International Criminal Court understand the importance of examining the foundation and construction of the institution and how it shapes its contemporary behavior. Scholars that focus on the construction of the ICC argue that the Court's founding and construction lead to the political dynamics and relations we see today. Gallarotti and Preis (1999) examine various competing opinions to argue that, while the ICC may be considered weak and not immune from politics, the Court's construction is not the cause of this weakness (p.2). They argue that politics and limited autonomy are inescapable for such an institution, but they need not be detrimental to the functioning of the ICC as they can be used as

a diplomatic weapon to pursue peace and other humanitarian goals on an international stage. As Gallarotti and Preis (1999) argue, a Court centered around political issues such as genocide and crimes against humanity can utilize political strategies to promote the "spirit of justice" by protecting individuals from harm and facilitating resolutions to conflict (p.19).

Similarly, Chesterman (2008) argues that the rule of law, while already universal on the international stage, needs to be defined as a political tool to pursue justice in countries that do not follow the rule of law (p.331). Schabas (2007), another international law scholar notes in his introductory chapter the similarity of the political elements of the International Criminal Tribunals of Rwanda and Yugoslavia created by the UN Security Council, and how these ad hoc tribunals were used as a foundation upon which to build the ICC (pp. 13-14). He focuses on the problematic notion of primacy.[1] The International Law Commission, which played a central role in the creation of the Court, sought to borrow this notion from the tribunals. Ultimately, the end result was the creation of the principle of complementarity[2]. Schabas' focus on the notion of primacy and its application in the ad hoc tribunals of Rwanda and Yugoslavia does not adequately address the political ramifications of the ICC due to the Court's adoption of the principle of complementarity to replace the use of primacy. However, Schabas does offer a thorough examination of the two concepts, as well as the development of the mechanisms used to initiate legal investigations by both the tribunals as well as the ICC.

[1] The concept of primacy was used in the ad hoc tribunals of Rwanda and Yugoslavia. This concept allowed the temporary tribunals more jurisdiction than the respective domestic courts. This resulted in the tribunals having greater authority and power in ruling against criminals in the respective states.

[2] Complementarity allows the ICC to initiate or investigate a case when the state is either unable to launch an investigation themselves (due to lack of capacity, structure, etc.) or unwilling to (with a specific focus on ending impunity in this situation).

The rule of the law is the foundation upon which many legal institutions are built throughout the world. Scholars who focus on the rule of law, a staple in the domestic justice systems of many states, argue that it can be transferred to the international stage as a way of 'domesticating the international' and ensuring that impunity ends regardless of domestic legal systems. Krever (2013) offers a critique of international criminal law and argues that when countries intervene in the political economy of other states, it creates conditions for criminal activity within the state amongst its most prominent actors. As a result, he argues that international criminal law ultimately ignores the factors, such as the intervention by countries into the political economy of other states, which shape the environment where criminal behavior of individuals emerges. He maintains that reform is needed in regards to interventions into the political economy of states so that it ceases to exist as a factor in the creation of international criminal behavior. (pp. 703-704).

Franceschet (2004) offers a more optimistic argument that while the ICC is an example of liberal legalism succeeding the Westphalian model, it is a function of changing perceptions of how the rule of law relates to global inequalities. He submits that the ICC fills the need that states have to criminally prosecute an individual when the host state is incapable of doing it itself, and that the rule of law is an effective way to mobilize support for this ideal on the international stage (pp. 23-25). Powell (2013) focuses on the legitimacy of the rule of law in states and how this in turn affects the legitimacy of the rule of law on the international stage. She argues that there is a link between the quality of a state's domestic legal system, specifically the rule of law, and perceived legitimacy of an international court (pp.364-365). Countries that have

an established rule of law tend to be more accepting of the International Criminal Court (with the notable exception of the United States, as well as other prominent non-signatories like Russia, China, and Israel). Focusing solely on the rule of law of domestic jurisdictions and how it translates into the international does not fully encapsulate the argument of the political implications of the ICC. It may show an avenue of the politics that surround the Court by focusing on the rule of law and its translation to international institutions and how each individual state may have different views of the law practiced at the ICC, but the scope appears too narrow to effectively analyze all of the political components of the Court.

While the ICC may influence state policy, decision-making, and international relationships, many states often seek to shape and influence the ICC. Many academics argue that in order to best understand the political dynamics of the International Criminal Court, it is important to develop an understanding of how states use the Court to pursue their own international agenda in regards to humanitarian concerns. Cakmak (2006) examines the ICC in three sections focusing on state relations with the Court. First, he argues that the ICC avoids violating national sovereignty by not intervening in matters that are tied to the sovereignty of states. Secondly, Cakmak argues that the ICC is evidence of a shifting global order, one that is no longer "state-centric". Finally, the author argues that the US opposition to the ICC is detrimental to the shift of global order as the US is seen as a global superpower that maintains an essential role in global politics (pp. 29-32). Hurd (2014) echoes those sentiments, noting that international law is situated in international politics and the respective policies of individual states. It is noted that international law cannot simply be reduced to a country's ability to accept

or reject legal commitments on the global stage and that international law needs to shift beyond this focus (pp. 39-40).

Irving (2014) takes a different approach to analyzing state influence on the ICC, steering clear of examining state influence on the Court beyond the host state. She focuses on the issue of legal jurisdiction for the International Criminal Court and how the host state affects that jurisdiction, as well as how the ICC affects the jurisdiction of the host state's justice system (pp. 479-481). Irving argues that there are important policy implications that need to be put in place to protect the host state from being held responsible for the actions of an international institution on their territory (p. 492). I view this as being similar to the role of the United States as one of the hosts of the UN. Focusing on state relations and how each individual state may use the Court for political reasons does provide a strong argument for the political nature of the Court due to the role state agents played in creating the Court. This argument could coincide with specific cases and show that the Court both influences, and is influenced, by states and their respective actors.

