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"T.I.A" - this is Africa - so why the ICC?

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“T.I.A”- This Is Africa – so why the ICC?

Introduction

Since its creation the International Criminal Court (“ICC”) has been under scrutiny and repeatedly criticised for judicial failure and imperial arrogance. At the heart of this criticism is the simple fact that it has only brought proceedings in African states. As put by the Rwandan President Paul Kagame, the ICC reflects “colonialism, slavery and imperialism.”\(^1\) The ICC is a court mandated to address the most serious crimes including genocide, war crimes and crimes against humanity.\(^2\) However, given the politically questionable decisions to exclusively prosecute African leaders coupled with severe challenges to function as an effective court, the ICC could be on the verge of collapse, potentially following a similar fate as was met by the United Nations Commission on Human Rights. The inception of the ICC came about whilst the African continent is trying to assert its political and economic independence. Some would argue that this is not a coincidence, but rather efforts of western states to assert dominance and control over African countries under a veil of international justice and in an era of capital globalisation. This paper will address the key factors causing perceptions of bias while considering the extreme difficulties faced by the ICC in operating a judicial body within a politically driven international community. As said by Abraham Lincoln:

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\(^1\) Rwanda’s Kagame says ICC targeting poor, African countries, AGENCÉ FRANCE-PRESSE, 31 July 2008, available at http://afp.google.com/article/ALeqM5iIfwB_Zg00Jx3N9h5X-Wu8zFVqGlg.

“You can please some of the people some of the time, all of the people some of the time, some of the people all of the time, but you can never please all of the people all of the time.”

Part I of the paper discusses the financial realities of the ICC noting the obvious skew of contributions from member countries of the European Union (“EU”). Indirect contributions from mysterious parties and the United States of America (“US”) are argued as contributing to funding bias. An analogy is then used to show that aid funding from these countries is much higher than funding for the ICC, which helps to distinguish priorities and reduce claims of bias. The United Nations Security Council (“UNSC”) and the powers inferred as part of the Rome Statute are then examined.

Part II considers the idea of colonialism as not so long ago and justifies some of the sensitivities including issues of sovereignty and self-determination. The question of whether the ICC has focused solely on Africa due to the greater need by African nations is answered by considering other situations and conflicts that fulfil ICC criteria and analysing one situation in particular, Operation Cast Lead in Palestine. More bias issues are discussed as the facts show the ICC has targeted particular individuals and governments, effectively giving immunities, which is supported by considering a case heard in the International Court of Justice (“ICJ”), Armed Activities on the Territory of the Congo (DRC v. Uganda). The results of this case are then reflected on to display the damaging consequences which can arise due to a lack of checks and balances on the Court, the very same lack of checks and balances to which the US listed as problematic when the US refused to ratify the Rome Statute.

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The paper then considers the fallacy of self-referrals and how these referrals are made as a result of political pressure, which is leveraged by African aid contributions, which effectively weakens the Courts mandate and allows problematic governments to align themselves with the ICC.

Part III discusses the ICC as a judicial body operating in a heavily politicized environment. The consequences of ignoring political considerations are outlined including weakening the integrity of the Court in international eyes and more importantly, disrupting peace negotiation efforts. These claims are demonstrated by the outcome of the investigations in Uganda. Finally, the paper addresses what the ICC should do in the future to increase its world standing, namely spreading the caseload and responding to grave situations outside of Africa.

**Part I – Puppet Masters - The EU and the UNSC**

It can be argued that judicial bodies are only as independent as their funding. Unfortunately for the ICC, the majority of its funding comes from the EU and therefore fails the test of independence which has led to criticisms of bias. The ICC has a 22% funding cap on contributions to the total budget by each state member.\(^4\) However, four out of the five biggest contributors are European countries\(^5\) and 60% of the funding comes from EU members.\(^6\) When considering financial and political relations, especially in regard to this court, members of the EU could easily be considered one government.\(^7\) This percentage is even greater if countries allied to the EU, including the countries trying to win acceptance

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into the EU, are also taken into account. On top of this, Article 116 of the Rome Statute allows voluntary contributions from a number of third parties. However, the ICC does not give any further details as to these mysterious contributions. Further to this point, rule 106.1 of the Financial Regulations and Rules allows unexpended voluntary contributions to be disposed of by the Court in accordance with the agreement under which the contribution was made. Therefore it seems that donors can dictate to the Court how they would like their money spent.

