MORAL PRACTICES: ASSIGNING RESPONSIBILITY IN THE INTERNATIONAL CRIMINAL COURT

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I
INTRODUCTION

Who has the authority to assign responsibility for international crimes? There is a simple answer: international tribunals, in particular the International Criminal Court (ICC). Yet this obvious response obscures further questions regarding where the political authority to create international tribunals comes from, as well as the vital *moral* question regarding how courts are constituted as actors with the capacity to assign blame. In modern international politics, authority has traditionally rested with states, meaning that rightful legal institutions were created by states and justified by their consent.[1] The ICC is granted authority in this way, because it was created through a treaty negotiated and signed by states.[2] Such a procedural response, however, obscures as much as it reveals about the politics and morality of assigning responsibility for international crimes. Asking how a new international authority is constituted and justified as an actor with the political power to try state officials and other international criminals—and to thereby embody and defend supposedly emergent norms of global justice—is a more contentious, difficult question that takes us beyond questions of positive law.

In international law, there is also an account of the law's authority based on the moral claims it makes, which are intended to shape states and constrain their power.[3] The ICC belongs to this tradition as well. The fundamental issue I want to explore in this article is how such moral authority is constituted in real-world institutions, particularly the authority to assign responsibility for international crimes. This is a vital issue to consider if we want to understand the ICC, its limits, and its place in the changing world of contemporary international politics. From the beginning the idea of an international criminal

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1. Nicholas Greenwood Onuf, *International Legal Order as an Idea*, 73 AM. J. INT'L L. 244, 253 (1979).

2. Rome Statute of the Int'l Criminal Court art. 126, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

3. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 184–85 (2005).

court was framed in legalistic terms, in both its founding and practical activities to date.[4] Now that the ICC is in operation it actively claims authority through its defense of universal moral principles and pursuit of justice for victims of violence. On this basis, authority is granted to the institution because it embodies universal moral norms, which in turn constrain the actions of states, leading to the reform of international politics.[5] Supporters of the ICC characterize the court as a victory of law over politics, and of morality over the self-interests of states.[6] This account of the ICC's authority leaves us with important issues to consider: How was such a victory for international law possible? What are the court's prospects for continued success? Should we accept the claim that the ICC is a legal rather than political institution?[7]

International courts are products of their time and place, created through political compromise, responsive to particular crises, and dedicated to the interests of particular actors.[8] Despite rhetoric that insists that the ICC and other international tribunals are (or should be) legal rather than political institutions,[9] a focus on the constitution of these courts reveals the way preexisting social practices and power hierarchies structure their work. Placing the ICC's authority to assign responsibility in its social and political context complicates our understanding of such authority and enables important lines of criticism. I argue that rather than overcoming the politics of their creation, legal institutions are indelibly shaped by them, and rather than escaping politics, legal institutions like the ICC transpose politics into a legal register.[10] These claims do not make the attribution of responsibility impossible but they do push us to consider the moral authority to make such attributions differently. The conventional account of moral authority is seen as the just application of rightful law, although the realities of politics may make the ideal exercise of that authority difficult.[11] The goal, nonetheless, is to make the law as impartial and judicious as possible to ensure its separation from politics. An alternative way of understanding moral and legal authority is to acknowledge its political element, in the sense that the authority exercised is always the product of a

4. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 12–13 (1997).

5. ADAM BRANCH, DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA 181–84 (2011) [hereinafter BRANCH, DISPLACING HUMAN RIGHTS].

6. Steven C. Roach, *Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court*, 4 J. HUM. RTS. 475, 483–84 (2005).

7. Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 942–46 (2010) [hereinafter Nouwen & Werner, *Doing Justice to the Political*].

8. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 410–17 (2007).

9. Alexander K. A. Greenwalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 586 (2007).

10. GERRY SIMPSON, LAW, WAR AND CRIME 23–29 (2007).

11. Jamie Terence Kelly, *The Moral Foundations of International Criminal Law*, 9 J. HUM. RTS. 502, 504 (2010).

decision to impose values upon others, which always remains a kind of violence because those decisions are never universally or finally justifiable, but rather are in some measure politically driven.[12]

If we understand the capacity to assign moral responsibility as part of a social practice, it is vital to understand the background conditions that partly determine who can assume the privilege of assigning responsibility, while also considering the effects those privileged actors have as they exercise their authority. Understanding the assignation of responsibility as a social practice requires us to identify the social relationships through which a particular individual or institution gains the capacity to assign responsibility to culpable agents who are then subject to punishment. Taking this approach allows us to begin addressing the difficulty Jens Meierhenrich identifies in "attempting to disaggregate the first permanent international criminal court by scrutinizing various socially meaningful or otherwise significant aspects of its everyday life."[13] In international politics, the historically dominant practice has been one of "victor's justice," in which the authority of legal bodies and the punishments they hand down is given by the force of arms possessed by the victorious state.[14] This practice has always provoked opposition and for advocates of international criminal law the ICC represents a milestone in the long evolution from "victor's justice" to true international justice, in which the rule of law rather than the rule of power becomes the basis for international politics.[15] "The ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted."[16] International criminal law seeks to reconstruct this practice of assigning responsibility by moving towards the effective rule of law and creating new moral actors, most vitally an independent international court. In this article I argue that the shift in the social practice of assigning responsibility that is sought through the ICC contains within it an impossible renunciation of politics.

This shift in practice is explored by looking at the creation of the ICC. Using the history of the founding of this landmark institution I trace its limits, the power hierarchies that structure it as an actor capable of assigning responsibility, and its importance for the development of practices of international criminal law. The conclusion of this analysis is that the ICC, as a

12. *See generally* LAW AND AGONISTIC POLITICS (Andrew Schaap ed., 2009).

13. Jens Meierhenrich, *The Practice of International Law: A Theoretical Analysis*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 1, 4.

14. JOHN LAUGHLAND, HISTORY OF POLITICAL TRIALS: FROM CHARLES I TO SADDAM HUSSEIN 252 (2008).

15. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 383–93 (2000).

16. M. Cherif Bassiouni, Chairman, Drafting Comm., United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Address at the Ceremony for the Opening of Signature of the Treaty on the Establishment of an International Criminal Court, *in* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY xxi, xxi (M. Cherif Bassiouni ed., 1999).

moral agent, is limited by its inability to acknowledge its own political power, because its authority is premised on the separation of law and politics. As former ICC Prosecutor Luis Moreno Ocampo described his role,

> I shall not be involved in political considerations . . . . It is the only way to build a judicial institution, to help the political actors to perceive the legal limits. To facilitate the work and planning of political actors, I inform them in advance of my next steps, and ensure that my Office be transparent and predictable. However, my duty is to apply the law without political considerations. Other actors have to adjust to the law.[17]

This limitation in turn presents significant obstacles for the ICC's goal of ending impunity and raises questions about the promise of international justice for those most directly affected by the conflicts where the ICC is involved. These negative consequences are seen in the court's actions in Uganda, where its first arrest warrants were issued.[18]