The ICC is made up of a number of internal offices, such as the Office of the Prosecutor, the Registry, and the Pre-Trial Chambers. Many scholars argue that these offices offer the best insight into the political implications of the ICC, and how the politics of the Court translates into further political dynamics outside of the Court. Schiff (2008) contends that the three offices mentioned above are often susceptible to power struggles with each trying to influence the action of the Court, which cases to pursue, and the overall direction of the Court. He also highlights that the election of the judges was a political process, similar to any election for an official (p. 251).

Finally, it is important to note the role of diplomats in creating the offices of the Court and how this role was the result of a combination of diplomatic-political and legal activity.

Similarly, Economides (2003) notes the role that various offices play in bringing to light the politics of the Court. However, he expands from internal power struggles within the Court to include lobbying when discussing the Office of the Prosecutor. He notes the susceptibility of the OTP to outside pressure when it comes to the question of what cases will be pursued (pp. 41-43). Economides submits that non-governmental organizations (NGOs) can lobby and present to the OTP what individuals or states to indict, as evidenced in Schiff's (2008) piece when he noted that at least 1,732 messages were sent to the OTP between the creation of the Court and February 10th, 2006, claiming crimes had been committed in 139 countries (p.156). The power dynamics within the offices of the Court do show that there is jockeying within the ICC for power and supremacy when the OTP and the Pre-Trial Chambers (PTC) have differing opinions on what cases should be pursued. However, this could be said for many domestic and international court systems, and as a result does not provide a strong enough argument to showcase the distinctiveness of the political dimensions of the ICC.

Therefore, the bulk of the analysis of the essay will be focused on exploring the specific cases of Uganda and Libya in order to demonstrate distinct functions of the Court; when a state is unable, or unwilling, to prosecute an individual in their own domestic courts. Many scholars have used Uganda to analyze the politics of the ICC. More recently, scholars have turned their attention to the Libyan cases, which were referred to the ICC by the Security Council in 2011. Branch (2004) offers a unique analysis in the sense that he examines the Ugandan case by noting

the political backlash in response to the first ICC case. He argues that the community of victims in the northern part of Uganda was against the ICC's investigation into Joseph Kony's militia group, the Lord's Resistance Army (LRA) because they were more concerned about efforts centered around peace, rather than those centered on justice that were seemingly the focus of the ICC (pp. 24-25). He argues that the people it is aiming to serve must guide the ICC and that local justice must be prioritized over international justice.

Examining Libya, Dunne and Gifkins (2011) explore the Responsibility to Protect agenda and how it applied to Libya. They argue that further examination of the Libyan case is warranted due to the fact that the US voted in favor of referring the case to the ICC. Given the US's record of strong opposition to the Court, the authors maintain that Washington's vote in favor of Security Council referral signifies the importance of an investigation into Libya and the ICC's pursuit of those accused of committing crimes against humanity. The US vote in favor of a referral to a Court that they do not recognize themselves demonstrates a belief in the usefulness of the Court in some situations and regions of the globe (pp. 524-525). They demonstrate some of the political effects Libya has had on the Court, and in turn, some of the political effects the indictment of Saif Al-Islam Gaddafi has had on Libya and the prospect for political stability in the post Gaddafi era.

Combining the schools of thought examined above with a close examination of the cases of Uganda and Libya offers a balanced look at the political effects of the ICC. The work of scholars who are concerned with the development and creation of the Court and its respective agents can be used and applied to an analysis of the cases of Uganda and Libya. Other authors

offer explanations that do not necessarily focus strictly on the ICC, but examine international institutions as a whole, such as Cronin and his analysis of the UN, or offer a unilateral analysis of a state's influence on the Court, such as Irving's focus on the role played by the Netherlands. Furthermore, studying the ICC through the lens of IR helps demonstrate the politics surrounding the Court in the cases of Uganda and Libya. As a result, the politics of the ICC and the resulting implications are evident by analyzing the theory and facts of these two unique cases. Before diving into these cases, however, more background work must be done in order to better understand the unique relationship between law and politics, as well as how the creation of the Court offers insight into the politics surrounding the ICC, and also the internal power dynamics between the various offices in the Court.

The Developing Relationship Between Law and Politics

While the studies of law and politics have long been intertwined, the creation of the ICC has legal and political experts shifting towards developing a better understanding of the relationship between their respective fields. This can be examined in the two unique cases of Uganda and Libya and how the ICC has developed both politically and legally through these examples. As indicated previously, an examination of various International Relations theory can also aid in explaining the politics enmeshed in the Court and international law as a whole. The historical context and development of international law, specifically the world's most prominent judicial body, the ICC, must first be explored to develop a foundational understanding of how the international system works today as a mix of competing political and legal values.

The two conflicts at the end of the 20th century are often viewed as the beginning of the new relationship between humanitarian law and politics that we see manifested today. With both the war in the Balkans and Rwanda, Western observers, politicians, and media immediately attached the label of 'genocide', as well as coined a new term, 'ethnic cleansing', to describe the atrocities committed during these conflicts. With these terms being used prominently for the first time since the Second World War, international political institutions and actors, such as states, NGOs, and other organizations dedicated to upholding human rights, had a keen interest in ending the conflict and ensuring those who were perpetuating these atrocities were brought to justice. With the domestic legal institutions unable to fulfill their legal duties in the respective countries' current state of affairs, the United Nations' Security Council stepped in, and within their mandate of ensuring peace and security in the world, passed Resolutions 827 and 955 in 1993 and 1994 respectively in order to establish the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). These tribunals were set up in an ad hoc manner in order to bring individuals and groups responsible for these violations of international humanitarian law to trial, and ultimately prosecute them for gross violations of humanitarian law.