The less than obvious contributions do not stop there. While it is against the laws of the US to directly contribute to the ICC, fugitives on the ICC case list have been added to the “Rewards for Justice” program, a high value program run by the US government offering monetary rewards for information on criminals. By incentivising the procurement of information and then sharing this information, the US is indirectly supporting the ICC without being a member state and indirectly gaining political influence. To summarise, the ICC is a judicial body primary funded by the EU and potentially funded thereafter by a hint of corporate aims and ambitions and a dash of US political motivations. This detracts from the Rule of Law and any hope of the ICC appearing impartial. For African states being prosecuted, this is a hallmark of the ICC and exemplifies the idea of international justice to the highest bidder.

The question then becomes, if not the EU, then who will pay for this expensive court? The question is not an easy one to answer. It should be noted that although the EU states contribute substantially to the ICC funding, they contribute much more to aid development.

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8 Rome Statute, supra note 2, art 16.
9 International Criminal Court, How is the Court funded?, available at http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/6.aspx.
For example, in 2012 the United Kingdom donated €10,645,471 to the ICC budget.\textsuperscript{12} Similarly, in 2012 the United Kingdoms Department for International Development donated £2,174,000,000 to the African region as part of their official development assistance program.\textsuperscript{13} Applying an estimated calculation, the ICC funding would make up 0.4% of the aid budget. This is just one country example. It is difficult to ignore these figures when arguing where the United Kingdoms true priorities lay.

\textit{Nothing Escapes the UNSC}

An area of concern on both sides of the argument is the inclusion of two articles within the Rome Statute, which legally link the UNSC to the ICC including Article 13(b) and Article 16. These statutory links further carry the claims of bias by highlighting an unfair distribution of power.

Article 13(b) provides that the UNSC can refer a situation to the ICC even in cases where the state has not ratified the Rome Statute, i.e. the proceedings in Sudan.\textsuperscript{14} Article 16 allows the UNSC, following a United Nations Charter ("UN Charter") Chapter VII resolution, to defer investigation or prosecution for up to twelve months, at which time the case deferral can be renewed.\textsuperscript{15} These provisions reflect the veto power given to the permanent five members of the UNSC under the UN Charter, article 27(3).\textsuperscript{16} What was not reflected in the UN Charter at the time of signing was that members would be subject in the future to an international criminal court with jurisdiction under Article 25 of the UN Charter, which reads, "The Members of the United Nations agree to accept and carry out the

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\textsuperscript{12} Report of the Committee on Budget and Finance, \textit{supra} note 5. \\
\textsuperscript{14} Rome Statute, \textit{supra} note 2, art. 13(b). \\
\textsuperscript{15} Rome Statute, \textit{supra} note 2, art. 16. \\
\end{flushleft}
decisions of the Security Council in accordance with the present Charter.” Intentionally or unintentionally, the UNSC has expanded its reach. What is ironic and unacceptable with the inclusion of these provisions is the political authority which these articles provide the permanent five members, three of which, the US, China, and Russia, have failed to ratify the Rome Statute. These states, therefore, are resistant from the ICC by their unwillingness to ratify the Rome Statute but also by the powers they are granted as permanent members of the UNSC. International justice suddenly became less international.

It should be noted that both of the articles discussed could in some circumstances act to take the political pressure off the Office of the Prosecutor ("OTP") by referring a situation when it would be otherwise ill advised for the OTP to initiate an investigation. This is a useful tool in helping to maintain the ICC’s judicial integrity. However, this power can also put the OTP under scrutiny, applying political pressure to open investigations in situations where the OTP will have difficulties undertaking investigation and apprehending the indicted, as in Sudan.