The ICC's claim to authority rests on the renunciation of politics in favor of the power of the law, which is justified by the law's moral quality. International criminal law's moral quality is characterized by two distinct ends: first, the elimination of impunity for individuals with state position and power, which extends the rule of law to the international level, and second, responding to the suffering of victims of atrocity and war by bringing those responsible to justice, through punishment.[19] These aims are intended to ensure the just application of universal moral principles. In the discussions and official drafting documents that led to the creation of the ICC, this moral authority was emphasized while political authority, associated with partiality, compromise, and impunity, was rejected.[20] The difficulty this creates, and that is revealed when we think about moral responsibility as a social practice, is that moral authority is always tied up with other forms of social authority that must make use of coercion and compromise, and is unavoidably partial. In practice the ICC must be a political actor, but the way that its moral authority is constructed leads to a kind of schizophrenia. Even in the terms set out by the ICC's own ideals for moral actors, the ICC is in practice inconsistent and contradictory. This can be seen in the Uganda case, where the ICC had strong pragmatic reasons for choosing to pursue the Lord's Resistance Army (LRA) as a first prosecution and to seek close cooperation with the Ugandan government. These political choices raise doubts about the ICC's impartiality and capacity to serve the ends of

17. Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Keynote Address at Council on Foreign Relations 6 (Feb. 4, 2010) (transcript available at http://i.cfr.org/content/publications/attachments/MorenoOcampo.CFR.2.4.2010.pdf).

18. *See, e.g.*, Prosecutor v. Kony, Otti, Odhiambo & Ongwen, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony (Sept. 27, 2005), http://icc-cpi.int/iccdocs/doc/doc97185.pdf; *Kony, Otti, Odhiambo & Ongwen*, Case No. ICC-02/04-01/05, Warrant of Arrest for Raska Lukwiya (July 8, 2005), http://icc-cpi.int/iccdocs/doc/doc97193.pdf; *Kony, Otti, Odhiambo & Ongwen*, Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo (July 8, 2005), http://icc-cpi.int/iccdocs/doc/doc97197.pdf; Warrant of Arrest for Dominic Ongwen (July 8, 2005), http://icc-cpi.int/iccdocs/doc/doc97201.pdf.

19. Rome Statute, *supra* note 2, at pmbl.

20. MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT 129–30 (2006).

international justice.[21] Although the authority of the ICC is articulated through the renunciation of politics, its exercise of authority is quintessentially political. The court not only was constituted by states and through a process of compromise and negotiation that has shaped it as an institution[22] but also exercises its legal authority to make choices on matters beyond the law: who to prosecute, how conflicts are represented, and when to compromise to secure the cooperation of states.[23] In the end, I want to claim that attending to how the ICC assigns responsibility in terms of social practice should lead us to reconsider the law–politics relationship sought by international criminal law. The agonistic character of international criminal law should be acknowledged. This agonistic character suggests that the law never escapes politics and that failing to embrace the political role of the ICC is damaging to this important institution, because disavowing politics lends itself to naivety and a lack of self-criticism.

There are a number of difficulties with the claims I am making here. First, how does the ICC act as a moral agent? Second, how can I justify the claim that the court is acting in the way I claim? Third, how can I show that the cause of the court's action has to do with how the ICC is constructed as a moral agent? The truth is I cannot respond fully to these difficulties. In the first case, speaking of the ICC as a moral agent is necessarily a shorthand for speaking of the acts of individuals that take place within the ICC as an institution. In most instances, I am talking about the prosecutor at the time in question, Luis Moreno Ocampo, but this too is a simplification, given that those with whom he conferred surely shaped his actions and decisions. A further issue is that there is no record of his thoughts and actions, much less those of who he worked with—the evidence available is very limited. Finally, with respect to the third difficulty, I am not claiming that the way the ICC was constructed as a moral agent is determinant, that it is a structural force bearing down on all those involved, but rather that the initial act of construction shapes and constrains the practice of the court and is important so far as we see the court's claim to authority made in terms of a rejection of politics. This self-understanding means that the ICC struggles to be clear or open about its politics in its public pronouncements, and one suspects even internally, though this is hard to judge because of the lack of evidence. So, the argument presented here is not based in a deep and long term empirical engagement with the court as an institution simply because such work has not yet been done, though it is increasingly seen as important and being attempted.[24] Rather, my claims are based on available

21. BRANCH, DISPLACING HUMAN RIGHTS, *supra* note 5, at 183–215.

22. *See* Antonio Cassese, *The Statue of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 170–71 (1999).

23. Nouwen & Werner, *Doing Justice to the Political*, *supra* note 7, at 961–65.

24. This issue of *Law and Contemporary Problems* represents a move in that direction, as is highlighted in Jens Meierhenrich's *The Practice of International Law: A Theoretical Analysis*, *supra* note 13, at 1–5.

textual evidence and a kind of conceptual analysis of the moral ideals that shape the court. In light of these limitations, my conclusions are suggestive rather than determinate.

II
MORAL RESPONSIBILITY AS A SOCIAL PRACTICE

The link between morality and law is hardly simple or straightforward. There are those who see the law as grounded in effective political authority and its institutional execution, and for them moral claims are only ideological justifications of authority; morality does not have its own power.[25] International criminal law starts from the opposing side of this claim. Its fundamental justification is that there are some wrongs that are undeniable and, in turn, norms that should be applicable everywhere.[26] Assuming this link between morality and law, in which moral principle provides justification for the social power that the law exercises, the question of assigning moral responsibility becomes central.

Moral theory, however, does not provide any one compelling understanding of responsibility. The question moral philosophy commonly confronts is, Can individuals can be held morally responsible for their actions?[27] The typically modern response is that they can so long as they acted freely and were capable of knowing the morally right action.[28] These presumptions are echoed in legal norms, such as *actus non facit reum nisi mens sit rea* (the act is not culpable unless the mind is guilty). This account of responsibility, in which moral culpability is constructed from causal responsibility and blameworthiness, treats responsibility as a quality of an individual actor. Philosophers have found two fundamental problems with this account. First, it depends on the reality of free will, because the responsible actor must be the cause of her own actions.[29] Second, it depends upon the universality of moral principles, which must be known to any right-minded individual.[30] Both of these assumptions have proven problematic.

There is not space here to go into the philosophical debates on moral responsibility, but neither is there any need to do so, because an identifiable

25. *See* CHINA MIÉLVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 295–320 (2005).

26. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law, in* THE PHILOSOPHY OF INTERNATIONAL LAW 569, 571 (Samantha Besson & John Tasioulas eds., 2010).

27. Galen Strawson, *The Impossibility of Moral Responsibility,* 75 PHIL. STUD. 5, 5 (1994).

28. MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY 72–104 (1992).

29. Strawson, *supra* note 27, at 21–22.

30. Alasdair MacIntyre, *Social Structures and Their Threats to Moral Agency*, 74 PHIL. 311, 329 (1999).

compatibilist compromise position has come to dominate.[31] This compromise suggests that although individuals' actions are in many ways determined by forces outside their control, individuals nonetheless maintain some capacity to direct their actions and choices. Further, whether we see moral norms as rational or conventional, there is an assumption that an individual can be expected to know and respect some moral norms, meaning that the assignation of responsibility is possible. What this compromise fails to account for is that assigning responsibility becomes a political act once we no longer see it as a discovery of a fact about the world. Rejecting the responsibility-as-fact concept is especially important for the compatibilist position, because that position acknowledges that both free will and moral principles are at least partly social constructions, in which someone exercises power over someone else. Yet, because this compromise position remains committed to the idea of responsibility as a quality that individuals possess, it is not clear where or how the political aspects of responsibility can be considered.