Scholars have recognized the unique role in which the law attempts to constrain the power of political actors through a unique paradoxical tie between the two. Laws are created through political processes, but laws also restrict the power and politics that led to their inception. It soon became apparent that with the development of an International Criminal Court that power relations would change and similar to domestic political and legal institutions, politics

and the law would have conflicting objectives, as evidenced in the peace versus justice debates in the following cases.

Political Dynamics within the Foundation of the Court

The ad hoc tribunals had mixed results, with many individuals being prosecuted for the crimes they committed, however, these courts also faced the challenge of capturing and bringing to trial high profile officials. This meant that some individuals who had "political capital" or were prominent politically were able to evade justice, and as Schiff (2008) notes, there were concerns amongst observers that Prosecutor Richard Goldstone's methodical prosecution strategy would lead to some individuals avoiding justice due to their political stance (p. 52). Even before the creation of the ICC, this protection shows the beginning of politics mixing with the legal process in international prosecutions. Individuals who were to be tried for their war crimes or crimes against humanity were able to escape prosecution due to their political status. Much of the success of the Tribunals hinged on the cooperation of local governments due to the need to respect state sovereignty, and if these governments did not fully cooperate, or chose to protect certain individuals, much of the legal process for justice was circumvented by political objectives and power.

When beginning the negotiations of the Rome Statute, states wanted to remember the problems that the Tribunals had faced in their pursuit of justice, while also developing a political and legal institution to achieve international justice. A key point of the Statute negotiations was the importance to protect state sovereignty, while also ensuring that this sovereignty could not be

used as a shield against a Court-led investigation in order to protect individuals in a country. As a result, the key principle of complementarity was worked into the Statute. Complementarity focused on allowing the Court to only proceed if the state was unable or unwilling to prosecute an individual or group (Stigen, 2008, pp.1-2). I argue that, while this principle of complementarity helps protect state sovereignty, it does not help protect the Court from the political ramifications that exist as a result of the Ugandan and Libyan cases.

The Rome Statute also gives the Security Council the power to refer cases to the ICC. It can also suspend the activities of the Court within individual states where it was entrusted to investigate possible crimes, but this is only permitted when the investigation threatens the peace of a region, and only if the Security Council adopts a resolution to this effect. Such a resolution would require the support or abstention of the P5 members. Having this mechanism built into the Statute of the International Criminal Court heightens the political nature of the Court itself and how it conducts its investigations. Over the past decade we have seen the Security Council susceptible to political whims amongst its member states, notably the United States when it threatened to withhold its dues to the UN if there was a chance those funds would be furnished by way of a loan or aid to the ICC (United Nations SC/8351, 2005). With states susceptible to political practices within the Council, it also leads to an extension of those political practices when the Security Council wishes to refer a case to the ICC. This will be examined further when focusing on the case of Libya.

When the Security Council refers a case to the ICC, the Court claims primacy over the jurisdiction in the state when, as mentioned above, a state is either unable or unwilling to pursue

an investigation. This has political ramifications, which are best examined when studying the case of the government of Sudan, who refused the investigation on the grounds of maintaining the integrity and sovereignty of the Sudanese state. When this happens, the Security Council can authorize enforcement measures. It is clear that both the ICC and the Security Council are having difficulty maintaining the balance between the justice and the political value of state sovereignty when a country such as Sudan initially rejects an investigation but still finds itself in the midst of one. The freedom that each individual country maintains as a core pillar of their sovereignty must be respected by international institutions, especially those institutions where the state in question did not ratify the statute in order for it to become binding on them and their actions.

Internal Power Dynamics of the ICC

There is similar evidence of political calculations surrounding the Court even within its internal structure and division of labor. The Rome Statute outlines that the judges of the Court must be elected for terms of nine years. With the election of judges comes the inevitable campaigning for the position, as well as the need to take a position on various issues facing the Court in order to distinguish the candidate. As with any election, politics come in to play in order to hold and maintain power. Schiff (2008) further notes the election of judges depended more on "campaigning, bargaining, and vote trading, than on the issue-or experience-based characteristics of the candidates" (p.107).

The internal offices of the Court are broken down into three sections: the Office of the Prosecutor, the Pre-Trial Chambers, and the Registry, which leads to a differing visions for the

direction of the Court. There is a constant power struggle between the Chief Prosecutor, who undergoes the same political appointment as the justices, and the Pre-Trial Chambers, who may have their own aims and ideas for the direction of the Court. Judges are often concerned with the slow process of the Court and attempt to speed up the process in order to help victims faster. The Prosecutor can also take initiative to pursue what he or she deems as politically and legally feasible and start an investigation through a method called *proprio motu*, which allows the Prosecutor to initiate an investigation into a country without it being referred by the country itself or the Security Council. Granted, this has a check attached to it in that the Pre-Trial Chambers must approve it. However, the Office of the Prosecutor retains political components due to the sheer ability it has to use *proprio motu* to select cases it wants to pursue, rather than solely allowing other bodies like the state in question or the Security Council refer matters to the Court.

Political tensions between the three offices are built directly into the Statute. The offices, which seek to serve as a system for checks and balances within the Court, add to the politics that surround the institution exemplified in the election and appointment of officials, and the ability of the OTP to use *proprio motu*. With competing aims between offices, the ICC faces internal challenges in their quest for justice beyond the political calculations that arise from state investigations. The Court's goal of justice and ending impunity for crimes against humanity is difficult to achieve while it remains enmeshed in the politics of states.