PART II - SENSING COLONIALISM

The fact that African states alone have had to deal with the international justice of the ICC brings up old wounds of colonialism. Out of the eight situations brought by the ICC, seven were past colonies of either France or the United Kingdom, two of the biggest contributors to the ICC. Between fifty and sixty years ago these African countries won their independence, a recent time frame in the scheme of history. Many African individuals would remember the days of imperial rule and many of the indicted African leaders today would have lived through remnants of imperialism and learnt the stories of the hardship in gaining independence and imperial rule from their elders. As explained by Prof. McDonnell, simply

17 Id.
19 Report of the Committee on Budget and Finance, supra note 5.
gaining independence does not mean social constructs such as attitudes and customs of the colonizer or the colonized are eliminated, just as religion, corporations and government structures and institutions will not simply disappear after operating for many years. The war for true independence is ongoing. Given the introduction of the ICC and the way it has operated so far, it is potentially viewed by many as just another battle to be won in the war for true independence.

Protector of the International Community

At the UN World Summit the ICC exclaimed that it would be the protector of the “International Community.” This echo’s the leading western powers at the kick-off of colonial expansion in the eighteen and nineteenth centuries, delivering a similar sentiment, that they would protect “vulnerable groups”. But with the vested power of the UNSC permanent five encompassed within the Rome Statue and the financial and political power of the EU, it is no surprise that all other parts of the world have managed to avoid investigations from the ICC. The claim by the ICC as the protector of the international community is problematic. Along with three of the permanent five UNSC members mentioned who have not ratified the Rome Statute, neither have other major world powers including India, Indonesia or Pakistan among others. Therefore initiating investigations solely in African states, arguably perceived as too weak to defend or oppose international law, may be the only politically feasible option for the ICC. This puts in jeopardy international criminal justice and reaffirms the idea of colonialism as the Court challenges the ideas of sovereignty and self-determination within these African states.

It is important to address the possible counter argument made by advocates of the ICC that situations in Africa are the most grave and therefore require the Courts full attention. This I would argue cannot be said to be true. As of July 2009, the OTP reported that its office

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had “received over 8,137 communications… from more than 130 counties.”  

It is unsurprising that so many communications were received, as there is no shortage of conflicts that meet the jurisdictional and admissibility requirements of the Rome Statute. Despite this the ICC has ignored these situations, leaving victims of international criminal injustice defenceless. The ICC has avoided several situations, which have been brought to the attention of the international community. These include atrocities in North Korea, Burma, Sri Lanka, Chechnya, Columbia (where crimes have been committed by both the Farc and government forces), the actions of British and American soldiers in the Iraq war, Afghanistan, as well as actions in Gaza and occupied territories of Palestine. Avoiding these situations and others raise significant doubts as to the political independence of the Court and does nothing but support the accusations of the ICC as working to appease major world players such as the US and the EU.

Considering these examples more closely, the United Kingdom and United States armed forces have “caused the deaths of thousands of civilians in Iraq and Afghanistan.”

Considering this death toll as well as reports of death squads, secret torture centres, brutal interrogations and the continued plight of women as well as severe hostilities in urban areas resulting in civilian death and injuries, the ICC undoubtedly has jurisdiction but continues to turn a blind eye to these crimes. However, the one situation, which stands out more than

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22 Rome Statute, supra note 2, Part II.


others, is that of the situation in Palestine, which provides the perfect example to further support these claims. As John Dugard outlines, Operation Cast Lead, an Israeli attack on Gaza in 2008-2009, left many Palestinians dead or injured, including civilians, women and children. The wake of this attack, which involved sophisticated weaponry, was truly devastating. The world media extensively broadcast the attack, which resulted in investigative reports by a number of reputable bodies including Human Rights Watch, Amnesty International, a Fact Finding Committee appointed by the League of Arab States and a UN Fact Finding Mission established by the Human Rights Council.\textsuperscript{27} The investigations found that the violations fell well within the jurisdiction of the ICC and recommendations for the ICC to pursue an investigation were given. Unlike Africa, this situation had been investigated extensively with an abundance of evidence and existing documents. Questions as to whether Palestine was a state which was able to be investigated arose but due to the declaration given under Article 12(3) of the Rome Statute by the Government of Palestine in December 2008 and the UN General Assembly resolution in November 2012 to give Palestine ‘non-member observer State statute’ in the United Nations,\textsuperscript{28} the Prosecutor is now able to initiate an investigate into this situation. But instead the Prosecutor has opted to investigate Mali, another African state, where the evidence is far less clear and the world media attention far from reaching the same level of coverage. Given the circumstances and the facts of the situation, it is difficult to disagree with the explanation pointed out by John Dugard that, “the Prosecutor lacks the strength to confront Israel, and thereby face the ire of the United States and many European states.” These actions do not strengthen or build on the resolve made by the Prosecutors to end impunity in line with the

\textsuperscript{27} John Dugard, Palestine and the International Criminal Court, Institutional Failure of Bias?, 11 JICJ. 563, 564 (2013).
purpose of the Rome Statute and certainty do not give the African states under investigation any confidence as to the independence of the Court investigating them.29

Who Are We Investigating Anyway?