It is for this reason that some scholars have moved to think of moral responsibility in different terms, namely as a social practice.[32] This move is based in the idea that when we hold each other responsible we are not really concerned with larger philosophical questions of free will and rational morality, but with influencing the actions of others (and ourselves). Understanding responsibility as a social practice allows us to see how the act of holding each other accountable to social norms is rooted in particular contexts and always involves the exercise of power. The difficulties of dominant accounts of responsibility are only exacerbated when we consider international crimes involving collective actors and the mobilization of social groups.[33] Therefore, it is this understanding of moral responsibility as a social practice that I want to use in thinking about the ICC and how it is able to claim the authority to hold individuals accountable. In arguing for a social practice account of responsibility I share the concern for moving beyond the impasse between theoretical abstraction and naïve empiricism that Meierhenrich expresses in his introduction to this issue, but I also stand slightly to the side of his central aim because my analysis remains explicitly normative.[34]

In previous work, I have argued for an understanding of moral responsibility as a social practice rooted in John Dewey's pragmatist philosophy.[35] The key

31. Randolph Clarke, *On an Argument for the Impossibility of Moral Responsibility*, 29 MIDWEST STUD. PHIL. 13, 19–20 (2005).

32. Responsibility has been addressed as a practice by those working in an Aristotelian tradition, such as Alasdair MacIntyre, *supra* note 30, as well as a pragmatic tradition, as in the work of Marion Smiley, *supra* note 28. Within contemporary moral philosophy, the work of Peter Strawson has been very influential in motivating this move to focus on the act of holding others accountable as a social practice. *See* PETER F. STRAWSON, FREEDOM AND RESENTMENT, AND OTHER ESSAYS 1–28 (2008).

33. *See* ANTHONY F. LANG, JR., PUNISHMENT, JUSTICE AND INTERNATIONAL RELATIONS 45–57 (2008).

34. *See generally* Meierhenrich, *supra* note 13.

35. Joseph Hoover, *Reconstructing Responsibility and Moral Agency in World Politics,* 4 INT'L

points I want to bring out here are twofold. First, when we think of responsibility as a social practice the question of whether individuals possess free will, and therefore can be causally responsible for an act, is transformed into the question of whether individuals are enabled to be reflective in their actions and whether social conditions grant them the capacity to act purposefully. Second, thinking of responsibility as a social practice shifts our attention away from the question of whether a moral norm is universally binding as such and towards the question of the quality and consequences of the moral ends we pursue. Assigning responsibility, then, is the social practice of holding individuals to their proclaimed ends. Once we adopt this view, the task of morality is not to find agents who can be held responsible or determine the norms to which they must be accountable, but to consider the quality of our social practices and the consequence of the ends we pursue.

A social-practice approach to responsibility brings the political elements of assigning blame and holding accountable to the fore, and a number of scholars have considered the distinctive difficulty of finding culpable agents when we are concerned with addressing "international" crimes. The account of responsibility that sees moral culpability as a quality that adheres to individuals cannot adequately address the reality of mass crimes in which whole populations can be seen as more or less culpable.[36] For example, although soldiers may be responsible for particular atrocities, their actions are enabled by other collective actors, such as military leaders, state representatives, and democratic publics, who are thus in a way responsible as well.[37] These moves to reconsider responsibility in world politics in terms of social practice are important, but they also understate the role of power in constituting culpable actors through the practices of international criminal law. Put another way, the focus on volitional individuals who commit heinous crimes is not only a conceptual mistake, but it also makes it all too easy to ignore structural causes of mass violence and the role that powerful international actors have in instigating and prolonging conflicts.[38]

Paying attention to the construction of culpable agents, however, reveals only half of emerging practices of international responsibility. The actor who is able to assign responsibility, and in turn empowered to construct and limit which causes of conflict are to be addressed, is also socially constructed and defined by existing conditions and power hierarchies. So, whereas in previous work I have argued that accepting the idea of individual culpability in the practice of prosecuting international crimes obscures the social conditions that enable conflict and preserves the power inequalities that limit what the pursuit

THEORY 233, 254–56 (2012).

36. Kirsten Ainley, *Excesses of Responsibility: The Limits of Law and the Possibilities of Politics*, 25 ETHICS & INT'L AFF. 407, 409 (2011).

37. Neta C. Crawford, *Individual and Collective Moral Responsibility for Systemic Military Atrocity*, 15 J. POL. PHIL. 187, 188–89 (2007).

38. Hoover, *supra* note 35, at 252–54.

of international justice can achieve, in this article I focus on how the authority to hold responsible is constructed. To begin this work two things are needed: First, an account of what practices we are concerned with, and second, an understanding of what is meant by a social practice.

The first concern is answered by looking to the emerging practices of international criminal law and the way that international courts are constituted. Courts deliver judgments of culpability based on the assignment of responsibility made by prosecutors. So, the moral question is, how are they justified? What gives legal institutions the authority to hold us responsible? These questions are answered in many different ways by competing accounts of the law, but my focus will be on the way the authority of international courts is justified in their founding documents and practices of prosecution. In this instance I am looking at the ICC as a landmark institution in the development of international criminal law because it is the first permanent international criminal court and as such its authority had to be explicitly justified at the time of its creation, and continues to be justified in practice. The work done here is only an initial opening, because digging into the full complexity of the practice of holding responsible at the ICC would require more extensive fieldwork. Although my analysis here falls short of Meierhenrich's injunction to move from desk based research to field research, it does provide a framework for how scholars interested in distinctly moral practice might begin such work.[39] How I judge the ICC requires more explanation, which is why I now turn to the question of how analyzing responsibility in terms of social practice enables us to evaluate the moral quality of our practices.

In looking at responsibility as a social practice I draw on Dewey's ethical thinking. Although Dewey did not use the language of practice in his ethics, he did set out a theory of ethics that was practical and social. Dewey suggested that the work of ethics begins with an understanding of how norms function socially and how ethical ideals are practically viewed within a society.[40] Dewey's notion of responsibility is focused on the importance of holding individuals accountable to social norms, while also encouraging moral reflection on both the means by which this work is done and the ethical ends society pursues.[41] In this way, we can see Dewey as offering an account of responsibility as a social practice. An important part of the practice of responsibility is the institutional context in which society holds individuals responsible, notably considering who is able to hold others accountable and how such authority is granted and its social consequences. I want to suggest that we can use Dewey's ethical theory to develop a practical method for analyzing the value of the ICC as an institution with the authority to assign responsibility.

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39. Meierhenrich, *supra* note 13, at 4–5.