Understanding Political Dynamics of the Court Through Cases

African countries have been featured prominently in the early function of the ICC and the cases it pursues. Many have criticized this aspect of the Court, arguing that it needs to broaden its focus and widen the scope of cases and individuals brought to the Court. This highlights an example of the political aspects of the International Criminal Court as compared to judicial systems found within states. This is clear when examining the prominence of African states in the Court's docket, which include cases pursued by Security Council and national government referrals. Tadli (2009) argues that the emphasis on African cases being brought to the Court through the Security Council demonstrates the common critique of the Court in that it is a tool of the West to promote values, and desired political results in the region such as the end of conflict and development of the area for investment (p. 58). It also speaks to the perception that the ICC is a political tool for Western imperialism, exercising control over African subjects (pp. 59-60). Tadli (2009) goes even further in emphasizing that the ICC is seen by many as shifting away from a post-colonialist world and moving towards further Western hegemony in the region (p. 66).

Beyond the politics of the Court itself and how it functions, specific cases outline political effects that result in states as a result of an ICC investigation. These effects are evident in the cases of Uganda and Libya. As a state party to the Rome Statute, Uganda was a case of self-referral. It managed to avoid the political issues that Libya has faced as a non-state party and its subsequent referral by the Security Council. However, the Court had effects on the state of

Uganda and Libya, with the latter being effected in its state building through the dual pursuit of justice and peace, a difficult balance for the ICC to maintain in both countries. One of the key challenges of the Court when it deals with cases is to adhere to a key principal of judiciaries around the world: impartiality. When the ICC seeks to pursue a case, they must remain impartial on political issues related to peace, and focus on justice. In the investigation of Uganda, the Court had difficulty in maintaining its impartiality. This was evident when the President of Uganda and the Chief Prosecutor issued a join statement for the referral of the situation to the ICC in January of 2004, which heightened the concerns that the international community had in regards to the impartiality of the Court by appearing to side with the Ugandan government at the beginning of the investigation (Allen, 2006, n.p.)

In the following section, the cases of Uganda and Libya will be examined in depth. Specifically, attention will be paid to the political components that can be teased out of the background of each conflict and the resulting referrals, as well as the internal political ramifications of both cases for the ICC and the two states in question.

Uganda: The Politics of Peace versus the Justice of the Law

The conflict in Uganda has a long history, dating back to colonial times with northern groups fighting against southern groups over religious and economic differences (Kastner, 2012, pp. 19-20). As a result of these differences, the Lord's Resistance Army (LRA) led by Joseph Kony, a self appointed spiritual and military leader was formed in the later 19th century. Allen (2006) highlights that the LRA began to kidnap children as "recruits", as well as use them for

soldiers, laborers, and slaves (n.p.). The Ugandan government sought to protect civilians from the militia group by setting up camps, but these camps, housing internally displaced persons, quickly came under attack from the LRA. The Sudanese government offered its support to the group but the support quickly subsided and stopped all together shortly after the United States government labeled the LRA as a terrorist group in December of 2001.

At the start of the 21st century, the LRA was slowly loosing ground with some members accepting amnesty from the government. As a result, the government attacked the remaining forces in hopes of destroying the LRA altogether. However, the government campaign failed and the LRA resumed its attacks and atrocities in northern Uganda. Many observers estimate that the LRA abducted approximately 38,000 children, and more relevant, 12,000 after the Rome Statute came into effect. Insecurity has led to reduced farming, trading, and schooling, which have caused the Ugandan economy to decline (Schiff, 2008, p. 198).

Ugandan lawyers had informal conversations with ICC personnel about the possibility of referring the LRA and Joseph Kony to the Court. Near the end of 2003, President Museveni sent a confidential letter to The Hague to formally refer the matter to the Court. Museveni and Chief Prosecutor Moreno Ocampo offered strong joint statements focusing on apprehending and bringing Kony and his leadership to trial that, as previously alluded to, made it appear that Ocampo was not remaining impartial at the start of the investigation. It was noted in the media that both resolved to work with other states and international institutions, and that the Court could not capture and try the responsible individuals by itself (Price, 2014, n.p.). Furthermore,

Sudanese officials announced afterwards that they would comply with the ICC's investigation as a result of Uganda's referral.

However, President Museveni had clear political objectives he hoped to achieve as a result of the referral to the Court. By calling on the ICC to investigate, Museveni could shift the international community's attention away from the poor governance and actions of his military in the conflict, the Ugandan Peoples Defense Forces (Branch, 2007, p. 181). With a similar focus, his call on the ICC could help legitimatize his government in the eyes of the international community. Museveni desired this in hopes that it would stir the developed world into providing aid for his victimized country. Schiff (2008) makes reference to the carrot and the stick analogy to demonstrate Museveni's wavering commitment to the ICC and its objectives (p. 199). The President hoped that the mere threat of the Court would bring the LRA to the negotiating table as the carrot, and the simultaneous calling for Kony's prosecution as the stick.

The internal political dynamics within the Court were apparent when examining the role of the Chief Prosecutor in the Ugandan case. While the Chief Prosecutor did not use his *proprio motu* power to initiate an investigation on his own accord, his role within the case still carried political elements. Ocampo had been analyzing the situation in Uganda since 2002 in the hopes of using the power of the ICC to investigate the militia in the country. Branch (2007) argues that the ICC chose the Ugandan case as it was politically pragmatic despite its mandate to pursue justice rather than choosing cases based on political reasons (p.180) Furthermore, Ocampo's decision to wait until January 29th, 2004 was based on the political reasoning of improving the legitimacy of the ICC in the eyes of the international community by promoting cooperation

between states parties. In Ocampo's preliminary research into the case of the LRA in 2002, he would have been aware of the crimes against humanity committed by the LRA during this time period. Instead of recognizing the criminal behavior of the organization and pursuing the arrest and detainment of the individuals, some maintain that he waited for an opportune, politically beneficial time to pursue an investigation with the cooperation of the Ugandan government. In this case, he prioritized political legitimacy over a strict pursuit of legal justice. To expand, Ocampo had the opportunity to initiate an investigation into the LRA well before when he actually did. This highlights the fact that the ICC faces a different set of political calculations and questions than a domestic criminal justice faces. A domestic criminal justice system is able to refrain from political calculations, while the ICC is unable to. This is because it is entrenched in the politics of an inter-state system that it hopes to investigate. While aiming to pursue justice, the Court cannot escape the politics surrounding the investigations it pursues. This is an example of how the ICC is different in practice than domestic legal frameworks, and how it faces difficulty in truly domesticating the international.