Beyond selecting African countries, the ICC has come under criticism for selecting certain African individuals, targeting particular governments or leaders, which are adversaries to western governments, and conferring immunity on others. Professor Mandani outlines some of the situations:

“In Uganda the ICC has charged only the leadership of the LRA but not that of the pro-United States government. In Sudan too, the ICC has charged officials of the Sudanese Government... In Congo, the ICC has remained mum about the links between the armies of Uganda and Rwanda – both pro-United States – and the ethnic militias that have been at the heart of the slaughter of civilians.”30

These situations give authority that the ICC rather than impartially prosecuting perpetrators of crime is instead attempting to control the political environment by supporting one party, even if it means ignoring crimes committed of the same magnitude by the opposing party. President Museveni, of Uganda, who spoke of cooperation with the ICC at the time of referral, is the same president who can be clearly linked to war crimes committed by his Ugandan People’s Defence Force (“UPDF”) in the Democratic Republic of Congo (“DRC”). The DRC made the allegations in 1999, that its neighbour Uganda had invaded Congolese territory, massacring civilians in the process of stealing natural resources. These crimes were heavily investigated and documented by the International Court of Justice (“ICJ”) in the case of Armed Activities on the Territory of the Congo (DRC v. Uganda).31 The ICJ overwhelmingly found the Ugandan government guilty of invading the DRC and in doing

29 Dugard, supra note 27.
31 Democratic Republic of the Congo v Uganda, supra note 3.
so, violating principles of non-use of force and non-interventions in international relations as well as international human rights law and international humanitarian law.\textsuperscript{32} The ICJ outlined exactly which laws were breached and extensively documented the investigation of crimes, most of which happened after the formation of the ICC and therefore came within ICC jurisdiction under the Rome Statute.\textsuperscript{33} Yet the OTP ignored crimes perpetrated by the Ugandan government, which could be tied to President Museveni and his government officials, instead opting to prosecute solely the rebel force in Uganda, the Lord Resistance Army (“LRA”). As pointed out clearly by David Hoile:

“The ICC has not indicted any Ugandan officer or official for involvement in the large-scale crimes against humanity for which they have been responsible within Uganda itself – choosing to charge only Ugandan rebels. It would be difficult to imagine clearer examples of the Ugandan government being accorded “exemption or freedom from punishment” by the ICC.”\textsuperscript{34}

This case demonstrates political motivations, which effectively gave indemnities and immunities, something the ICC has stated that it would stand against. Interestingly enough, the apparent bias in this example, which is expressed by African states, resulted from weaknesses in the Rome Statute, the same weaknesses which were pointed out by other more powerful states, particularly the US, when justifying their failure to ratify the Rome Statute. The US has repeatedly expressed concerns as to the lack of accountability on judicial staff, the lack of separation of powers, and therefore the vulnerability of the Court to political pressure, and the encompassing jurisdiction of the Court that includes states not a party to the treaty, which effectively violates international customary law.\textsuperscript{35} Action was taken against a

\textsuperscript{32} Id.
\textsuperscript{33} Rome Statute, supra note 2, Article 24.
\textsuperscript{34} DAVID HOILE, THE INTERNATIONAL CRIMINAL COURT: EUROPE’S GUANTANAMO BAY?, P. 59 (2010).
non-state actor when the UNSC made the resolution to give the ICC jurisdiction in Darfur, Sudan. The actions of the UNSC, to which the US is a permanent member, demonstrate the bias of the Court to which the US had raised the very same concerns earlier, most prominently, taking action against a non-state actor and wielding the power of the Court to gain political leverage. This demonstrated to the international legal community the blatant use of the ICC to pursue political agendas. It could be argued that the African states, by ratifying the treaty, are the leaders in promoting international law. However, the reality is that African states did not have the political power necessary to avoid signing the Rome Statute.

