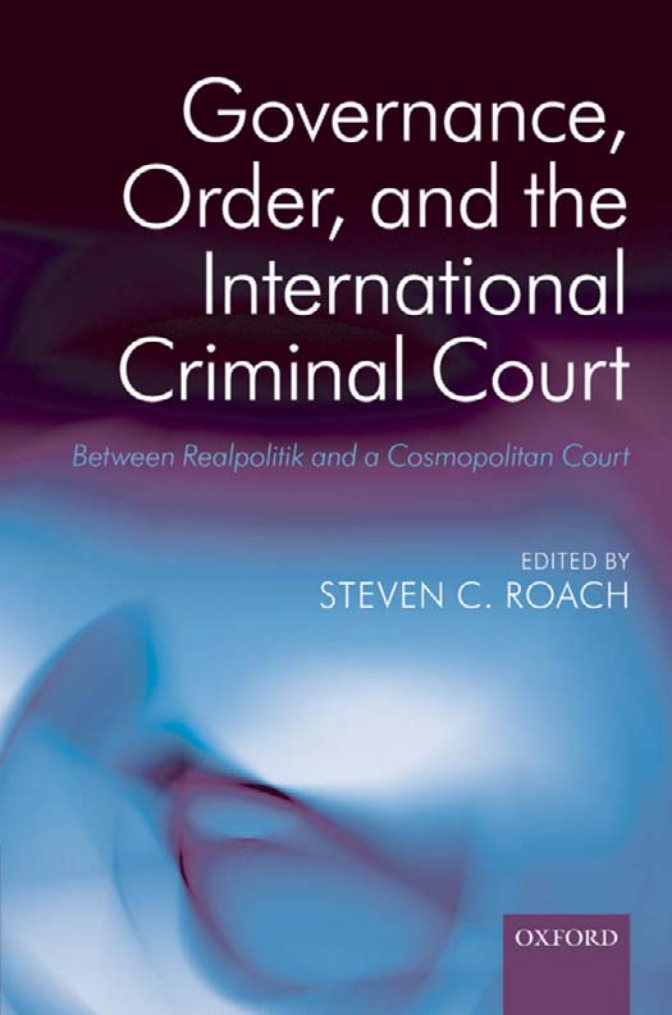
Governance, Order, and the International Criminal Court

Between Realpolitik and a Cosmopolitan Court

EDITED BY
STEVEN C. ROACH



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Abbreviations

ASPA	American Servicemember's Protection Act
AU	African Union
BIA	bilateral immunity agreement
CAR	Central African Republic
CICC	Coalition for an International Criminal Court
DLF	Darfur Liberation Front
DoD	Department of Defense
DRC	Democratic Republic of Congo
DSB	Dispute Settlement Body
ESF	Economic Support Funds
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IR	International Relations
JEM	Justice and Equality Movement
LRA	Lord's Resistance Army
MLC	Movement for the Liberation of Congo
LMG	like-minded group
MCA	Military Commission Act
NSA	Nonsurrender Agreement
PMC	Private Military Company

RCD	Congolese Rally for Democracy
RDT	rational design theory
SCCED	Special Criminal Court on the Events in Darfur
SOFA	Status of Forces Agreement
SLA	Sudan Liberation Army/Movement
UPDF	Uganda People's Defense Force
VPRS	Victims Participation and Reparations Section

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Introduction: Global Governance in Context

Steven C. Roach

A new test case

The International Criminal Court (ICC) continues to pose many conceptual, legal, and policy issues for a wide range of scholars, practitioners, and authorities.[1] One issue in particular is whether the ICC, which depends on state cooperation to prosecute and punish, can overcome the effects of realpolitik (power politics). This book accepts the uncomfortable fact that realpolitik will continue to challenge the capacity of the ICC to prosecute and punish the worst perpetrators of gross human rights abuses. However, realpolitik should *not* be conceived of as an unmitigated threat to the ICC's capacity to administer and promote justice. Rather it should be viewed as a crucial, ongoing test of its ability to serve the ''interests of justice,'' as well as an important determinant of its operations and responsiveness. Realpolitik in this respect is helping to (further) shape the dynamic, novel design of the ICC, which, in turn, raises two important questions: How does the institutional design of the ICC regulate the opportunities of states to shape and strengthen international criminal justice? And how do the institutional dynamics of the ICC reflect the capacity and control exercised by prosecutors, judges, states, and nonstate actors to determine its responsiveness?

The answers we advance to these questions focus on the contextual parameters of responsiveness. Any responsive global institution must first and foremost act in the best interests of justice and the global community.[2] In this case, a responsive ICC will hold fair trials, address the needs of the victims of human rights atrocities, and refrain from judgments that would not serve the best ''interests of justice'' (Article 53(1c)). To meet this third

requirement, the ICC Prosecutor will need to exercise his or her discretion carefully when choosing who to investigate and prosecute (decisions confirmed by the judges), and to act in accordance with the Rules of Procedure and Evidence and any relevant prosecutorial guidelines. These constraints represent an important refrainment, or what I call a negative global responsibility to serve the best ''interests of justice.'' A negative global responsibility needs to be distinguished from a positive global responsibility, which refers to the shared, open-ended duty to promote the universal morality of the Court. This distinction derives from two distinctive claims to justice: the cosmopolitan that focuses on the fairness and equality accorded to all individuals; and the international that refers to the state's duty to fulfill its normative obligations (i.e., cooperation, peace, and friendly relations).

The pursuit of these claims means that the Court operates somewhere in between cosmopolitan and international justice, or at various levels of responsibility. To analyze this phenomenon, I have formulated a synergistic model of global governance in which the combination of the ICC's novel dynamics and the collective will to promote justice produces an effect (global deterrence and the global rule of law) that is greater than the sum total of cooperative, participating elements or actors. The model consists of four levels of responsibility of multilevel global governance: (1) the state's negative responsibility to refrain from committing harm against its own citizens (the harm principle); (2) the state's positive responsibility to fulfill its obligations to the Court, most notably, its duty to cooperate with the Court; (3) the Court's negative global responsibility, which, as mentioned above, denotes the procedural requirement to refrain from any judgment that would not serve the best ''interests of justice''; and (4) the Court's open-ended positive global responsibility to promote universal norms and morality, or the cosmopolitan principles of fairness and equality. Within this schema, 4 represents the cosmopolitan intent of the Court; while 1 and 2 refer to the statist and/or internationalist elements of the Court's operations. Accordingly, 3 denotes the procedural requirements of exercising prosecutorial discretion, and highlights the complex and potentially conflictual relationship between prosecutorial discretion and the political dynamics at the national level. It suggests that the Office of the Prosecutor (and Judiciary) will need to adopt and follow present and future guidelines for implementing its decisions and policies and promoting its bargaining power with states and subnational actors.