Non-governmental organizations (NGOs) also play a key role in the political dynamics of the ICC. They play a unique role in the Court as both lobbyists for what they would like to see pursued, as well as players in helping achieve the Court's mandate. NGOs add a political dynamic to the Court in this sense, as they have political objectives that they would like to see achieved through the Court. In the case of Uganda, as well as in other cases before the ICC, one of the main goals of international NGOs is the end to impunity for crimes against humanity. However, it must be done without the appearance of being partial to one side over the other. In Uganda, Ocampo appearing with President Museveni came off as favoring the government's

position over the LRA. This highlights a key political dynamic in the example of optics. Within a purely legal body, solely law governs the concern of optics and how things may or may not appear partial to one side. However, within the ICC, NGOs have highlighted the importance of how things are perceived by the international community and the resulting political ramifications. Furthermore, NGOs have pursued their own political objectives in the case of Uganda. With the main goal of NGOs being primarily driven by humanitarian concerns, they have advocated for a humanitarian approach and an end to conflict over other results (Schiff, 2008, p. 195). This speaks to their desire to achieve what they deem as a desirable political outcome for themselves as well as for the people involved.

Within the ICC's investigation into the Ugandan case, there was much focus on the debate of peace versus justice, and if they could both be achieved in the region. This relationship required a balancing act in Uganda, and highlights an important political dynamic of the Court. Peace must be weighed against justice through concerns for child soldiers and other victims of the LRA's reign in Uganda. Specifically, the ICC as an international institution with political support and political behaviors has the ability to look past the legal sphere and understand the ramifications that are felt by citizens and victims as well as help pursue a political plan for peace.

It is necessary to note the importance of countering impunity within the Rome Statute, and how this should lead to an end of crimes against humanity. In other words, the judicial-based absence of impunity should aid the political-based peace. However, in the case of Uganda, the politically charged peace efforts often prevented justice. President Museveni continually argued that if the LRA would negotiate with the government he would suspend the ICC's investigation.

Museveni's desire for peace in the country, a political matter, outweighed his desire for LRA leadership to be tried and held accountable by the ICC, a judicial matter. The non-judicial political dynamics built into the Court, specifically the ability to lift arrest warrants, allowed the Ugandan government to offer political impunity to the LRA by offering to have the arrest warrants removed so they could avoid justice in exchange for the end of the conflict. These political dynamics are in stark contrast to some of the aims of the ICC that were touched on at the beginning of the essay, such as the end of impunity, and the irrelevance of official capacity.

Furthermore, after the preliminary inquiry into Uganda and the conflict, which continued on, citizens began to distrust not only the government but also the ICC itself. It had become a political issue through its involvement in the sense that its investigation polarized advocates and opponents. Interestingly enough, the Chief Prosecutor issued a statement with Ugandan leaders to, among other things, achieve justice and rebuild communities, while simultaneously calling on other stakeholders in the international community to cooperate. This is significant because it shows the political nature of the OTP tied in with a focus on a legal issue; in October of 2005, Ocampo issued a statement calling for justice in the region, but also mixing this with a call for political peace. Ocampo wanted to move forward with peace. On the face of it, the statement was issued to ease concerns of NGOs and other international actors of the conflict concerned with the LRA's escalation of violence since the ICC got referred to the matter, and the possibility of justice taking priority over peace in the country. However, the statement resembled a speech made by other international institutions like the UN. The core of the message was not to promote justice through the Court, but to reassure outsiders that the Court was addressing the political concern of peace in the region, through aligning itself with the Ugandan government. The

statement was a calculated political move to maintain international legitimacy during the investigation. It was not done according to strict legal standards, and as such offers a niche example of a political move done by an international legal body. One could argue that it highlights how launching criminal prosecutions in the context of an international criminal court unavoidably brings to the fore the continued presence of political calculations, which in the context of the legal standards of a domestic criminal justice system would be considered unacceptable.

In addition to the peace versus justice debate surrounding it, the Ugandan case has further elements that demonstrate the political dynamics of the International Criminal Court. The issuing of arrest warrants had political ramifications in that the LRA members who had warrants issued for their arrest, had no incentive to come forward and end the violence as that would lead to their trial and possibility of internment. According to the Rome Statute the arrest warrants are to be issued on the basis of evidence and not conditional on future circumstances (Souaré, 2009, p. 379). In the case of Uganda, the Pre-Trial Chamber wanted to be certain that the OTP would not circumvent the Statute's articles on arrest warrants and not have them used as a bargaining tool or rescinded in the future for peace in the region.

Further examining the Office of the Prosecutor leads to the realization that it became susceptible to political attack from advocates for both peace and justice, with each side trying to lobby Ocampo into a decision to pursue or defer indictments. In this sense, the politics of this decision show that the Court is susceptible to the mood and opinion of the people, much like other domestic political bodies and institutions. Furthermore, the peace process was slowed

down in order to pursue justice through the ICC. The lengthy process highlights the difficulty for the ICC to maintain a balance between pursuing its agenda of international legal justice and the concerns for victims and the peace of the region.

Libya: A Contemporary Challenge for the Court In A Shifting Political Landscape

Nearly a decade after the ICC investigation into Uganda, the Court was drawn to a new conflict brought about by the Arab Spring in 2011, which led to further investigation into the Gaddafi regime in Libya. As discussed above, with the Ugandan case, the matter was referred to the ICC by the national government. However, in the case of Libya, the Court was given its mandate to investigate through a referral by the UN Security Council, which will be examined for its own political dynamics. However, it is important to understand the background of the Libyan conflict in order to better understand how the details of the civil war and the Gaddafi regime led the ICC to take on a political role in the proceedings. The ICC's cases in Libya became enmeshed in matters concerned with state building, competing claims to government, and uncertainty surrounding the legal proceedings, which will be discussed below.