Avoiding the Rome Statute

It is important to consider the implications surrounding African states when deciding to ratify or not to ratify the Rome Statute. Facts suggest that great pressure is available to encourage African states to ratify the Rome Statute and in doing so, remain in good graces with the EU. Part of the pressure faced by African states is due to the political power gained by the EU through the Cotonou Agreement, which is the EU-African trade agreement. As part of this agreement, African states are paid large sums provided through the European Development Fund ("EDF"). Each EDF cycle typically lasts six years. The 10th EDF from 2008-2013 saw Uganda receive €460.9 million and the 9th EDF an amount of €363 million.\(^3^6\) These aid money contributions buy the EU political power directly by the obligations within the agreement but also indirectly by the need for the African states to appease the EU if funding is to continue.

In 2005 the Cotonou Agreement was revised to include a legally binding clause directly addressing membership to the Rome Statute as part of the agreement. Article 11.7 of the Agreement provides obligations to seek out and take steps towards ratification and

implementation of the Rome Statute.\textsuperscript{37} It can be seen that unless an African state wants to forgo very substantial economic gains, it will accede to such demands. Sudan is one African country that refused to sign resulting in huge economic losses. The European Commission in regard to Sudanese inaction made the following statement:

\begin{quote}
\textit{“Since Cotonou provides the legal framework for relations between the European Commission (“EC”) and African, Caribbean and Pacific Group of States, non-ratification by Sudan prevents the EC from implementing bilateral development cooperation in Sudan under our main financial instrument for development assistance to developing countries, the 10\textsuperscript{th} European Development Fund (EDF). This means that the EC will not be able to disburse the €300 million pledge at the May 2008 Sudan Consortium for the period 2008-2013.”}\textsuperscript{38}
\end{quote}

For Sudan, the cost benefit is not great enough to justify signing the agreement. It should be noted that Sudan has a relatively large economy in comparison to other African states and possibly more freedom to forgo such funds. For other states, the cost benefit is a different equation. For example, the benefits of signing far out weigh the costs for states such as Uganda and Botswana, who enjoy the benefits of financial support and international recognition provided by the EU.

\textit{Who is referring whom?}

An obvious defence to the concentration of cases in Africa is that they were referred from the African states themselves in the way of “self-referrals”. Four of the eight situations, including Uganda, Democratic Republic of Congo, Central African Republic and Mali have been self-referrals. The first Prosecutor, Luis Moreno Ocampo stated when questioned about the African bias, “Why focus on cases in Africa? Because the leaders requested our


However, it is questionable how independent these referrals are of external influences and pressures. It has been confirmed by Human Rights Watch that “the Office of the Prosecutor actively sought the referrals in the DRC and Uganda” and that the Prosecutor had prior to issuing a referral, identified Uganda as an area of concern. Political pressure and influence is unquestionably part of the process of self-referral. On the 17 July 2008, the Prosecutor admitted he had put pressure on Uganda and the DRC to refer their situations to the ICC, in doing so dismissing any belief that the Prosecutor is only responding to requests but rather picking and choosing his own cases to pursue. Prior evidence of this can be seen in the press release made by the OTP after it opened its investigation:

“In September 2003 the Prosecutor informed the States Parties that he was ready to request authorization from the Pre-Trial Chamber to use his own powers to start an investigation, but that a referral and active support from the DRC would assist his work. In a letter in November 2003 the government of the DRC welcomed the involvement of the ICC and in March 2004 the DRC referred the situation in the country to the Court.”

The Prosecutor, Moreno Ocampo, has tried to falsify this pressure by stating that these countries were invited by the OTP and they then proceeded to invite the Court to intervene, thereby claiming that no intrusion had occurred. However, if these circumstances

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40 Human Rights Watch, supra note 23, p. 40.
are considered from a government’s perspective it is easy to come to the same conclusion as both the Ugandan and DRC governments. When faced with the inevitable involvement of the ICC directed at a rebel force, it is clear that the benefits of inviting the ICC far outweigh the benefits of opposing. This leads into the next argument, which outlines the fallacy of self-referrals.