Together, then, these levels of responsibility reflect the tensions between three evolving parameters of global governance: the wide scope of law (the

wide range of discretion and comprehensive Rules of Procedure and Evidence), the increasing efficacy of norms (regulating state behavior in terms of generating desired outcomes), and agent/citizen control (''increasing their capacity to empower and constrain representatives'') (Kuper 2004: 135). This edited volume seeks to contextualize and analyze the tensions between these parameters by addressing the present and future political challenges to the Court's capacity to promote fairness, equality, and accountability. Critics might argue that this aim gives in to the whims of power politics, and that the institutionalization of international rules and norms encompasses a growing network of autonomous global institutions that will eventually transcend the destabilizing effects of realpolitik (Held 2002; Caney 2005; Habermas 2006). But the idea that we can transcend these tensions through the institutionalization of global norms and rules overlooks the political constitutivity of realpolitik factors, or how the political challenges facing the ICC will inform and shape its discretion and effectiveness. It is far more reasonable to believe that the Court, via the complementarity principle, will develop its own capacity to manage the effects of realpolitik, and that realpolitik will remain a permanent feature of how we assess its capacity to serve the ''interests of justice.''

It is worth emphasizing that when we treat the cosmopolitan and realpolitik in polarizing, or strictly dichotomous terms, we also leave ourselves with one choice: to transcend realpolitik itself. This predicament needs to be avoided for two reasons. First, it downplays the importance of the political tasks and realities that will determine how the ICC can and should act to reinforce the fragile solidarity at the global level. Second, it overlooks the contingent nature of the cosmopolitan principles of fairness, universal equality, and respect. Such principles are neither transcendent nor detached regulative ideals, but are evolving out of and *through* the ethical tasks and political strategies of resolving the effects of gross human rights abuses, ethnic conflict, political persecution, and humanitarian crises. I want to stress the word ''through,'' since complementarity is a principle that not only affords reflective judgment, but also builds the necessary trust for reinforcing solidarity around moral culpability. The fact that ethical and political deliberation is inherent in the exercise of discretionary power only underscores the multiple ways that politics, ethics, power, and law will continue to intersect (Reus-Smit 2003: 24–7; Wippman 2003).[3]

This book seeks to investigate and explore these intersecting points. It argues that the independence of the ICC introduces many novel challenges of understanding and explaining the present and future development of

global governance and international criminal law. Such independence represents the institutional freedom from realpolitik factors, such as the UN Security Council veto, and raises the crucial question of how the ICC will exercise this independence, or serve the ''interests of justice'' on its *own terms*. What, in other words, is the constitutive link between realpolitik and the ICC's own unique capacity to serve the best interests of international and global justice?

In addressing these questions, this book assesses the novel predicament that this link represents for extending global governance and understanding the practical and ethical challenges for promoting international criminal justice (Fehl 2004; Ralph 2007; Schiff 2008). Four theoretical perspectives serve as the basis of research: rationalism, constructivism, communicative action theory, and cosmopolitanism. The ICC clearly takes us beyond the scope of rationalism, but in so doing helps to test and even reinforce some of the scientific assumptions and variables of mainstream theories. Caroline Fehl and Eric Leonard both stress this idea for the very reason that the ICC allows us to test the assumptions of these perspectives. Within this mainstream framework, the ICC serves as a test case for maximizing the interests of states and for exposing the limits of cooperation in the anarchical realm of international politics. This holds important implications for other statist approaches to world order, which focus on the novel dynamics of bargaining in international institutions. Transgovernmentalism, for instance, argues that the liberal internationalist/Westphalian model has become an outdated approach to understanding the changing dynamics of world order. As such, a new functional theory is required to explain what they refer to as the new ''hierarchy of institutions'' and ''universal membership'' of the new world order (Slaughter 1997: 183). The ICC, in linking ratification with the promotion of universal morality, underscores the many ways of building and reinforcing such ''universal membership.''

A synergistic approach to the ICC might also help to bridge the divisions within cosmopolitanism. Many liberal and moral cosmopolitan thinkers, for example, maintain that the global network of international justice has created new universal communities that seek to promote moral culpability (Linklater 1998, 1999, 2005; Held 2002). Critics of moral cosmopolitanism (and its variants of ''humanitarian cosmopolitanism'' and ''culpability cosmopolitanism'') claim that moral cosmopolitans fail to show the empirical ties between solidarity and moral culpability at the global level, and that the nation-state remains a viable source for extending cosmopolitan principles (Miller 1995; Habermas 1996; Yegenoglu 2005; Eckersley 2008).

This book agrees with the thrust of the former claim: that moral cosmopolitans fail to address the political realities of weak solidarity at the global level. However, it takes issue with the latter claim that solidarity needs to be derived from the political dynamics of the nation-state (i.e., constitutional patriotism and national community). The conceptual challenge, as we see it, lies in explicating the relationship between the operational effectiveness of global institutions and the levels of increasing global/state/regional/local cooperation. The more we understand of this evolving relationship, the more we can expect to explain and reinforce solidarity at the global level.

Many of the essays in this book, then, while sympathetic toward statist and idealist approaches, seek, in various ways, to test the limits and problems of these approaches. The result, I hope, is the beginning of what might be loosely called *cosmopolitan political realism*, a lego-political approach that focuses on the politics and dynamics of global institutional responsiveness and the permanent, constitutive links between realpolitik and the cosmopolitan focus on the individual. The approach begins with and builds on the following idea: any state that considers itself to be a member of international society must universally condemn the crime of genocide, crimes against humanity, and war crimes. It is this condemnation that establishes a minimal threshold of responsibility and a permanent commitment to promote the ICC's capacity to promote universal morality. As Antonio Franceschet (2005) has argued, it is precisely this moral and political requirement that reveals the political tension between cosmopolitan ethics and global legalism: where legalism is not simply empty political ideology.

Given these challenges, we need to visualize the intersecting points of law and politics. As the editor of the volume, I find that the *switch levers of train tracks* provide just such a guiding metaphor to imagine this emerging trend in global politics. Most cosmopolitans, for instance, differentiate between two operational tracks of politics and justice: the power politics at the interstate level and cosmopolitan democracy at the global level (Archibugi and Held 1995; Held 2002). They claim that the two can and should coexist with one another, but that their operational tracks run strictly parallel with one another. Global institutions, in their view, develop and operate on a separate track, and are thus designed to contain the instability and hostilities associated with power politics. As such, global institutions like the ICC are expected to contain these effects, that is, to act as so-called ''principal containers'' of realpolitik. The goal of this book is not simply to treat global institutions as ''principal containers.'' Rather, it is to

focus on the overlapping scales of realpolitik and the cosmopolitan, or how multilevel global governance involves the mutual constitutivity of realpolitik and cosmopolitan factors. From this vantage point, the image of crisscrossing realpolitik and cosmopolitan tracks represents the synergism of the four levels of responsibility of global governance. Here, the complementarity regime (especially positive complementarity mentioned below) creates new challenges for promoting the effectiveness and responsiveness of the institutional network of global justice; while the Prosecutor (and the Judiciary) is the principal agent controlling the switch levers or initiating and conducting the crisscrossing.