Similar to other conflicts that began during the Arab Spring, there was dissatisfaction among the people with the regime in Tripoli. In February of 2011, popular protests against the regime reached a turning point when Libyan government forces fired on the public. The focus of the protest changed from demanding reform, to attempting to overthrow the government. As a result, a group of Libyan opposition forces rose up in an attempt to overthrow the government of Muammar Gaddafi and his military regime. However, it was not simply a military coup. The

National Transitional Council (NTC) was created during the civil war as a political face of the revolution in an attempt to help the post-Gaddafi political transition. This is an important distinction between the Libyan case and the Ugandan case. In the case of Libya, the opposition militia was not the cause of the ICC investigation like the LRA. Rather, it was the former government that was accused of crimes against humanity. This is key to point out because the same political critiques of the ICC trying to pursue peace along with the government in Uganda do not apply to Libya. However, there are still political effects that emerge with the Libyan ICC cases, but these effects are not tied to the same issues of balancing political peace and protection of citizens with international justice.

The United Nations Security Council, charged with upholding international peace and security, recognized the growing international support for an intervention in Libya, and passed Resolution 1973 which supported military intervention in the form of a no-fly zone over the country without the consent of the Gaddafi regime, which was passed with important abstentions by P5 members Russia and China, as well as non-permanent states Brazil, Germany, and India. However, more importantly was Resolution 1970 and the unanimous referral by the Security Council of the Libyan case to the International Criminal Court[3]. This marked the second time since its inception that the Security Council referred an issue to the Court, the case of Sudan being the first. Resolution 1970, among other things, deplored the mass violations of human

[3] Resolution 1970, operative clause 3: *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

rights committed by the Gaddafi regime[4] as well as recognized the support of the African Union and Arab League[5].

The UN Security Council recognized the important role that the ICC could play in the situation. Believing that a NATO-led coalition could handle the military aspect of the conflict, the Security Council, by calling on the Court to prepare an investigation, understood the importance of holding individuals accountable crimes under IHL, as referenced in Resolution 1970. It is important to note that Libya, as a UN member, is bound by the resolution as stated in article 25 of the UN Charter and must allow for the ICC to investigate. What needs to be highlighted here is the fact that Libya is not party to the Rome Statute, but as a member of the United Nations, they must abide by all resolutions passed by the Security Council, even when it refers the issue to a body the state does not recognize.

Libya not being party to the Rome Statute yet still being bound by the workings of the International Criminal Court is problematic for them as a state. In the post-Gaddafi era, Libya originally viewed themselves as bound to the Security Council resolution that referred the matter to the ICC. Libya worked with the Court even though they had never signed on to it. While this does not directly demonstrate the politics enmeshed in the Court, it speaks to the political ramifications that Libya has felt as a result of the Security Council referral. Chief among these ramifications is the sense in which Libya was bound to cooperate with an institution they

[4] Preambulatory clause: *Deploring* the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,

[5] Preambulatory clause: *Welcoming* the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya.

opposed under the Gaddafi regime, and remained skeptical during the initial launch of the investigation as they attempted to move towards a more politically stable country. With the case of Uganda, the self-referral negated the potential for the violation of Ugandan sovereignty; they freely chose to allow the ICC to investigate the LRA (with both the government and the ICC having political reasons to do so as discussed previously).

However, again noting that Libya was not a party to the ICC and thus not accepting of its jurisdiction over crimes against humanity, or directly susceptible to the power of the Court to initiate an investigation in the state, the investigation was initiated in a way that circumvented Libya's ability to freely accept or reject a non-state body intervening in state affairs. Furthermore, this disregard for Libyan sovereignty is also in contrast to one of the mandates of the Court, which is to pursue justice through the principle of complementarity. The Libyan government showed that they were both 'able' and 'willing' to prosecute both Saif Gaddafi and al-Senussi, the two key conditions that underpin the principle of complementarity. However, it was decided that al-Senussi could be tried in Libya while Gaddafi was to be tried at the ICC, an apparent contradiction. While the Court presented reasoning for this at the time, political issues, such as the ability to investigate during an ongoing crisis and the ability to procure Gaddafi from rebel detainment may have contributed to the varying approaches between alleged perpetrators (Bo, 2014, p. 516). This demonstrates the Court's determination to achieve justice in the case, but by doing so it ignored the key political factors stated previously that are essential to both Libya as a state, and the functioning of the Court.

When members of the Security Council refer a matter to the ICC, they too have their own political factors that must be examined, albeit briefly. The Libyan case was referred to the ICC in large part due to the lack of hard opposition it received in the Security Council and the public perception towards stabilizing the region. With the unanimous passing of Resolution 1970, it is clear that states on the Council were in agreement on the importance of Libya. However, critics of both the Security Council but more so the ICC point out that the conflict in Syria is just as pressing as the Libyan crisis. While admittedly there are some important distinctions between these conflicts, many view the difference as tied to the contending political objectives and alliances of some members of the Security Council. When a state is not party to the Rome Statute, and the Security Council cannot refer a matter to the Court due to political reasons, the ICC becomes susceptible to the same political gridlock that the Security Council experiences. Rather than being able to pursue justice when the gravity of a situation demands it, the ICC may be unable to act due to the political dynamics among Council members. This political gridlock can be viewed when examining the debate surrounding the ability of the P5 to utilize their veto to block a resolution that is against their wishes. Council stalemates also emerge from the differing world views of member states. Further, Kersten (2014) highlights an important piece of information hidden within Resolution 1970: it refers the Libyan investigation after February 15th, 2011 (p. 156). This is relevant to the politics surrounding the situation because it effectively 'protects' Security Council members from their involvement with the Gaddafi regime before that referral date. While ultimately the matter was referred to the ICC, the members of the Security Council, utilizing their referral power in a manner that protects their own interests, is another level of the aura of politics that surrounds the functioning of the Court, beyond simply justice.