40. JOHN DEWEY, LECTURES ON ETHICS, 1900–1901, at 88–92 (1991).

41. JOHN DEWEY, HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY 315–18 (2002).

Dewey's method of ethical intelligence begins with identifying a problematic situation, looking for the practical concern to which ethical and political action responds.[42] In the case of the ICC we can consider both the perceived need for such a court, which is a central part of its justification, as well as the problems generated by the court's actions. The ICC was created as a response to the commission of atrocities worldwide, and particularly as a way to end the impunity many perpetrators of atrocity enjoyed. Criticism of the court has focused on whether it has been able to effectively achieve its ends and whether it is sufficiently attentive to the victims of atrocity.[43] To evaluate the court and the criticisms leveled against it, we can follow Dewey's general approach.

First, consideration should be given to the context in which the ICC was set up, including its aims and means, as well as the social and political dynamic in which the court was created. This analysis also includes a consideration of historical context, considering how the ICC responds to and embodies existing practices. Second, this analysis should look to how well the professed aims of the court are met by the prescribed means, giving special attention to unexpected consequences. This reflection is important for tracing the width of the gap that can open up between the aims of an institution and the consequences of its practical action. Importantly, this gap can appear even in cases where the aims and means are pursued sincerely and effectively, because practical action to address a problem, like international impunity, can alter our overall evaluation of the aims towards which a particular moral practice is oriented. After a reflective analysis of the practice of the court, a Deweyan approach asks us to evaluate the institution and practice in question, in terms of whether it achieves its ends and the consequences of its activities. This process of valuation is always done with more general moral values in mind and should focus on the wider consequence of a particular institution or practice. In this case, does the ICC make world politics more just or peaceful by some measure, and how does it affect the social and political relationships between the actors involved? In my own analysis I focus on whether the ICC is an authority that enables effective responses to atrocity and to what extent it engenders greater equality and control for those who suffer those atrocities. Finally, a valuation of the ICC provides a basis to suggest further reconstruction and, most importantly, further practical action to improve upon the failings of the court. In evaluating the ICC as an institution with the authority to assign responsibility, I consider both the founding of the court and its first arrest warrants, applying a pragmatic method of analysis to both grasp the practices of responsibility that the court is a part of, and to consider its achievements and limitations.

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42. *See* JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 107–23 (2004).

43. David Kaye, *Who's Afraid of the International Criminal Court*, 90 FOREIGN AFF. 118, 119 (2011).

III
THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

The creation of the ICC was something of a surprise. Supporters of the idea of a permanent international criminal court had struggled for years to generate interest and support for such a court.[44] It is clear that in historical perspective the ICC is a response to the need to address the impunity of those who commit atrocities and an important component of an international legal system that protects universal human rights and seeks justice for the victims of atrocity. [45] What is less clear is why in 1998 the ICC was seen as a necessary institution, even among states whose sovereign authority would be undermined by the court. There is a simple and comforting story that could be told about the advance of international law and human-rights norms in the post–Cold War era, but this would obscure more than it illuminates. Rather, I want to suggest there were a number of different actors who were supportive of the court, and each for rather different reasons.

First, there were individual advocates for an international criminal court (academics, lawyers, politicians, and activists) who were able to put the idea back on the agenda at the UN and proved instrumental in garnering support from states and global civil society. Second, the UN itself, particularly the International Law Commission (ILC) and the General Assembly (GA), was supportive of the idea of a permanent court that could not only bring enforcement powers to bear in defense of the international legal norms, but could also relieve some of the strain that the organization faced in trying to respond to atrocities in an ad hoc manner. Third, an increasing number of states were sympathetic to the idea, both to develop humanitarian and human rights law, and to defer some of the responsibility and cost of responding to atrocities to an international institution. Finally, global civil society, particularly the coalition of nongovernmental organizations (NGOs) that became known as the Coalition for the International Criminal Court (CICC), was able to mobilize wider sentiment in favor of the court and advocate for its necessity as an institution that could alter international politics by enforcing international law in service of moral ends. The diversity of reasons why the court was seen as a necessary project is important because even while the synergy of interests helped bring it to realization, the divergence in how the court was envisioned reveals how the ICC embodies competing projects and was defined from the beginning by political calculations.

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44. Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 3–4 (1999).

45. *See generally* Herman von Hebel, *An International Criminal Court – A Historical Perspective*, *in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 13 (Herman A. M. Hebel, Johan G. Lammers & Jolien Schukking eds., 1999).

Trinidad's Prime Minister Arthur Robinson, along with Robert Woetzel, Ben Ferencz, and M. Cherif Bassiouni, initiated the GA request for a draft statute of a permanent international criminal court from the ILC.[46] Originally, the proposal was framed as a way of dealing with the specific crime of drug trafficking, but those involved ensured that the wording was left broad, so that other crimes could eventually be included.[47] The passage of the resolution was, however, hardly a guarantee that anything substantive would come out of the discussions with the ILC. Bassiouni was particularly influential in the process, setting up an informal group of experts that provided its own draft statute,[48] stepping in as chairman of the ILC after the first chairman quit, and securing outside resources for the project.[49] Creating a permanent international court was a lifelong goal for Bassiouni and he did much intellectual and practical work to make it a reality.[50] Looking at the importance of individuals reveals that, although the ICC is by no means the work of one man, it is nonetheless a highly idealistic institution supported by the conviction of particular individuals as much as it is by states or a wider community concerned with the development of international criminal law.[51]

Other important individuals include Adriaan Bos,[52] who chaired the Preparatory Committee meetings that laid the groundwork for the Rome Conference, and Philippe Kirsch, who was the chairman at the Rome Conference.[53] In both cases, the individual commitment and political skill of these men ensured that the creation of the court was neither delayed nor undermined by powerful state interests. They were vital to maintaining the momentum of the drafting as it went from being yet another proposal at the ILC to a treaty approved at the Rome Conference. William Pace, who led the CICC, was another individual who shaped the drafting process and the constitution of the ICC. He was essential in engaging global civil-society actors and coordinating their contributions, which included providing technical assistance to states, mobilizing public sympathy, and galvanizing support from a broad spectrum of NGOs.[54] This shows how the court was partly a response to a problem perceived more by individuals than international institutions, states, or the wider public. Further, the leadership of these individuals influenced the aims and means adopted by the ICC, grounding its authority in moral terms and

46. GLASIUS, *supra* note 20, at 10–11.

47. *Id.*

48. *See* M. Cherif Bassiouni, *Draft Statute: International Criminal Tribunal*, *in* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY, *supra* note 16, at 759, 759–93 (M. Cherif Bassiouni ed., 1999).

49. GLASIUS, *supra* note 20, at 12.

50. Benedetti & Washburn, *supra* note 44, at 9–10.

51. *Id.* at 8–10.

52. Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124, 125 (1998).

53. Benedetti & Washburn, *supra* note 44, at 27–28.

54. GLASIUS, *supra* note 20, at 26–27.

focusing on the court's potential to transform international politics.[55] Their emphasis on the independence of the court and its potential to undermine traditional notions of sovereignty, however, challenges the authority of the states that the court depends on practically to do its business.