With this evolving metaphor, we can begin to understand the significance of the ICC's own evolving role in the expanding institutional network of global justice. As of the writing of this book, the Office of the Prosecutor has already issued several arrest warrants and opened up cases against rebel leaders and former state leaders in the Democratic Republic of Congo (DRC), Uganda, Sudan, and the Central African Republic (CAR). The cases of the situation in the DRC include Thomas Lubanga Dylio whose trial has yet to get underway officially (it was suspended in June 2008), Bosco Ntaganda, Germain Katanga, and Mathieu Ngudjolo Chui (the confirmation hearings for the latter two got underway on June 27, 2008). In Uganda, international arrest warrants have been issued for Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen; in the CAR, for Jean-Pierre Bemba Gombo; and in Sudan, for the former minister of state, Ahmad Harun, and Ali Kushayb. In what is perhaps the ICC's highest profile case, the ICC Prosecutor recently issued an indictment against the sitting head of state, Omar al-Bashir. As the ICC opens up more cases and holds fair trials, it is likely to encourage somewhat reluctant signatory states, which have yet to ratify the Rome Statute (i.e., Russia), to speed up ratification, and to convince nonsignatory and somewhat hostile states (i.e., United States and Libya) to reconcile their differences with the Court. China, for instance, which has yet to sign the Rome Treaty, has continued to pledge support for the Court, while Russia has signaled its willingness to reconcile its domestic laws with the ICC Statute (Amnesty International 2007). Some of the domestic issues of ratification, or the political sticking points with non-party state resistance, are discussed in Chapter 1.

One of these issues concerns the strategic use of self-referrals, or situations referred by the territorial state party (within whose boundaries the atrocities are purported to have occurred), to promote the political power of state leaders. This issue, as I explain below, points to the potentially divisive role of domestic politics and the divisions within the ICC, or between the

Prosecutor and Judiciary. Specific examples of the latter include the Pre-Trial Chamber judges' changing the nature of the charges against Lubanga, and the June 2008 judgment in which the Trial Chamber (I) threatened to stay Lubanga's trial owing to prosecutorial nondisclosure of important documents. Addressing these challenges will thus depend on the mutual efforts of states, ICC authorities, nongovernmental organizations (NGOs), and regional actors to further international justice.

The International Criminal Court: Design, representation, and accountability

The creation of the ICC remains one of the crowning achievements in the evolution of international criminal justice during the twentieth century. Established in July 1998, in Rome, Italy, it was immediately hailed as a millennial event. Of those participating in the conference, there were 160 states, 33 intergovernmental coalitions, and a coalition of 236 NGOs (Rome Statute 1998).[4] When the final proposal was adopted on July 17, 1998, 120 states voted in favor of the statute, 7 rejected, including the United States, Israel, China, Libya, Iraq, Qatar, and Yemen, and 33 abstained. After receiving 60 required ratifications in April 2002, the statute would soon enter into force on July 1, 2002. As of June 2008, 108 states have ratified the Treaty.

The idea of creating a permanent international criminal court can be traced back to the interwar period (1919–39). After World War I, for instance, the League of Nations Council attempted to establish an international tribunal to try the German Kaiser. But when Holland refused to extradite the German Emperor, who had taken refuge there, the Council failed to carry out its plan (Sadat 2002; Fehl 2004; Roach 2006). In the ensuing years of the interwar period, a convention for the creation of an international criminal court was set forth, but no state was willing to ratify it. It was only after the grave atrocities committed during World War I that the Allied Powers established an international tribunal in 1945 to try the Nazi criminals. The International Military Tribunal (IMT) of Nuremberg tried twenty-four Nazi leaders, bureaucrats, and architects of the Holocaust for committing crimes against peace (aggression), war crimes, and crimes against humanity. Although the success of the Nuremberg and the Tokyo Military Tribunals, along with the adoption of the Genocide Convention in 1948, created some momentum toward establishing a permanent international criminal court, the UN General Assembly decided to set aside efforts to establish such a court in 1953. During the Cold War, little,

if any progress would be made in terms of establishing a permanent international criminal court.

At the start of the post-Cold War, however, the General Assembly called on the International Law Commission (ILC) to draft a statute on serious crimes. In the mid-1990s, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in order to investigate and prosecute the atrocities committed in (the former) Yugoslavia and Rwanda (Kerr 2004). Note that the design of the ICC is quite different from the international criminal tribunals. Unlike the ad hoc tribunals, which were established by the UN Security Council (under Chapter VII of the UN Charter) and given the temporal mandate to investigate, prosecute, and punish crimes committed within a particular region/state/territory, the ICC is a permanent standing court established under international treaty law. Its mission is to investigate, prosecute, and punish the worst individual perpetrators of serious international crimes (genocide, crimes against humanity, and war crimes, see Articles 5–8) regardless of nationality (Cassese 1999; Roy 1999; Bassiouni 2003).

Thus, when a state ratifies the Rome Treaty, it also becomes party to the statute, agreeing to fulfill its obligations to the ICC, including its duty to cooperate with the Court on all matters related to a case. The ICC can exercise jurisdiction over serious crimes committed by nationals belonging to non-State Parties, if the crimes committed by the nationals had occurred within the territory of a State Party. It can also exercise extended jurisdiction over the territory of non-State Parties when the UN Security Council refers a situation to the ICC. The Darfur genocide (Sudan), which the Security Council referred to the ICC in 2004, is the only situation, to date, involving a non-State Party; the other three situations, as noted above, involve (self-)referrals by Uganda, the DRC, and the CAR. In addition to these two sources of investigative power, the ICC Prosecutor reserves the right to initiate an investigation (*proprio motu*). Of these three sources, it could be said that the Prosecutor's *proprio motu* power remains the most prominent, since it supports and reinforces the Prosecutor's independent discretionary power.

Accordingly, the ICC's mission is based on three broad objectives: (1) to ensure that the worst perpetrators are held accountable for their crimes, by removing national immunity or amnesty law that could shield a perpetrator from prosecution; (2) to serve as a court of last resort; and (3) to assist national judiciaries in investigating and prosecuting the worst perpetrators. The ICC pursues these objectives within the principled framework of complementarity. The complementarity principle holds that states are

entitled *prima facie* to investigate and prosecute, but that the Prosecutor reserves the right to launch its own investigation if he or she determines that the national judiciary has not conducted a genuine investigation or trial. Here, the Prosecutor must determine whether the state's unwillingness or inability to investigate and prosecute violates the provisions of inadmissibility (see Articles 17–20) and if there are admissible conditions for launching a case. Article 17, for instance, provides that the Court shall determine inadmissiblity where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

These conditions also provide the basis for a minimal threshold of admissibility or a set of criteria for ICC investigation and prosecution. At the Preparatory Committee meetings and Rome Conference, ICC authorities and state delegates discussed a set of criteria (i.e., partial state collapse, undeveloped judiciaries) that would necessitate the Prosecutor's *proprio motu* power, while also reinforcing the Court's status as a judicial mechanism of last resort (Holmes 1999; Clapham 2003). Carsten Stahn (2007: 95–7) refers to this model of complementarity as a ''threat-based'' concept or ''classical model of complementarity,'' in which the operation of the Court is tied to state failure, the preservation of domestic jurisdiction, and compliance through threat. The other, more open-ended side of complementarity embedded in the statute is the Court's positive role in facilitating ''burden-sharing'' and ''assistance from the Court to states'' (Burke-White 2005; Heller 2006; Stahn 2007: 89). Stahn refers to this open-ended side as ''positive complementarity.'' As he points out, positive complementarity, while articulated in the statute, remains controversial in regards to ''a deferral of responsibility'' and ''consent-based division of labor'' (Stahn 2007: 89). These factors raise important normative issues of the Court's impartiality and independence, including whether the Court should defer its so-called ''responsibility to enforce'' in order to avoid becoming an instrument of despotic national governments, or a potential source of further political instability (Burke-White 2005: 568).