As was the case in Uganda, the ICC's investigation into Libya could be argued as one-sided, even though it was not initiated through a self-referral. In the conflict, some Western powers, such as NATO, and other national and international actors including key Arab allies such as the United Arab Emirates, Qatar, and Kuwait supported the Libyan rebels. The rebels were made out to be the "right" side of the war. However, as seen in the Ugandan case, it is problematic for the Court to view one side as being "right" and the other side being "wrong". In order for justice to be reached, the politics of the situation must be removed, and any perception of bias must be ignored. As Kersten (2014) points out, the Court, by issuing indictments and warrants for the arrest of individuals, reaffirms the narrative that there is in fact a "right" or a "good" side by virtue of not being indicted (p. 161). This changes the perception of the situation in the eyes of international actors, and has the potential of lending political legitimacy to one side of the conflict over the other. While the ICC cannot simply avoid entering a conflict due to this problem, it does show an element of the political context which necessarily accompanies the Court's cases.

Much like the Ugandan case, there have been concerns with Libya and the Courts involvement, specifically how it will alter the path to peace as well as justice. In fact, the balance between peace and justice in Libya is even more important than it was in Uganda due to the toppling of an established government regime, and the statebuilding efforts by the United Nations following the fall of Gaddafi. The ICC has played a political part in the statebuilding of Libya as it has attempted to negotiate with one of the groups that claim legitimacy in hopes of securing Saif Gaddafi for trial at The Hague. Furthermore, the Court has recognized the inherent shift of the situation with Saif to a more political than legal focus. This became evident when, in

order to try Gaddafi at the ICC, the Court had to negotiate for his release with a rebel group. This negotiation outlines a political function rather than a clear legal mandate, such as a standard issuance of arrest warrants. As a result, those involved with the ICC have attempted to maintain the Court's focus on judicial issues by appealing to other states and international institutions to aid in the negotiation for Saif. Some proponents have even suggested that the Security Council play a larger role in the mediating process when situations shift to more political issues, especially in instances of non-compliance (Ferstman et. al, 2014, p. 9). This showcases that the Court, while still a political body, has recognized the problems associated with it and is taking steps to ensure the politics surrounding the Court are limited.

Roach (2013) echoes these views by arguing that the ICC would have gained an advantage in consulting with other political bodies on Libya. He argues that in doing so the Court would have aided in the quest for justice by avoiding making similar mistakes in regards to the political peace process in Uganda (p. 509). Further, the ICC affected the attitudes and perceptions of parties involved in the political processes of war and peace. By getting involved in the conflict, the ICC changed the rebels' willingness to negotiate with Muammar Gaddafi as they felt the ICC would ensure he was brought to justice (Kersten, 2014, p. 161). This demonstrates an unintended political effect of the Court's involvement in that it may have prolonged the political negotiations between parties towards peace. With the ICC's involvement having vast political ramifications in the case of Libya, this has led authors such as Roach (2013) to lose faith in the credibility of the Court. This is due to its lack of strategy to administer justice that reaches a solution for both sides of the conflict (pp. 515-517).

Conclusion

As the sole point of analysis, IR theory is limited in its scope of attempting to understand the politics surrounding the ICC. However, this essay has utilized three of these theories, realism, neoliberal institutionalism, and constructivism, in order to demonstrate how the ICC is situated in the study of International Relations and how it behaves like an international political institution rather than solely as a legal body.

This essay, while specifically focusing on the International Criminal Court, is grounded in the unique relationship between law and politics and how this dependent relationship is played out in various arenas both domestic and international. Although not discussed enough to produce a conclusion on how this unique relationship is played out at the ICC, this essay has shown that politics are enmeshed with the law at the international level, and it is important to note the paradoxical relationship between the two, how politics is responsible for creating the law but at the same time the law constricts the power of politics.

Unique to the ICC is the evidence of politics in both the creation of the Court, as well as the internal dynamics between the differing Offices of the Court. This essay has argued that even in the drafting of the Rome Statute, there has been evidence of politics enmeshed with the law through the negotiation of the Court's founding document between both diplomats and legal experts. Further, these politics can be seen in multiple instances within the functioning of the Court itself, such as the political elections of judges or the competing aims and goals that the OTP and PTC have.

However, this essay has shown that while there is a vast amount of varying academic ideas surrounding the politics of the Court, the most adequate way to examine it is through an exploration of real-world cases and investigations that demonstrate the politics enmeshed in the ICC. The cases of Uganda and Libya, chosen to demonstrate the unique referral processes to the Court and how a self-referral and Security Council referral result in differing political calculations of the Court, exemplified the politics enmeshed in the ICC in real-world situations. A recurring focus between the two cases is that of peace versus justice, and how the ICC, while attempting to pursue justice, ultimately is unable to escape from the peace process during their investigation of politically unstable states.

While for some scholars the International Criminal Court is a step towards universal justice and equality, for others it is simply another institution that is at the whim of power politics played by states on the international stage. However, the Court is in fact as much of a political body as it is a legal body. This is in large part due to the foundation, structure, and development of the ICC by not only legal experts, but by politicians and diplomats. These individuals created a Court that fits into the notion of global governance. A political Court is best viewed when using cases to examine both the academic and applied political principles, and Uganda and Libya offer traditional yet contemporary evidence of the political dynamics of the ICC. As the Court continues to widen its scope and grow its mandate, so too will the political ramifications of the International Criminal Court.