These influential individuals, however, were hardly operating in a vacuum. An international criminal court had first been on the UN agenda in 1948, at the time of the passage of the Genocide Convention and the Universal Declaration of Human Rights, when the plan for such a court was first referred to the ILC for consideration.[56] The ILC helped to develop the legal thinking that went into the ICC[57] and kept the hope for a court alive while it was a political impossibility.[58] Additionally, the GA's support was influential, particularly in insulating the court from the interests of the permanent members of the UN Security Council (UNSC).[59] So, even while the initiation of the drafting process was left up to the effort of dedicated individuals, the UN provided an institutional space in which the court was seen as a way to fulfill the organization's mission of protecting human rights while ensuring international peace and security.

The sense of urgency and possibility around the drafting of the ICC had something to do with events at the UN. As the organization's activities expanded with the end of the Cold War and it was called upon to respond to humanitarian crises and human-rights abuses, the need for a permanent court increased.[60] This should not, however, be taken to show that the UN's actions were purely moral—particularly among UNSC members, part of the appeal of a permanent international court was that it would ease the burden of responding to international crises in an ad hoc way, both by building up a reliable infrastructure and passing some of the responsibility to a new institution.[61] The

55. *See generally* William R. Pace, *The Relationship between the International Criminal Court and Non-Governmental Organizations*, *in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS, *supra* note 45, at 189.

56. Hebel, *supra* note 45, at 21–26.

57. *See generally* Rep. of the Expert Grp. to Conduct a Review of the Effective Operation and Functioning of the Int'l Criminal Tribunal for the Former Yugoslavia and the Int'l Tribunal for Rwanda, U.N. Doc. A/54/634 (Nov. 22, 1999) [hereinafter Report of the Expert Group]; Study on Ways and Means of Ensuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention, Comm'n on Human Rights, Ad Hoc Working Grp. of Experts & Special Comm. Against Apartheid, U.N. Doc. E/CN.4/1426 (Jan. 19, 1981); Rep. of the 1953 Comm. on Int'l Criminal Jurisdiction, July 27–Aug. 20, 1953, U.N. Doc. A/2645; GAOR, 9th Sess., Supp. No. 12 (1954) (containing draft of Rome statute); Rep. of the Comm. on Int'l Criminal Jurisdiction, Aug. 1–31, 1951, annex I, U.N. Doc. A/2136; GAOR, 7th Sess., Supp. No. 11 (1952) (containing draft of Rome statute).

58. Hebel, *supra* note 45, at 26–27.

59. Benedetti & Washburn, *supra* note 44, at 23–24.

60. Bassiouni, *supra* note 4**Error! Bookmark not defined.**, at 55–59.

61. Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169–70 (1995).

UN's role reveals another important tension at the heart of the ICC: Although there was a real commitment to the development of international criminal law, there was also a political goal of transferring responsibility, as much as authority, to an institution with potentially very little power to effectively enforce the law.

Perhaps the most surprising feature of the drafting of the ICC was that so many states were supportive. This support, however, was characterized by important tensions. There were a number of states that were committed to the idea of a permanent and independent court. Eventually becoming known as the like-minded group (LMG), the states involved expanded throughout the drafting process and supported the court in hopes of building the rule of law internationally, spurred on by atrocities seen in the former Yugoslavia and Rwanda, as well as a sense of completing the institutional protection for human rights originally envisioned in 1948.[62] Within the LMG there was important variation. The group included European states long committed to the development of international law (such as the Netherlands and Germany), states from the global south keen to support a court they hoped would be independent from the UNSC and the influence of powerful states (especially in South America and Africa), and states more recently convinced of the need for an international court (such as the United Kingdom, which joined late in the process on the back of the developing consensus and changes in domestic leadership).[63] These states cooperated with global civil-society actors, fought to preserve the independence of the ICC from the UNSC, worked to establish the independence of the court's prosecutor, and insisted on a wider jurisdiction than some would have preferred.

Although the LMG proved that the court had support from states, many others were less supportive. Yet, despite their reticence, there were few serious attempts by powerful states to obstruct the drafting process. This is in part due to the political events at the time. High-profile atrocities had made the issue of responding to such events an issue that was hard to ignore.[64] The success of the ICC was partly due to circumstances. Its necessity and the moral imperative for reform were strengthened by events rather than the concentrated efforts of individuals or states. The lack of resistance was also political. In particular, the United States offered cautious support for the project, not wanting to appear callous in the face of atrocities, and also convinced that a permanent international court with limited powers could prove useful for states, providing a minimally demanding way of responding to events.[65] Even countries that had never signed the Rome Statute (and still have not) like India, Russia, and China involved themselves in the negotiations, seeking to shape rather than simply

62. Benedetti & Washburn, *supra* note 44, at 20–21.
63. GLASIUS, *supra* note 20, at 49–51.
64. Benedetti & Washburn, *supra* note 44, at 3–4.
65. *Id*. at 17.

oppose the court.[66] In the end, the political context of the ICC's creation has engendered persistent tensions: First, there remain important inequalities between supportive states, particularly between European states who provide a good deal of the financial backing to the court and African states who are thus far the only states being investigated; second, powerful states that are not party to the Rome Statute (especially the permanent members of the UNSC), continue to use the court for their own ends, which may have little to do with expanding the rule of law or seeking justice for victims of atrocity.[67]

There was also a counterpressure coming from global civil society, which opposed the instrumentalization of the court by states. Operating under the CICC, civil-society groups represented a wider concern than that of specific individuals or the UN. Supportive groups came to the drafting process with a number of concerns, though human-rights advocacy and international-law groups were dominant. What united them was a desire for a court independent of state control.[68] Judging the impact of global civil society is complex, because although there is a consensus that the efforts of the CICC to provide information and advocacy were fundamental to the success of the Rome Statute, the ends of those involved were hardly homogenous.[69] Global civil society's importance shows that the ICC was seen as a necessary institution by a relatively large number of people. This gives some credence to claims that the court represents the interests of humanity. However, such statements elide the partiality of the groups most involved, who tended to be from wealthy Western countries and who can hardly be said to unequivocally or unproblematically speak on behalf of "humanity."[70]

There were many different reasons for supporting the creation of the ICC, such that the court was not a single response to a single problem. Yet as the statute of the ICC was drafted and the institution came into being, an account of the aims and means of the court was needed.[71] Keeping the context of the process in mind, we can see that the stated aims of the court obscure as much as they reveal. The drafting process and the documents produced therein gave rise to rhetoric of common endeavor, which is laid out in the ends the court claims to serve. The extreme and pervasive violence of the twentieth century, enabled by a lawless international order and the impunity enjoyed by perpetrators, are designated as the problem the court is responding to, giving rise to its necessity. In order to respond to the violence and impunity of international politics, the

66. *Id.* at 17–19.

67. Mark Kersten, *A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court, in* INTERNATIONAL LAW AND THE POLITICS OF JUSTICE (Jeff Handmaker & Karin Arts eds., forthcoming 2014).