In addition to the Office of the Prosecutor, the ICC consists of a Judiciary (Pre-Trial, Trial, and Appeals), Registry, and the Assembly of States Parties (the legislative organ of the ICC, where each State Party holds one vote). Provisions in the ICC Statute offer important checks and balances, including

voting procedures that are designed to constrain the Prosecutor's abuse of discretionary power. For example, the Pre-Trial Chamber, which is charged with the task of scrutinizing the merits of evidence, can authorize the Prosecutor to stop with, or to continue with prosecutorial proceedings. Also, the Assembly of States Parties can hold the ICC Prosecutor accountable in two principal ways. First, it can require the Prosecutor to report back to the Assembly with the details of an investigation, especially if the proceedings result in accusations of the abuse of prosecutorial power. Second, the Assembly of States Parties is responsible for electing the Prosecutor for a single nine-year term. Article 42(4), for instance, calls for the Prosecutor ''to be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties''; while Article 42(3) stipulates that the Assembly of States Parties will elect a person of ''high moral character, to be highly competent in and have extensive experience in the prosecution or trial of criminal cases.''

An issue discussed at the Rome Conference was whether the ICC Prosecutor or Security Council (or both) would be able to determine if acts of aggression had occurred.[5] In regards to the role of the Security Council, ICC authorities failed to agree on a solution. Instead, they elected to hold open-ended sessions or meetings to discuss the future elements and comprehensive definition of the crime of aggression (Assembly of States Parties 2002, 2003, Politi and Nesi 2004). However, with respect to the issue of the Prosecutor's discretionary power, ICC officials and state delegations ultimately agreed on the Prosecutor's right to initiate an investigation.

Despite these checks and balances, the ICC remains dependent on the voluntary cooperation of states. As such, it lacks a reliable enforcement mechanism, or a permanent standing army to enforce its demands and decisions. Other comparable organizations make up for this lack of enforcement through binding mechanisms based on strict consensus. The WTO's dispute settlement mechanism, for instance, is based on ''reverse consensus,'' which requires a majority to reverse a decision or judgment (Narliker 2005: 32–3). Precisely because of the binding nature of this consensus, losing states remain compelled to carry out the recommendations of the Dispute Settlement Body (DSB), even though no compulsory measures or means of punishment exist to enforce its recommendations.

On the other hand, the specificity of the elements of crimes of the ICC Statute offers a high degree of transparency. In fact, the statute contains an extensive list of elements of war crimes and crimes against humanity, including rape, enforced pregnancy, and enslavement. Many of these elements appear in earlier statutes, such as the Genocide Convention, International Military Tribunal Charter, and the International Criminal

Tribunals. In many ways, the specificity of these elements and definitions help to underscore the Court's duty and responsibility to address the needs of victims who have the right to participate in proceedings and to seek reparations.

Still, such transparency does not resolve the issue of the ''responsibility to enforce'' (Stahn and Nerlich 2008: 429). If state authorities do not cooperate with the ICC's demands for surrender, then the ICC will need to rely on its ties with international organizations, regional actors, and NGOs to pressure these authorities. The dilemma the ICC confronts is a difficult one. On the one hand, if its demands are not met, it will likely lose credibility. On the other hand, if it applies too much pressure on state authorities or is inflexible in its demands, then the territorial state may become increasingly resistant. In situations involving the demands for surrender of state authorities, the Court is quite likely to encounter difficulties and long delays. Time and experience may help to alleviate some of these difficulties; however, the Prosecutor's *proprio motu* power renders its involvement in situations of severe human rights abuses virtually inevitable.

The nexus between international law and politics

The issue of reliable enforcement has become one of the defining features of the evolving nexus between law and politics. The nexus reflects a long history of conflict between the enforcement of international rules and state sovereignty. Much of twentieth-century international criminal law, in fact, concerns the general political conflict between international law and state power; more precisely, the conflict between international enforcement and the state's monopoly on the legitimate use of violence. In recent years, however, the development of international decision-making processes has highlighted the increasing delegation of state power to international and global institutions. In the case of the ICC, the delegation of state power has resulted in an independent prosecutor and the increasing legitimization of discretionary power at the global level. Here, ''politics in law'' represents the political overtones and pressures that arise when prosecutorial discretion is exercised. Precisely because prosecutorial power does not operate in a vacuum (perfect impartiality), or in a way that it can effectively satisfy all parties involved, conflict will arise. It is this novel context of conflict that reflects an important, evolving dynamic of international criminal law.

It is important to stress, then, that no single theory can capture the full complexity of the political dimensions and dynamics of the ICC. Rather, a

plurality of competing theories are needed to address the tension between *realpolitik* and the cosmopolitan principles of the ICC. The politics of the ICC, as we shall see, remains a topic of equal concern for legal scholars, social scientists, practitioners, and policymakers. As a novel mechanism for promoting global order, it has become arguably the most high-profile institution for examining the intersection between politics and law. Indeed, the study of the ICC encompasses an array of issues and themes, including the constitutive role of legitimacy, the delegation of authority, and the evolution of international law. It is unsurprising, then, that some of the most influential theories have come from legal scholars. Thomas Franck (1999), for instance, has argued that legitimacy reflects a compliance pull toward norms: where states desire to be part of a club. For many political and ethical theorists, however, this raises the issue of Western moral hegemony and the need to contest the imposition of the principles of legitimacy and justice. Contesting norms in this sense is part of a larger strategy to unmask and expose the power relations between developed and developing countries (Edkins 1995; Dillon 1998).

By contrast, mainstream International Relations scholars conceive legalization of international rules as a dynamic process of the new world order. The adjudication of such rules, in their view, produces important causal effects on global politics. The ICC's legalized authority, for instance, involves many novel constraints on state power, including its ability to retry perpetrators of gross human rights atrocities. Yet for many legal scholars and social scientists, the ICC is but one example of the growing synthesis between international law and political science. Until recently, these two disciplines employed different models of analysis to study the political dynamics of the law.[6] Whereas legal scholars preferred to use inferential logic to study and analyze the legal implications of the impact of a US Supreme Court case, political scientists employed independent and dependent variables to test and validate their hypotheses concerning the causal impact of international rules.