*The Fallacy of Self-referrals*

As previously discussed, four out of the eight situations brought under the Rome Statute have been self-referrals. The idea of self-referrals presents a number of issues. Firstly, a prosecutor has no obligation to allow a self-referral. A prosecutor could just as easily pick a referral of the same situation from another state member bringing the situation to light or use his or her own powers of Motu Proprio under Article 15 of the Rome Statute to initiate an investigation. Therefore, it can be argued that the Prosecutor just as randomly selected these self-referrals as when the power of Motu Proprio was used by the Prosecutor to initiate investigations in Kenya and Côte d’Ivoire. Further, as argued by Antonio Franceschet, when the ICC accepts self-referrals in cases where there is no obvious inability of the state to hold trials (as in the Uganda situation), this effectively weakens the express duties of states to exercise jurisdiction over criminals and derogates from the complementary nature intended of the Court as set out in the preamble of the Rome Statute.45

The next point clearly outlined by Kenneth A. Rodman demonstrated the dangers of allowing self-referrals. The ICC risks being politically perceived as aligned with questionable governments, who are not democratic, as these governments use the ICC as a “good guy” brand to the international community as well as their own citizens.46 This can be seen quite clearly as the case in Uganda. When President Museveni referred the matter to the ICC he legitimized himself and his government to the international community as well as further

45 Antonio Franceschet, *The International Criminal Court’s Provisional Authority to Coerce*, 26, Ethics Int. Aff. 93, 95 (2012).
46 Rodman, *supra* note 18, p. 67.
criminalized the insurgency of the LRA in Uganda. When the Prosecutor announced that the referral to Uganda would be accepted, this was done in a joint statement with President Museveni. By only indicting the LRA and not the Ugandan government, the common belief has arisen in northern Uganda that the ICC is a tool of state policy.\textsuperscript{47} Comments made by President Museveni offer support to these allegations:

\begin{quote}
\textit{"... If Kony goes deeper into Sudan, beyond where Sudan has allowed us to pursue him, we need the ICC’s assistance to get the Sudanese government to cooperate with us and help us to get him. This is why we need the ICC."}\textsuperscript{48}
\end{quote}

This statement by Museveni effectively teams himself with the ICC. As discussed previously, the case of \textit{DRC v Uganda} heard in the ICJ demonstrates that the Ugandan government does not come to the table with clean hands.\textsuperscript{49} The political advantages of referral are therefore attractive to a leader. It should be noted that President Museveni later asked the ICC to drop the charges, a request which was immediately dismissed.\textsuperscript{50} Furthermore, it is plainly obvious why the ICC would pursue self-referrals. A self-referral allows the OTP, as it has, to share with the world the request of the African state for assistance and thereby counter any accusations of bias.

\textbf{PART III – POLITICAL REALITIES}

Considering the ineffectiveness of the Court to date despite the vast amount of money that has been poured into the Courts funding, perhaps international justice is not the most effective mechanism in resolving these conflicts. The lack of results recorded by the ICC and the aggressive way the Court has approached the transitional justice environment, including interactions with peace negotiations and reconciliation efforts, has not helped to gain support for

\textsuperscript{49} \textit{Democratic Republic of the Congo v Uganda}, supra note 3.
the ICC or managed to draw attention away from bias. I would argue that the ICC has failed to negotiate the difficult political challenges it faces resulting in an overall disappointing performance.

The ICC has approached the question of political considerations aggressively. The OTP has made it very clear that its ultimate goal is deterrence through heavy-handed prosecution independent of political considerations and therefore independent of considerations regarding peace-promoting negotiations. This view is apparent in the language used in an OTP policy statement:

“The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law... [the court] will pursue its own judicial mandate independently... international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.”

The argument made supporting the importance of punishment and the pursuit of justice to deter criminals in the future is a strong one. As is the argument that all courts, including the ICC, must follow the law and the evidence, even without political backing, as a means to increase legitimacy, reputation and to win state support in the long run. However, I would argue that the ICC is a political body, and as such, must take into account the considerations of political actors, whether it wants to or not. If it fails to take political considerations into account, two main consequences can ensue.