68. GLASIUS, *supra* note 20, at 27.

69. *Id.*

70. Marlies Glasius, *What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations*, 31 HUM. RTS. Q. 496 (2009).

71. Benedetti & Washburn, *supra* note 44, at 33–34.

ICC resolves to hold those most responsible for international crimes accountable to the international community, and in doing so to bring justice to the victims and deter future violence.[72] These are the ethical aims of the ICC, the ends to which it is dedicated in principle and practice. Importantly, these aims provide the deeper justification for the court's authority, beyond the agreement of the states that signed the Rome Statute.

The means for achieving these ends are set out in the ICC's founding document, which is focused on the need to extend the rule of law to the international level and to punish those responsible for atrocities. These intertwined projects of improving the procedures of international criminal law, moving away from "victor's justice," and punishing responsible individuals, were seen as vital to achieving the court's aims.[73] Central to this work is maintaining the separation of law from politics, because the court's means of achieving its ends are premised on the neutrality and fairness of the legal process as well as the justness of the punishments imposed. Although the aims and means of the court fit well together in official statements, there are real problems with the details of its practice.

The ICC claims to promote the rule of law by being a court of last resort, stepping in when states are unable or unwilling to prosecute crimes of international concern, but this much-discussed principle of complementarity says little about the standards that must be met by domestic prosecutions to pass the threshold of being able to prosecute crimes.[74] This creates a problem because nearly any minimally legal proceeding would seem to circumvent the ICC's jurisdiction, making it very difficult for the ICC to pursue cases where states are unwilling to prosecute cases in a thorough and rigorous way, especially if those states are powerful.[75] Further, by not having a clear measure of competency, the ICC is open to manipulation by states that invoke the ICC's jurisdiction for their own political gain rather than out of any real inability to conduct a domestic trial. For weaker states the ICC can provide legitimacy to the government and improve the state's ability to gain assistance from other states and international institutions, because working with the ICC can be used to show concern for international law and a willingness to follow international norms.[76]

Within the idea of complementarity we find one of the big difficulties the ICC faces: Its authority is drawn from its ability to enforce the rule of law upon state representatives, but the practice of the court protects the power of states.

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72. *See* Rome Statute, *supra* note 2, at pmbl, arts. 1, 5 & 27.

73. Cassese, *supra* note 22, at 170–71.

74. *Id.* at 158–59.

75. Rome Statute, *supra* note 2, at art. 17, ¶ 2 (setting out the definition of unwilling, which is not very demanding and allows a lot of scope for interpretation).

76. *See* Sarah Nouwen & Wouter Werner, *The Law and Politics of Self-Referrals*, *in* COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE 255, 257–60 (Alette Smeulers ed., 2010) [hereinafter Nouwen & Werner, *The Law and Politics of Self-Referrals*].

The idea of complementarity leaves the meaning and quality of domestic law to states at the same time that the court claims to be the embodiment of a universal law.[77] A successful court, short of being one with no cases (as Ocampo famously said),[78] is one whose authority is not coercive, such that states either try cases domestically or willingly submit cases to the ICC via referrals from state parties or the UNSC. In practice, even *proprio motu* referrals depend upon cooperation, either of the state under investigation, or of states powerful enough to force the offending state to comply. One could accept this limitation more sanguinely if the court were dedicated to improving the quality of domestic courts and building the capacity of states to uphold the rule of law—even though in this case the ICC would look less like an independent international court and more like a conventional international institution focused on capacity building.

The issue of punishment is also troubling because its justification is unclear and its effectiveness is hard to confirm. If the point of punishment is deterrence, then the ICC is undermined by its dependence on states to enforce its arrest warrants. (It has no independent power in such matters, a point made clear when President Omar Al Bashir travelled to Chad[79] and Kenya[80]—both parties to the ICC—without incident.) Further, the evidence that the threat of prosecution can deter international crime is questionable. It is not clear how the threat of prosecution is effectively communicated and whether it changes the calculations of those committing atrocities in contexts of mass violence.[81] Other justifications for punishment are likewise problematic. The sentences the court is able to hand out may not be appropriately retributive for the crimes it pursues, if any prison sentence could be for acts of genocide, crimes against humanity and war crimes.[82] The ICC's first conviction tells the story. Thomas Lubanga was convicted for war crimes relating to the use of child soldiers in his militia, but was sentenced to only fourteen years with time served, meaning he will be free in eight years.[83] In such a case it is hard not to feel that Ocampo has oversold his accomplishment when he says, "An international court investigated

77. Cassese, *supra* note 22, at 159.

78. OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 4 (2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

79. Mariana Rodriguez Pareja, *Al-Bashir to Visit Chad… Again*, HUFFINGTON POST (Feb. 27, 2013, 12:23 PM), http://www.huffingtonpost.com/mariana-rodriguez-pareja/albashir-to-visit-chad-ag_b_2750846.html.

80. *Court Worry at Omar Al-Bashir's Kenya Trip*, BBC NEWS (Aug. 27, 2010, 8:09 PM), http://www.bbc.co.uk/news/world-africa-11117662.

81. Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of the International Justice*, 24 ETHICS & INT'L AFF. 191, 192–93 (2010).

82. Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 579 (2002).

83. *DR Congo Warlord Thomas Lubanga Sentenced to 14 Years*, BBC NEWS, (Jul. 10, 2012, 12:38 PM), http://www.bbc.co.uk/news/world-africa-18779726.

the suffering of some of the most vulnerable members of humanity - children in war zones . . . . The court provided a fair trial to the suspect and convicted him. It is a victory for humanity."[84] Ocampo's comments also highlight the difficulty of knowing for whom the ICC prosecutes. Punishment is meted out in an international space and to international standards, severing the link between punishment and the society and individuals affected. However much we may want to put convictions in context and see it as one step in a larger process, the victory for humanity and for those affected by violence in the Democratic Republic of the Congo (DRC) is modest.

The aim of holding the perpetrators of atrocity to account is obviously appealing, but again the ICC runs into serious practical problems on this point. Although the court claims political independence, it not only is dependent upon the willingness of states to apprehend suspects but also is pursuing a political project of its own that may have very little to do with the victims affected by violence. The issue of punishment highlights this point: When the ICC is operating effectively it should remove an individual suspect from the society in which his alleged crimes are committed, taking him to The Hague to stand trial before an international panel of judges and, if convicted, sentencing him according to international standards, and holding him in custody in a foreign country. Whatever one thinks of the merits of this project, the court does not adequately acknowledge its politics on this point. The implicit idea is that the international community, referred to in the abstract as "humanity," has priority in seeking punishment and in finding justice.[85] Further, by focusing on the acts of individuals the ICC presents a very limited view of the causes of conflict, one that also happens to excuse systemic causes and the influences of outside institutions and states. We need not attribute malicious motives to the court's political project for this to be problematic. The ICC's project is played out in an existing context in which powerful states are able to influence the court's actions, which suggests that there are deep reasons why it has tended to focus on weak African countries, lending credence to the complaint that the ICC is a court for European states to put African leaders on trial.[86] This is a disturbing possibility given the stated aims of the ICC.