By the late 1990s, mainstream social scientists and legal scholars had managed to collaborate in various ways to close this methodological gap (Beck, Arend, and Vander Lugt 1996). The result was an offshoot theory of institutionalism called legalization (Abbot, Keohane, Moravcsik, Slaughter, and Snidal 2000; see also Keohane 1997). Legalization theory is the systematic study of the rules, norms, and decision-making processes of institutions (i.e., the ICC, WTO, and European Union [EU]). It formulates three general variables to examine the causal effects of institutions: obligation, delegation, and precision (see Chapter 2). Here,

obligation refers to both the ICC's and the state's responsibility to implement and enforce the rules of the statute; while precision reflects the transparency associated with the Rules of Procedure and Evidence. The ICC also delegates authority to states by entrusting them with the ability to investigate and prosecute the worst perpetrators. High levels of precision, obligation, and delegation, therefore, explain why some institutions are more successful than others in securing compliance.

Another rationalist approach, rational design theory (RDT), complements legalization theory by focusing on the specific tasks and design properties of institutions (Koremenos, Lipson and Snidal 2001). According to rational design theorists, states ''use diplomacy and conferences to select institutional features to further their individual and collective goals, both by creating new institutions and modifying existing ones'' (*Ibid*.: 766). Effective centralized task building, low sovereignty transaction costs, participation in meetings, and transparent membership rules explain why some institutions evolve and operate more effectively than others. Within this framework, the ICC is particularly effective since each State Party can vote on measures, bills, recommendations, and amendments in the Assembly of States Parties (Article 112).

One of the problems with rationalist approaches, however, is that they tend to downplay legitimacy factors. The construction of the ICC was strongly influenced by NGO participation at the Rome Conference meetings, in particular women's NGOs. NGOs are allowed to attend the Assembly of States Parties meetings and to provide the Office of the Prosecutor with evidence and information of serious crimes, that will likely shape the discretion of the Prosecutor (Danner 2003: 519–22; Struett 2008). In this way, their role adds to, and highlights the ICC's diverse, broad-based efforts to promote the ends of peace and justice, including protecting and recognizing the most vulnerable victims (i.e., women and children). To be fair, neither legalization theory nor RDT ignore the presence of these cosmopolitan factors; rather their aim is to analyze the causal effects of legalized authority.

Still, in order to move beyond the limits of rationalist theory, we will need to address the relationship between the task-building by states and the organs of the ICC and the pursuit of cosmopolitan justice. We will need to do this carefully, however, by first recognizing how the statism of the ICC encompasses certain dimensions of realpolitik that have restricted some of its actions.

Confronting realpolitik: Dimensions and effects

Realpolitik is a term that arose in the nineteenth century and is used to refer to power politics and to the prescriptive guidelines for exercising state power (i.e., foreign policy). It is rooted in Machiavellian formulations of power which focus on the practical (and often amoralistic) need to preserve political power, rather than the pursuit of ideals. For this reason it remains largely synonymous with political realism. For the purposes of this book, there are three realpolitik dimensions of the ICC: (1) Opposition by hegemonic non-State Parties; (2) noncompliance by nonhegemonic (developing), non-State Parties; and (3) the lack of a reliable international enforcement mechanism.

Hegemonic opposition

The first dimension refers to US opposition to the ICC (Leigh 2001; Roach 2006; Ralph 2007, 2002). The United States, for instance, has claimed, that jurisdiction over its military personnel allows the ICC to pass legal judgment on matters related to national security decisions. In opposing the ICC on these grounds, they have sought special exemption status of its military personnel through NATO Status of Forces Agreements (SOFAs), which are designed to protect US soldiers, sailors, and airmen stationed abroad. US officials also argued that exercising jurisdiction over individuals belonging to non-State Parties violated international treaty law (state consent). They believed that certain vengeful State Parties would politicize international justice by filing biased self-referrals of a situation to the Office of the Prosecutor. By stating the nature and source of these politicizing influences, the United States was, for many, attempting to define the political in terms of the ''Court's actions'' (Power 2002). But as I have pointed out, any such politicization is placed in check by the Court's procedures (i.e., the removal of the Prosecutor and the Pre-Trial Chamber's duty to screen out all bogus information).

The United States' efforts to define the political of the ICC would eventually help set the stage for its grand strategy of disengagement from the ICC. In the aftermath of the 9/11 attacks, the US Senate took up an anti-ICC bill introduced in the preceding year, called the American Servicemembers' Protection Act (ASPA). The bill, which stipulated special legal protection to US servicepersons from unlawful detainment overseas, was adopted by the US Senate in December 2001, and entered into force

during the summer of 2002. In May 2002, the Bush Administration withdrew Clinton's signature to the Rome Treaty and consequently pledged to veto the UN mandate that would extend the date of peacekeeping operations in Bosnia.[7] The United States' subsequent announcement that it would pull out its troops prompted the UN Security Council to call a special session to address the situation. The meeting resulted in the adoption of UN Security Council Resolution 1422, which granted a special 12-month exemption from ICC investigation and prosecution to all military personnel of non-State Parties engaged in peacekeeping and/or special policing operations overseas. Also, at this time, the Bush Administration drafted its text of nonsurrender bilateral agreements, or so-called ''Article 98 Bilateral Immunity Agreements'' (primarily with State Parties), which required states not to surrender any US nationals to the Court, nor to cooperate with the ICC in legal matters related to the investigation of US nationals.

In this respect, the US policy of disengagement has stressed complete immunity from ICC jurisdiction. In Chapter 1, Charles Anthony Smith and Heather Smith address how the logic of US disengagement, and its accompanying realist concerns, has ''embedded'' itself in the domestic political system of the United States. In their view, the embedded realist concerns reflect an important, albeit less understood dynamic of US opposition, namely, the dynamics of senatorial opposition. They argue that this domestic dynamic of US opposition to the ICC requires further analysis of the electoral logic of the US Senate (voting patterns) and the lack of public awareness of the complementarity principle. They also point out that recent US State Department speeches indicating an apparent warming up to the ICC only help to further confirm this embeddedness (Bellinger 2008).

Non-compliance and developing states

The second dimension stresses the effects of noncooperation by nonhegemonic, non-State Parties. Here, the case of Sudan illustrates some of the effects and dynamics of this dimension. The Sudanese government, as we shall see, has shown little willingness to cooperate with the ICC. Although it has established its own national court, the Special Criminal Court on the Events in Darfur (SCCED) in June 2005,[8] which has opened nearly 160 cases of investigation, it has yet to try any of the suspected perpetrators; nor does it seem willing to do so, in light of the evidence that continues to

surface concerning the ties between the Sudanese state and *janjaweed*, the group responsible for staging the attacks against innocent civilians in the Darfur region. As Amy Eckert points out in Chapter 8, the SCCED remains by all accounts a ''sham'' court.

Still, party status does not assure that hegemonic and developing State Parties will comply with the ICC's demands in a genuine manner. While there is little evidence to suggest that hegemonic State Parties have used the Court to achieve a particular political advantage, the self-referrals of the DRC and Uganda, two developing State Parties, suggest that state leaders have used the ICC as a political weapon to eliminate political competition and to focus attention exclusively on the crimes of rebel factions. William Burke-White (2005: 557), for example, has argued that because of the serious crimes committed by the political rivals to Joseph Kabila, the president of the DRC (whose own crimes may have been committed before the ICC entered into force in 2002), it was far more likely that these rivals would be subject to ICC prosecution.[9]

Like the DRC government, the Ugandan government also elected to refer a situation to the ICC. Although the ICC Prosecutor's threat to launch its own investigation may have triggered the referral, the Ugandan government's self-referral appeared to signal its willingness to gain some limited control over the legal process. However, in light of the Ugandan government's recent demands that the ICC drop its indictments (in exchange for an alternative, national war crimes court) – which the ICC has refused to do – the ICC's involvement has arguably become a political sticking point in the ongoing peace talks between the government and the Lord's Resistance Army (LRA). In an effort to address these political dimensions of justice, the Assembly of States Parties, at its sixth session meeting, issued several recommendations for promoting genuine cooperation (Kreβ 2004; Assembly of States Parties 2007).