Firstly, the legal norms of a judicial body operating in an internationally politicized community such as the ICC, have limited impact, resulting in the potential for the Court to appear weak. The Court does not possess an army or any economic power. It relies on state members to use their political powers and influence to support the Court and give weight to

its decisions. Any form of force, sanctions, peacekeeping or humanitarian relief required falls outside the capacity of the Court. The former ICC president Philippe Kirsch has summarized these points well by describing the ICC as a “two pillar” system. The first pillar is the judicial mechanisms of the Court and the second pillar, the operational pillar, is respecting and adhering to the Courts decisions, this requires states to actively cooperate to allow the system to work effectively.\textsuperscript{53} As concluded by Kenneth A. Rodman, by stating itself as a court completely independent of political considerations, the ICC is exaggerating its potential to deliver results without third party assistance, which can lead to “a discourse that seeks to delegitimize those who express moral or practical reservations about the application of international criminal law to specific conflicts.”\textsuperscript{54} Therefore, considerations as to the likelihood of successful enforcement must be made as to avoid the appearance of a weak court with unenforceable judgments.

Secondly, the ICC should consider political considerations as its decisions directly affect political landscapes, including peace negotiations. If a conflict is ongoing, and the ICC indicts someone, this severally puts in jeopardy peace negotiations and reconciliation efforts. This results as one side to the party, the indicted party, loses all incentive to negotiate. The investigations launched in Uganda highlight both of these points.

\textit{Ugandan Example}

The investigations in Uganda into the LRA offer a perfect example of what happens when political considerations are ignored. Firstly, the conflict in Uganda between the LRA and the UPDF has been ongoing on for 19 years. The UPDF army has been trying for all that time, unsuccessfully, to capture and prosecute LRA leadership. The problem here is not a lacking judiciary, rather lacking military capacity. It is difficult to understand what a


\textsuperscript{54} Rodman, supra note 18, p 69.
judgment from the ICC would do for Uganda. What the Prosecutor has done is focus on the inability of the government to apprehend and arrest the LRA captains rather than the purpose of the ICC, which is to assist when the state judiciary is unwilling or unable to prosecute. These failed indictments have only weakened the Court in the eyes of the international community.

Secondly, the actions of the ICC in Uganda have acted to disturb the transitional justice process, mainly peace negotiations, which have led to further violence and reflect extremely badly on the Court. It is unrealistic to expect the LRA or other rebel militia to come out and receive amnesty for peace talks when at the same time the ICC is threatening their arrest.55 Before the ICC issued arrest warrants for the LRA leaders ongoing negotiations were taking place, which were quickly dismantled when the ICC was introduced into the equation. The introduction of the ICC has seemingly only worsened the outcome. It has been documented that the cease-fire with LRA leaders, particularly in the time of negotiations, had dramatically improved the security situation and human living standards in the conflict areas.56 Interviews with Ugandans have found that many do not support the ICC involvement due to the resulting interruptions to the peace resolution process.57 Reuters reported in April 2007:

“Since peace talks started, a wave of popular opposition to the ICC amongst northern Ugandans – the main victims of Kony’s cult like rebel group – has dismayed rights groups. Northerners say only a lifting of the indictments will bring lasting peace.”58

This is a result of the LRA retreating from negotiations after the ICC, directly obstructing negotiations, made indictments. As a result, Ugandans are increasingly dissatisfied with the Court, saying the Court “fails to respect their desire for traditional reconciliation and is undermining efforts for genuine peace in their country.”\textsuperscript{59} Opinions have been voiced that the process of peace talks and negotiations should override that of justice in circumstances that permit it so.\textsuperscript{60} Here it is obvious that in these circumstances, peace talks do override justice, as justice has no legs to stand on. As discussed by Michael Struett, ICC prosecutors and judicial officers should be aware of the political situation surrounding a potential investigation. Sometimes consequences of pursuing legal action are so great as to justify postponing bringing legal action, even if on the face of things, the Court is mandated to bring this action.\textsuperscript{61}

\textit{Legal Considerations of Justice}

The power to avoid taking legal action in circumstances where the consequences are too great is contained within the Rome Statute. Article 53 of the Rome Statute allows the OTP some consideration when determining the interests of involved parties. The relevant parts of the article read:

1. … In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

   …

   (c) Taking into account the gravity of the crime and the \textit{interests of victims}, there are nonetheless substantial reasons to believe that an investigation would not serve \textit{the interests of justice}.