The concerns discussed thus far regarding the constitution of the ICC's authority to hold individuals responsible have been conceptual, looking at how the competing motivations that led to the creation of the court and the way in which its stated aims and means create problems for the court in practice. Following a Deweyan line of analysis, it is important to look at the consequences of the ICC's practical activity to judge how far the concerns

84. Henry Ridgwell, *Lubanga Conviction Boosts ICC – But Weaknesses Remain*, VOICE OF AM. (Mar. 14, 2012), http://www.voanews.com/content/lubanga-conviction-boosts-icc---but-weaknesses-remain-142819925/181219.html.

85. SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 14 (2006).

86. Kurt Mills, *"Bashir is Dividing Us": Africa and the International Criminal Court*, 34 HUM. RTS. Q. 404, 432–33 (2012).

raised thus far have proven warranted, as well as to consider ways in which the moral ends and practices of the court might be reconstructed. To do this fully would require far more space than is available here, so I focus on the ICC's first arrest warrants, issued for Joseph Kony and other leaders of the LRA to give some indication of the moral issues the ICC faces.

The key issue I want to focus on is how the authority of the ICC is premised on its abdication of politics—refusing to admit its political power and role—and claiming of authority through the nonpolitical moral and legal ends pursued. Yet politics is central to the court's actions; It must choose whom to prosecute, draw distinctions between worthy victims, and distinguish the most culpable perpetrators. The court will inevitably make compromises and exert its power in potentially violent ways, and it must also seek favor with other interested actors, such as the United States or the UNSC. Therefore, the ICC's disavowal of politics is potentially limiting. The ICC risks being ineffective and manipulated by other political actors if it is naïve on these matters. More importantly, the court's failure to recognize or acknowledge its own political power means that the depoliticization brought about by its appeal to moral and legal authority is obscured, potentially hiding negative consequences such as the court's tendency to disempower victims and act as a judicial institution of the strong to be used against the weak. These issues are explored in more depth with regards to the ICC's actions in Uganda.

IV
ASSIGNING RESPONSIBILITY: UGANDA AND THE ICC

Given the importance of appearing to uphold the neutrality of the law and the universality of its moral ends, the ICC faced more difficulty than a normal court in choosing its first cases. The first case the court pursued was going to be a test for the new institution. It would be a response to questions of whether the ICC could function independently and whether new forms of international justice were possible. In the end, the ICC had a number of cases to choose from as states began to refer cases to the court very quickly.[87] This act of choosing was the first exercise of the court's political as well as moral and legal authority. At first glance, the referral of the LRA from the Ugandan government to the ICC seemed an obvious choice. The Ugandan government was supportive of the investigation, the United States was not going to block the referral despite its assistance to Uganda, and the persons accused were notorious for the brutality in the long-running Ugandan civil war.[88] Joseph Kony made an excellent target for prosecution, his atrocities were shocking and well known, and he was unquestionably the most important leader in the LRA. Therefore, Uganda fit the ends of the court quite well. Court officials hoped that bringing

87. Nouwen & Werner, *The Law and Politics of Self-Referrals*, *supra* note 76, at 255–57.

88. TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 82–83 (2006).

top LRA leaders to justice would not only punish these criminals and deter future violence from rebel groups in the country, but also contribute to the peace process and providing a sense of closure for the LRA's victims.[89] Being able to frame their first case in these terms allowed the court, and its prosecutor, to act on the declared ends of the court without offering much reason for concern regarding the possibility of unexpected negative consequences.

What this focus on the ideal qualities of the Uganda case obscures is that this was also a decision that was deeply political. The ICC could have started elsewhere and they could have handled the proceedings differently. It is a common refrain from the ICC that their choice of cases are dictated by the interests of justice, not political calculations about what is best for the court, but that plea is unconvincing.[90] The ICC makes important decisions about whether a case is sufficiently grave to warrant their intervention and distinguishes between perpetrators who are more or less responsible, meaning the court must make decisions about the nature of the atrocities being committed and their cause. There are no clear guidelines on how these decisions are made and little record of the reasoning used by the prosecutor. Also, the decisions the ICC makes have consequences on those most directly affected by the events they are investigating, but the court prioritizes prosecution (in the name of justice) over concerns about peace and reconciliation, or relief for victims, despite having discretion on these matters in principle.[91] These problems are not fatal to the court's worth, or its moral quality. The legal process itself can address them to some degree, which will be seen in what follows. The central point, however, is that the court is a political actor, it makes distinctions and wields power that not only go beyond the law but also reveal that the appeal to law and morality is itself political.

In publically denying its political power and the importance of political calculations to its work, the ICC risks complicity with the very state authority it claims to constrain. This complicity is evidenced by Ocampo's appearance with Ugandan President Museveni in London in January 2004 for the announcement of the ICC's investigation in Uganda.[92] That moment conveyed the message that the ICC would not be investigating the government for potential crimes, despite accusations that the army had committed atrocities in northern Uganda and that the Ugandan government had supported rebel groups operating in the DRC. The court's defense has been that it is focused on the most serious crimes, but again how this is determined is not known and the pressures to work

89. BRANCH, DISPLACING HUMAN RIGHTS, *supra* note 5, at 184–85.

90. Victor Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, 31 HUM. RTS. Q. 655, 682–83 (2009).

91. OFFICE OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE 9 (2007), *available at* http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf.

92. Peskin, *supra* note 90, at 655–57.

closely with the Ugandan government are substantial.[93] First, the court is dependent upon the government for access to Uganda, without which investigations would have been impossible. Also, the court needs state support if it hopes to apprehend Kony and the other suspects; this effort has required cooperation from the Ugandan military. Beyond these practical reasons for cooperating with the government there is also the political message to be communicated that the ICC is not a threat to its supporters, reassuring them that bringing a case to the ICC will not result in the referring state finding itself under investigation. In Uganda we can see how this was good for both the government and the court: The ICC got its first case, helping it to establish its legitimacy, while the Ugandan government received international legitimacy and assistance in defeating its political opponents.

In terms of pursuing its stated moral aims, the ICC's complicity with the Ugandan government is troubling because the court's moral authority is based on its claim to end impunity and serve the interests of victims, both of which are compromised. It was originally thought that self-referrals would be rare at the ICC,[94] because it was assumed that states would not want to allow an international court to try their nationals, much less to potentially investigate their government. But this assumption only holds if the court does not compromise and maintains the separation of law and politics. The court's compromise and corresponding failure to attend to government atrocities in Uganda suggests that the court serves the interest of the government and of itself, not the interest in the rule of law or in the needs of victims. The rule of law is compromised because it is applied unequally (to the LRA leaders but not the government troops) and the needs of victims are compromised because the ends of legitimizing the ICC and securing the Ugandan government against its enemies are prioritized over putting an end to violence or taking care of the victims. Part of the problem in this instance is that the ICC has seemed unprepared for the political purposes that states would seek to serve by engaging with the court, which suggests that they have been naïve in not anticipating the political benefit states would find in bringing cases to the ICC. Uganda's government was able to garner military assistance, curry international favor, and marginalize its enemies by using the moral authority of the ICC. The court has seemed either unwilling to recognize or unwilling to accept this conclusion.[95]

The problem, however, goes deeper. The court is set up in such a way that if it were to act against the interests of states, it would struggle to be effective. Despite the moral justifications for the court's authority, which speak of a law that transcends state sovereignty, the court is thoroughly deferential to states. The principle of complementarity gives the first right and responsibility of

93. *Id.* at 678–89.