The responsibility to enforce

The issue of cooperation brings us to our third dimension of realpolitik: a reliable international enforcement mechanism. If states choose not to comply with the ICC Prosecutor's demands, the ICC will need to rely on three measures: (1) the willingness of other states to pressure resistant states to comply with the ICC's demands; (2) diplomatic isolation and reputational costs; and (3) in the most extreme case, the United Nations' willingness to impose coercive military measures (intervention) to force

the noncompliant state to accept the conditions of a UN peacebuilding arrangement (see Mayerfeld 2003). Recent studies of the ICC's bargaining power with national governments suggest that domestic conditions can negatively impact the ability of the ICC to apprehend indicted war criminals. Steven Roper and Lilian Barria (2008) conclude that some indicted criminals such as the CAR's former President Ange Patassé, may have an incentive to flee to non-State Parties, in order to seek refuge from ICC prosecution (Roper and Barria 2008: 469).

Other studies involve a more detailed and nuanced analysis called a ''three-level game.'' Here, Level 1 refers to the ICC's direct negotiation with the territorial state; Level 2 to third-party and international organizations; and Level 3 to domestic actors. Perhaps, most intriguing is the third-level: the ''direct negotiation with domestic actors within territorial states, through, among other things, the ICC's own outreach efforts'' (Burke-White 2008: 482). At this level, the global reach of the ICC refers to its efforts to work with community groups and local NGOs to foster awareness of the ICC and victims' needs. This level constitutes an important dimension of positive global responsibility: a global strategy designed to raise awareness of the ICC and to promote, as noted earlier, the rights of victims. In the Ugandan Acholi subregion, for example the ICC recently held workshops in which local communities ''took an active part in deliberations'' and ''pledged their commitment to assist in disseminating accurate information about the ICC'' (International Criminal Court 2008). The workshops involved the collaboration of its field Outreach Unit, the Victims Participation and Reparations Section (VPRS), the Youth Out of Poverty and Aids, a local NGO, and the local people.

We therefore need to see these three realpolitik dimensions as conceptual challenges to the ''responsibility to enforce,'' or, in this case, to the first and second-level of state responsibility. Again, all states have a negative responsibility to refrain from committing gross human rights atrocities. The United Nations has long sought to enforce and promote not only this negative responsibility via its Chapter VII mandate, but also the state's positive responsibility through membership and participation in its decision-making bodies. The complementarity principle and independent prosecutorial discretion are unique in this sense, since they introduce, or at least more clearly articulate, the conditions for a negative and positive global responsibility. Fulfilling these responsibilities, therefore, reflects the evolving dynamics of the Court and the (proscriptive) the ongoing efforts to embed the norms of international criminal justice into domestic law

(Risse, Ropp, and Sikkink 1999; for legal analyses, see Charney 2001; Duffy 2001; Ellis 2002).

As already suggested, norm embeddedness depends on global cooperation, or the building ties between and among states, international organizations (i.e., United Nations and NATO), NGOs, and grassroots organizations. Many mainstream theories of global cooperation, as we have seen, stress the functional properties of state bargaining, including transparency and transaction costs. Neoliberalism, for instance, holds that states will concede to short-term costs in order to maximize their interests. (Axelrod 1984; Keohane 1984). In Chapter 2, Leonard and Roach weigh in on the importance of the mainstream theories of realism and neoliberalism. Here, they draw on the above-mentioned offshoot theory, legalization, to explain the causality of ICC norms and rules and the stabilizing effects of the ICC's authority. They are careful, however, to point out that while mainstream theory explains many of the constraints of the ICC, it also raises questions of how the norms and rules of the ICC emerge and are defined. Norms and rules, in other words, are not static; rather they emerge out of social interaction, and are the products of social and political change. In this sense, people learn to accept and adopt new norms, primarily because they consider them to be legitimate. Here, constructivism reminds us of the importance of social interaction in explaining rule adoption: that we need to assess how legitimacy and moral principles are mutually constituted by agents and structures.

Rational design, constructivist logic, and discursive legitimacy

Constructivists share the guiding idea that the social milieu in which we live reflects an intersubjective network of interests, values, beliefs, and identities. Rules and norms are the social products of interaction, and the elements of a constitutive process of knowledge and consensus-building. As such, when we agree upon and vote for the institutional rules and procedures that will regulate our behavior, we also develop social expectations for when and how these procedures will be applied. Social values in this sense constitute the reasons for justifying the application of these rules to punish violators. Constructivists, therefore, explain how norms, values, interests, and rules are instituted and enforced, and why they are mutually constitutive of institutional governance.

In International Relations theory, social constructivists tend to fall into two camps: radical constructivism and middle-ground constructivism. The former emphasizes the social interaction and intersubjective knowledge of agents in order to work beyond the limits and problems of mainstream social scientific theory (dismissal of history and social change), including the use of reductive positivist methods to explain and predict outcomes (Kratochwil 1989, 2001; Ruggie 1998). The latter, however, seeks a middle ground between this subjectivism and scientific objectivism, one in which norms, interests, and identities are derived from material sources and are treated as both causal and constitutive properties of social action and institutions (Adler 1997; Checkel 1998; Wendt 1999).[10] In Chapter 5, Fehl uses the ICC as a context to test rationalist and constructivist assumptions, arguing that the ICC raises issues of legitimacy that these theories address, but do not entirely resolve. One issue in particular is whether increased moral authority helps to extend obligation and responsibility. What precisely should the role of the Prosecutor and Assembly of States Parties be in this process? If, for instance, the ICC is not a fixed system or body of rules, which reflects ''the 'rules' capacity to obligate and secure the community's behavior'' (Franck 1990: 40), then how do we explain this capacity to respond to problems related to governance? It is of course true that the ICC constitutes a complex system of rules. But, the ''rules capacity'' also refers to the possibility of instituting new Rules of Procedure to correct flaws in the system. Fehl's argument thus raises an important normative issue: how the ICC constitutes a discursive framework for legitimizing norms and rules through rational argumentation or, alternatively, whether discursive theory can further help us to understand the tension between the ICC's negative and positive global responsibility.