Works Cited

Allen, T. (2006). *Trial justice: The international criminal court and the Lord's Resistance Army*. London: Zed.

Branch, A. (2004). International justice, local injustice: The international criminal court in northern Uganda. *Dissent, 51*(3), 22-26.

Branch, A. (2007). Uganda's Civil War and the Politics of ICC Intervention. *Ethics & International Affairs Ethics Int. Aff., 21*(02), 179-198. doi:10.1111/j.1747-7093.2007.00069.x

Bravin, J. (2008). U.S. Accepts International Criminal Court. *The Wall Street Journal*. Retrieved April 11, 2016, from http://www.wsj.com/articles/SB120917156494046579

Bo, M. (2014). The Situation in Libya and the ICC's Understanding of Complementarity in the Context of UNSC-Referred Cases. *Criminal Law Forum Crim Law Forum, 25*(3-4), 505-540. doi:10.1007/s10609-014-9236-x

Cakmak, C. (2006). The international criminal court in world politics. *International Journal on World Peace, 23*(1), 3-40.

Chesterman, S. (2008). An international rule of law? *The American Journal of Comparative Law, 56*(2), 331-362.

Cronin, B. (2002). The two faces of the United Nations: The tension between intergovernmentalism and transnationalism. *Global Governance, 8*(1), 53-71.

Dunne, T., & Gifkins, J. (2011). Libya and the state of intervention. *Australian Journal of International Affairs, 65*(5), 515-529.

Economides, S. (2003). The International Criminal Court: Reforming the politics of international justice. *Government and Opposition, 38*(1), 29-51.

Fehl, C. (2004). Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches. *European Journal of International Relations, 10*(3), 357-394.

Ferstman, C., Heller, K., Taylor, M., & Wilmshurst, E. (2014, September 22). The International Criminal Court and Libya: Complementarity ... Retrieved February 29, 2016, from https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140922Libya.pdf

Kastner, P. (2012). *International criminal justice in bello?: The ICC between law and politics in Darfur and Northern Uganda*. Leiden: Martinus Nijhoff.

Kersten, M. (2014). *Justice in Conflict: The ICC in Libya and Northern Uganda* (Unpublished doctoral dissertation). London School of Economics. Retrieved February 12, 2016, from http://etheses.lse.ac.uk/3147/1/Kersten_Justice_in_Conflict.pdf

Krever, T. (2013). International criminal law: An ideology critique. *Leiden Journal of International Law, 26*(3), 701-723. doi: : http://dx.doi.org.library.smu.ca:2048/10.1017/S0922156513000307

Franceschet, A. (2004). The rule of law, inequality, and the International Criminal Court. *Alternatives: Global, Local, Political, 29*(1), 23-42.

Gallarotti, G. M., & Preis, A. Y. (1999). Toward universal human rights and the rule of law: The permanent international criminal court. *Australian Journal of International Affairs, 53*(1), 95-111.

Hurd, I. (2014). The international rule of law: Law and the limit of politics. *Ethics & International Affairs, 28*(1), 39-51.

Irving, E. (2014). The relationship between the International Criminal Court and its host state: The impact on human rights. *Leiden Journal of International Law*, *27(*2), 479-493.

Kalshoven, F., & Zegveld, L. (2011). *Constraints on the Waging of War* (4th ed.). Cambridge: Cambridge University Press.

Krisch, N. (2005). International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order. *European Journal of International Law, 16*(3), 369-408. doi:10.1093/ejil/chi123

Leonard, E. K. (2005). *The onset of global governance: International relations theory and the International Criminal Court*. Aldershot, Hampshire, England: Ashgate.

Powell, E. J. (2013). Two courts two roads: Domestic rule of law and legitimacy of international courts. *Foreign Policy Analysis, 9*(4), 349-368.

Price, S. (2004, January 30). Kony probe begins June. Retrieved February 22, 2016, from http://www.newvision.co.ug/new_vision/news/1107892/kony-probe-begins-june

Reus-Smit, C. (2004). The politics of international law. In *The politics of international law* (pp. 14-45). Cambridge, UK: Cambridge University Press.

Roach, S. (2013). How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy. *Global Governance, 19*(4), 507-523. Retrieved February 20, 2016.

Sarkany, L. (2015). *Explaining the Establishment of the Independent Prosecutor of the International Criminal Court* (Unpublished doctoral dissertation). Western University. Retrieved February 14, 2016, from http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=4226&context=etd

Schabas, W. (2001). Creation of the court. In *An introduction to the International Criminal Court* (pp. 1-22). Cambridge, UK: Cambridge University Press.

Schiff, B. (2008). Building the court. In *Building the International Criminal Court* (pp. 102-144). Cambridge: Cambridge University Press.

Souaré, I. K. (2009). The International Criminal Court and African Conflicts: The Case of Uganda. *Review of African Political Economy, 36*(121), 369-388. doi:10.1080/03056240903211083

Stigen, J. (2008). *The relationship between the International Criminal Court and national jurisdictions: The principle of complementarity*. Leiden: M. Nijhoff.

Tladi, D. (2009). The African Union and the International Criminal Court: The battle for the soul of international law. 57-69. Retrieved February 14, 2016, from http://councilandcourt.org/files/2012/11/Tladi-AU-and-ICC.pdf

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [accessed 12 March 2016]

United Nations, *SC/8351*, 31 March 2005. *Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court* [Press Release]. Retrieved from: http://www.un.org/press/en/2005/sc8351.doc.htm

UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan*

Arab Jamahiriya] , 26 February 2011, S/RES/1970 (2011), available at: http://www.refworld.org/docid/4d6ce9742.html [accessed 11 March 2016]

UN Security Council, *Security Council resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya]*, 17 March 2011, S/RES/1973(2011), available at: http://www.refworld.org/docid/4d885fc42.html [accessed 11 March 2016]