94. Nouwen & Werner, *The Law and Politics of Self-Referrals*, *supra* note 76.

95. Nouwen & Werner, *Doing Justice to the Political*, *supra* note 7, at 948.

prosecution to states,[96] and the focus on individuals diverts attention away from institutional and social causes of violence.[97] This reflects a wider failure of the idea of international justice that the court is poised to deliver. First, as was the case in Uganda, the ICC's involvement has ambiguous consequences for the victims of violence. The people of northern Uganda, especially the Acholi, suffered most in Uganda's civil war but their interest and needs were not well served by the ICC.[98] It is unclear that ICC prosecutions did much for them because it arguably made the violence in the region worse rather than better by discouraging LRA militias from agreeing a peace deal. Second, it is not at all clear that having figures like Kony stand trial in The Hague serves their interest in seeing justice done. Third, the lack of attention to the government's actions and the complicity of international institutions that have funded the displacement camps have meant that the underlying conditions that led to violence in Uganda have not been addressed.[99]

Instead the authority of the state is reaffirmed and the interests of the international community are given priority. First, ICC involvement brands the LRA leaders as criminals, thereby encouraging and justifying the use of further violence to bring those leaders to justice. Second, ICC involvement promotes the conception of justice as international accountability rather than local justice for those most affected, or peace for that matter. Put another way, the ICC uses its moral and legal authority to pursue a vision of justice that is seen as superior to that sought by those affected.[100] The ICC imports moral norms and models of legal efficiency that do seek the participation or knowledge of those involved but presume the superiority of international justice, which is itself made possible by powerful states. This dynamic risks perpetuating colonial modes of domination. The focus on international justice and building the capacity of the state tends to not only disempower victims, who are seen as passive, but also to portray the LRA as composed of irrational savages and criminals without legitimate grievances.[101] Further, even as the ICC has privileged the Ugandan state, its modes of intervention undermine democratic authority in the country by playing into preexisting dynamics of aid dependency, economic and military intervention from international community, and the necessity of forms of external governance.

This brief consideration of the ICC's intervention in Uganda shows that there are serious unintended consequences of the court's pursuit of its moral ends. There is definitely some room for improvement as the court becomes more adept in its work. For example, the naïveté shown by too readily

96. Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFF. 179, 187 (2007) [hereinafter Branch, *Uganda's Civil War*].

97. Hoover, *supra* note 35, at 257–59.

98. BRANCH, DISPLACING HUMAN RIGHTS, *supra* note 5, at 191–94

99. Branch, *Uganda's Civil War*, *supra* note 96, at 181–82.

100. BRANCH, DISPLACING HUMAN RIGHTS, *supra* note 5, at 195.

101. *Id.* at 214–15.

embracing the Ugandan government is relatively simple to overcome by being more attentive to the benefits that states may be seeking in referring a case to the ICC.

However, there are also more serious problems with the ICC's pursuit of moral ends. At least in Uganda, the court has been shown to be too deferential to the interests of states and too inattentive to the victims of violence. This is a damning indictment because it undermines the aims and authority of the court. There are many ways we can seek to address this problem, but I want to focus again on the ICC's denial of political motivations as a key cause, because this denial is contradictory. The court wields political power and must make political decisions to achieve its ends, which are not necessarily given in a singular or comprehensive way by the court's founding texts. If this is correct, then the court needs to acknowledge the power it has and articulate its ends as a political as well as a moral and legal project.

V
CONCLUSION

Considering how the ICC claims and exercises its authority to hold individuals responsible reveals important limitations upon the court's capacity as a moral actor. Most importantly, the court's moral authority is premised on the distance it maintains from politics by focusing on the impartial application of the law in the name of universal principles, but this distance is undermined in practice. The court's inability to maintain an apolitical stance is not simply the product of inevitable practical compromise. Rather, this inability reveals important problems with how the ICC claims moral authority. First, the ICC, like all social institutions pursuing moral ends, is complex and embodies multiple ends and divergent projects. Claiming to have a clear moral purpose supported by a wide consensus does the ICC no favors, because the practical reality is that its actions will be inconsistent at times and that pursuing international justice through high-profile trials of individual perpetrators is a political project in its own right. Second, the ICC's claim to represent humanity in its pursuit of international justice obscures the partiality of the project. Ideals of humanity and justice are defined in particular ways that reflect important power inequalities. The ICC serves many interests through such claims, partly as a counterhegemonic institution that nonhegemonic states have used as a way to bolster their ethical status with respect to hegemonic states like the United States, Russia, and China. Also, the ICC serves the interests of powerful states by providing further justifications for intervention in the global south, particularly in African states. Yet this dynamic is exploited by weaker states, which are able to use international attention and support for their own purposes. Third and finally, the ICC's apolitical stance obscures the fact that the interests of an international court are not necessarily the same as those of the victims of violence that the court claims to represent. This is the most morally

troubling limitation of the court because it reflects not only the reality that moral aims are always pursued in the real world but also that there may be something fundamentally troubling in the ends the court is seeking to realize.

International justice as an ideal presumes that there are principles and ends that are universally desirable, and that the realization of those principles and ends requires forms of global authority. This framing will always leave open the possibility that the powerful dictate to the weak, and the justifications of law and morality cannot alter this, which is why the political mechanisms through which international justice is realized are vital. If international justice is actually going to be about preventing future violence and serving the needs of victims, then it needs to find a way to provide an international level of protection and action that includes the knowledge, values and needs of those affected by violence. This is the primary critique that a Deweyan analysis leads us to, that the ICC, for all its potential, does not enable those subject to violence to exert greater control over their lives, and it does not effectively build social relationships that reduce the possibility of extreme violence. This happens because the court has oriented itself around high-profile prosecutions of individuals and has cooperated closely with states. There are real practical reasons this is important for the survival of the ICC as an institution, but acknowledging the political compromises involved reveals how this undermines the court's stated ends. On this point there is much the court could do by reorienting its practice—challenging states that refer cases more directly, being concerned with wider conditions that enable violence, and being more aware of how states seek to use the court to their benefit. More problematic, however, is that the court's vision of worldwide authority is itself undemocratic and is as much about securing the moral and legal authority of centralized global forms of power as it is about empowering communities and individuals affected by violence. This limitation is much more difficult to overcome, because it is less an unintended consequence of the court's actions and more a consequence of the political project that lies behind its stated moral aims. There is not sufficient space here to consider how the court might be remade to meet this objection, especially because it would have to consider the wider ethos that motivates international criminal law as a project. For now, thinking about the undemocratic nature of the ICC both in principle and practice should give us pause when celebrating the achievements of the court, forcing us to ask the question, Who is served by such trials and investigations, and what good comes of them? I do not want to suggest that the ICC cannot or has not done important work, but rather that there is a limitation built into how the court conceives of itself as an actor with the authority to hold others accountable, and that we should hold the court itself accountable to standards that are focused on the wishes, ideas, and needs of those who suffer, rather than the powerful interests that normally define international justice as an ideal.