Thomas Risse addresses the larger dimensions of this issue by arguing that Habermas's communicative action theory – when applied to International Relations theory – explains why reasoned argumentation, and not necessarily power relations, remains crucial to understanding outcomes in international politics. Legitimization, according to Habermas, consists of moral and ethical claims, which help to validate the reasons we use to argue and to be ruled by the force of the better argument. Such validity claims reflect our empathy for other people, which, in turn, presupposes some level of common knowledge. The problem, as Risse suggests, is that social constructivists fail to critically assess the discursive properties of knowledge-building in the international system.[11] This problem is important for two reasons. First, common knowledge reflects what Risse calls a ''thin conception of an

anarchy lifeworld'' (lifeworld referring to the repository of cultural values and given cultural understandings of our modern world), where empathetic understanding informs many of our strategic and political claims to truth and justice (Risse 2000: 524–6). Second, a discursive theory of international politics requires us to distinguish between strategic and communicative action in order to explain the outcomes of reasoned argumentation and the diminished role of power relations in the discourse of global governance.

In Chapter 4, Michael Struett argues that the legitimacy of the ICC depends ultimately on its capacity to persuade observers that the application of its rules will be perceived fairly and justly by all, which, in turn, reflects the discursive nature of the ICC's universal norms that is essential to understanding the universality of its juridical standing at the international level. Crucial to this legitimizing process is the complementarity regime. The complementarity principle, as we have noted, is designed in such a way as to allow the formulation of reasons for investigating, prosecuting, and punishing to have a potentially positive influence on the development of international criminal law. In Struett's view, persuasive arguments will need to be made that incorporate the views of all, or rather dispel the perception that one actor is imposing his or her interests on others. This requirement creates an interesting pressure on the officials of the ICC to engage in political strategies, gauged by communicative action, as opposed to simply developing strategic plans of action. Struett thus contends that the ICC may gradually succeed in developing its own legitimacy, and that this offers important implications for the development of international criminal law.

Such discursive potential also raises the following important question: How does the moral universality of the ICC ensure that the most powerful players will act in the best interests of the global community, especially when their political interests may be at stake? Jennifer Mitzen (2005: 402), for instance, argues that even disagreement within legitimate international institutions can devolve into violence. Face-to-face talks may be one way of preventing disagreement from devolving into violence. But this only highlights the problem of ICC inaction, or its possible ineffectiveness in high-intensity conflicts, where disagreement or conflicts may arise when powerful actors seek to restore and promote stability in these troubled regions. In Chapter 5, Jason Ralph examines this problem from an English School perspective, by addressing some of the ways that the ICC continues to challenge and reshape our thinking of international society and the transition to world society. His contention is that the establishment of the ICC is not merely a concerted attempt to develop

consensus on how best to hold individuals criminally responsible for acts that have offended humanity; it is, rather, a response to what Alexander Wendt (2003) calls the ''instability'' of an international society.

Thus, while greater accountability may constitute a collective response to instability – one that helps to promote expectations for peace and order – there remains the practical objective of increased accountability in terms of genuine, collective governance. Here, Ralph suggests that the checks and balances of the ICC Statute should help to dictate fair and responsive governance. Many cosmopolitan thinkers share this idea, but qualify it in terms of the constitutivity and evolving nature of the ICC's cosmopolitan ideals of fair and equal treatment. The cosmopolitan approaches of this book differ from the above rationalist and constructivist approaches, by critiquing and investigating the concepts of power, order, and right through the lenses of political philosophers, such as Arendt, Kant, Rawls, and Beitz. These philosophically grounded approaches investigate and reflect upon the political ethics and universal morality of the ICC. Accordingly, they represent critical contextual understandings of the moral trajectory of international criminal law.

A cosmopolitan court?

Cosmopolitanism, broadly understood, focuses on the individual and the regulative ideals of global justice, including the equal distribution of resources, universal ethics, women's rights, and world citizenship (Held 1995, 2002; O'Neill 1996; Tan 1998; Pogge 1999; Nussbaum 2002; Hayden 2005). Cosmopolitans believe that all humans are entitled to equal respect and treatment, and that there are universal public goods essential to promote, including the global protection of the environment. Cosmopolitans, however, frame the pursuit of these ideals in different ways. Some, for instance, equate the pursuit of moral goods of equal respect with the capacity of global and state institutions to confront political violence (cosmopolitan realists); while others (political cosmopolitans) focus on the evolving dynamics of participation and representation in global institutions in order to promote the rights of all citizens. In the context of the ICC, Andrew Kuper (2004: 135) argues that the Court's responsiveness is determined by several factors, including a wide range of checks and balances and the fairness accorded to all defendants. The ICC, he concludes, remains excessively statist, but can and should develop in a cosmopolitan

direction through its universal criterion of extending fair trials for all defendants.

As I pointed out earlier, political cosmopolitans like Kuper and liberal cosmopolitans such as David Held prefer to see global institutions as operating on a separate, qualitatively distinct track. In their view, realpolitik and the cosmopolitan operate on parallel tracks. As Daniele Archibugi and Held (1995: 13) put it: ''the term cosmopolitan is used to indicate a model of political organization in which citizens, wherever they are located in the world, have a voice, input, and political representation in international affairs, in parallel with and independently of their own governments.'' The two place strong emphasis on cosmopolitanism as a democratic process, arguing that new ''authoritative global institutions'' will be needed to monitor the development of these two tracks of the cosmopolitan. They conclude that ''cosmopolitan institutions must come to coexist with established powers of states,'' and that ''the international system's turbulence must be contained'' (*Ibid.*: 14, 15).[12]

This book adopts this dual track idea of cosmopolitanism, but challenges it in a very fundamental way. It asserts that the parallel tracks of the cosmopolitan and realpolitik are anything but divergent. Rather, as mentioned earlier, they reflect intersecting and evolving points of realpolitik and the cosmopolitan, and the nuanced tensions among the four overlapping levels of responsibility. The final section of the book develops this nuanced understanding in two particular ways: first, by showing how the ICC's confrontation with the political realities of state violence reinforces (albeit in somewhat ambivalent terms) the solidarity required to build the cosmopolitan traits of the ICC; and second, how the ICC contextualizes the nuanced and evolving relationship between realpolitik and cosmopolitan justice. The former way suggests that the ICC's global responsibilities reflect the need for an engaged approach to actively confront political evil. The aim here, as Patrick Hayden argues in Chapter 6, is to actively resist the reality of evil. Drawing on Hannah Arendt's and Ulrich Beck's ideas, Hayden contends that the emerging processes of global ''cosmopolitanization'' must be seen as driven by the merging of national and transnational power games, in which new rules for the strategization of power are being devised. Here, he examines the ICC in terms of the new ''rules of the game'' of power and counter-power in the global age.

In this manner, he focuses on the complex ways that cosmopolitanization is premised upon new strategizations of global power, particularly those motivated by a cosmopolitan imagination – shared by state and

nonstate actors alike – of fear, threats, and risks to human life. He concludes that the ICC can be understood as a new hybrid form of politics: a moral idiom of humanity grounded on the metapower and strategic action of global civil society, and the transformation of sovereign power through the calculated insertion of the state's right to protect itself against threats to human rights within a transnational security architecture. On this basis, the ICC's normative ambivalence is a reflection of the cosmopolitan power games and sociological uncertainty of international relations in a global age.