   …

\textsuperscript{60} Peace Before Justice, Congo Minister Tells ICC, AGENCE FRANCE-PRESSE, February 16, 2009.
2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

... 

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime, he shall inform the Pre-Trial Chamber and the State making a referral under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion."

As it is articulated in the statute, sections 53(1)(c) and 53(2)(c) allow the Prosecutor to determine ‘interests of justice’ taking into account as part of that the ‘interests of victims’. The question then becomes one of statutory interpretation. Article 31 of the Vienna Convention of the law of treaties says that the statute should be interpreted according the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. An OTP policy statement has given light to how the statute will be interpreted and highlighted that this particular provision will be read by the OTP as implying the interests of the victim as weighing in favour of prosecution, but the OTP “will listen to the views of the parties concerned.” The OTP states that the situation in Uganda exemplifies this approach, citing more than 25 missions to Uganda and two meetings of community leaders hosted at The Hague, all with the aim of listening to concerns of victims and representatives of local Ugandan communities. Yet the investigations and arrest

63 ICC Policy Paper, supra note 52, p. 5.
warrants in Uganda still went ahead. The OTP used this situation as an example to demonstrate its position of justice over peace:

“The situation demonstrates well the exceptional nature of the provision on the interests of justice as well as the differences between this concept and the interests of peace.”

To reiterate the argument, justice in this case is improbable, but despite this, the ICC is still pursing justice at the cost of valuable peace negotiations. The concerns raised by the stakeholders in local communities, as in the Ugandan case, should not be brushed aside in the name of legalism and the pursuit of a strong body of international law. Rather these views should be taken into account and implemented into a cost-benefit calculation by the Prosecutor when deciding whether to move forward with a formal investigation.

What comes next?

Several things will improve the ICC, its world standing and overall effectiveness. First and foremost, the ICC needs to spread its caseload to counter feelings of bias towards African states. Although the idea of geographically balancing the caseload has been heavily criticised, it seems the future existence of the Court in Africa will depend on it. The ICC is now attempting to broaden geographical boarders, currently conducting preliminary examinations in Honduras, Republic of Korea, Comoros, Central African Republic (each of these listed is in phase 2 – Subject matter jurisdiction), Afghanistan, Colombia, Georgia, Guinea and Nigeria (these are in phase 3 – Admissibility). However, to date, none of these primary examinations have resulted in a formal investigation. Note further, that of these

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65 Id.
66 ICC Policy Paper, supra note 52, p. 4.
67 Rodman, supra note 18, p 68.
preliminary examinations, Comoros, Central African Republic Guinea and Nigeria are all African nations.68

Secondly, the Court needs to become more sensitive to the investigations it opens, considering all possible variables and political considerations, especially the effects initiating an investigation will have on peace negotiations. Whether this consideration is given under Article 53 of the Rome Statute in the interests of victims or by the UNSC in their powers of deferral or referral or behind the scenes by the Prosecutor, using his or her discretion, the ICC can not continue to start investigations with no chance of a successful result, especially in cases where the safety of thousands is put in jeopardy as a result.

Thirdly, the ICC must respond to grave situations and not be seen to target soft options. The integrity of the Court demands it. A perfect starting point is Palestine and the conflict highlighted within the paper.

Finally, the AU needs to unify and strengthen African institutions and mechanisms for dealing with crimes that fall within the jurisdiction of the ICC. If this was achieved, it would not only decrease the prominence of the Court within Africa, it may also be the Court’s biggest achievement. The ICC has after all, always intended to be complementary.

No one can deny the difficulties faced by the ICC in operating in such a tough environment. Reasonable people would agree that the ICC has flaws that have been pointed out extensively in this paper. But such flaws are inherent in all globalized organisations including the United Nations. International law, a reasonably new phenomenon, will continue to grow and become more important in the future as the world continues to globalize. The ICC represents a huge step forward for international law and the pursuit of global justice and a final stop for those who have no alternate remedy.