The latter way of challenging the dual-track idea reflects what Antonio Franceschet refers to as cosmopolitan moral politics (Chapter 7). This approach is based on the four above-mentioned projects that are roughly analogous to the four levels of responsibility: rule (coercion), order, governance, and citizenship. Drawing on Kant's political writings, he claims that each of these projects have comprised underdeveloped conceptions and practices of international law. He argues that many of Kant's ideas of cosmopolitan right have yet to be fully extended to, or embodied by international law. If this is true, then each of these cosmopolitan projects still need to be integrated into a more interlocking conception of the cosmopolitanization of law. The more that the ICC allows us to test and realize such integrative aspects, the more that we can say these projects have become imbricated, that is, overlapping scales of global justice that register the increasing weight of political empathy and moral commitment. This raises an intriguing implication for the cosmopolitanization of law: namely, whether the cosmopolitan elements of the first two projects help to drive the development of the latter two projects and vice versa; and how realpolitik, when understood in terms of the normative aspects of rule and coercion, is immanent to the cosmopolitanization of law.

For Amy Eckert (Chapter 8), the Darfur genocide represents the first real cosmopolitan test to the ICC. She argues that the ICC's role in the high-takes Darfur situation remains, on the one hand, evidence of its commitment to promoting international and cosmopolitan justice. On the other hand, it also exposes how the political challenges of a high-intensity conflict have unduly tested the spirit and promotion of its universal morality. In this way, Eckert's cosmopolitan test turns on an important cosmopolitan theme: the stark and volatile tension/relationship between the ICC's positive global responsibility and the failure of the state to uphold its negative responsibility. Eckert concludes that further institutional development will likely mitigate this tension, and that the Darfur genocide, because it represents one of the most high-intensity cases, will

likely provide important lessons for prosecuting and dealing with the limits of the ICC's statist character. Even so, she cautions that as long as states remain the principal agents of the international system, noncooperation will continue to unduly test the cosmopolitan intent of the ICC. It is this caveat that underscores the often problematic relationship between global security and the ICC's independence. The final chapter thematizes this relationship by addressing the global deterrent effect, reconciling peace and justice, and global terrorism. All three thematic issues, while suggesting the somewhat ambivalent convergence between discursive legitimacy and strategic action, show how the ICC offers new ways for reflecting upon and potentially resolving global security issues and problems.

Notes

1. The most notable analyses of these conceptual issues can be found in Shelton (2001); Roggeman and Sarccevic (2002); Mc.Goldrick, Rowe, and Donnelly (2004); Michael, Vernon, and Harrington (2006).
2. A global community is constituted by the interests, beliefs, and values of a multiplicity of agents. It encompasses the actions of states, nonstate actors and individuals and their shared desire and commitment to promote global norms and rules.
3. For an excellent, critical review of the intersection of power, ethics, and law, see Mégret (2002).
4. For the history of the ICC project prior to the Rome Conference, see for example, Ferencz (1998); Hebel (1999); Morton (2000).
5. A summary of the Rome Conference meetings can be found in United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (1998).
6. For a seminal discussion of the methodological convergence between international law and political science, see Slaughter (1993).
7. President Clinton signed the Rome Treaty in December 2000, but pledged that he would not send it to the US Senate for ratification.
8. The SCCED is supported by two specialized courts and other institutions, including the Judicial Investigations Committee, the Special Prosecutions Commissions, the National Commission of Inquiry, and the Committees Against Rape.
9. Thus far, it seems that Kabila's apparent political calculations have paid off, albeit after the 2006 elections. On May 23, 2008, the Pre-Trial Chamber issued an arrest warrant for one of these rivals, Jean Pierre Bemba, who was eventually arrested in Brussels, Belgium (the first official case of CAR, though he was serving as vice-president of the DRC in 2005).

10. For an evolutionary perspective on constructivism, see Adler (2005).
11. Christian Reus-Smit explains why communicative action theory is also important to explaining the discursive formation of norms and moral standards of legitimacy. In his view, constructivists fail to take stock of the communicative issue of how ''prevailing ideas of legitimate state identity are inextricably linked to the nature of the institutions that states construct to facilitate coexistence and cooperation'' (2002: 503).
12. This is not to say that institutional and moral cosmopolitans fail to recognize the importance of the state; only that governance can and should be conceived independently of the state.

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Part I

Realpolitik and Rationalism

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1

Embedded Realpolitik? Reevaluating United States' Opposition to the International Criminal Court

Charles A. Smith and Heather M. Smith

Introduction

The United States, as noted in the preceding introduction, was one of seven states to vote against the International Criminal Court (ICC) Treaty on July 17, 1998, joining China, Iraq, Libya, Yemen, Qatar, and Israel in dissent. The fact that the United States would place itself in such dubious company may have confounded many, but for others, the United States' rejection of the Rome Treaty reflected a pattern of ''benign neglect'' by the Clinton Administration (Johansen 2006). At the Rome Conference and subsequent PrepCom meetings, the United States raised the objection that certain State Parties could file biased referrals to the Court, which would unfairly subject US personnel to ICC investigation and prosecution. With no other intention than to target US military personnel, State Parties would be allowed to use the Court as political tool to seek revenge against the United States, thereby politicizing the Court and international justice (Wedgwood 1999; Bolton 2000; Scheffer 2000). Unable to use its UN Security Council veto to protect its overseas interests, the United States claimed that the Court would undermine its authority at the Security Council (Arnold 2002; Becker 2003). Yet by insisting that extrajudicial measures, or special protections were needed to overcome this flaw in the ICC Statute, the United States, it could be argued, was also attempting to define the political elements of the ICC's actions (Power 2002).

This legal strategy, while designed to pressure Court officials to revise the Statute, also reflected the realist concerns of the United States, that is, its concerns that the ICC would threaten its military operations overseas. It was thus not surprising that the 9/11 attacks would convince the United States to actively disengage from the Court. In many ways, the new, post-9/11 realpolitik-based strategy could be seen as the logical, material(ized) extension of US realist concerns. In this chapter, we interpret this ''extension'' in terms of the embedded realist concerns in the political structure of the US Senate. We contend that the domestic politics of US opposition requires analysis of the logical grounding of these concerns in order to understand the ''deeply ingrained'' political reality underlying US opposition to the ICC. Our principal aim, then, is to show how this embedding process constitutes a crucial explanatory dynamic of such opposition, and how the electoral logic of the US Senate has helped to further reinforce US opposition.

Also crucial to understanding this domestic process is the opposition of the American public to the ICC. There are at least two ways of understanding the role of the American public. First, a gradual shift in the language used by the Bush Administration to describe the flaws in the ICC has limited sophisticated public discourse within the United States. Second, this lack of discourse has translated into a dearth of knowledge of the ICC among the American voting public, which explains an important dimension of the electoral logic that we set out to analyze. In this manner, Senators express opposition to the ICC because they fear electoral sanction by an American voting public that does not understand the finer nuances associated with exercising ICC jurisdiction. Between the lack of clearly articulated benefits associated with ratification and a potentially severe and immediate cost (American service personnel being hauled before a foreign court), hostility toward the Court among the American public was the natural response.

We should point out that considering electoral logic as the foundation of US opposition also explains why allies similarly situated to the United States, such as the United Kingdom, Canada, Australia, Poland, and Germany have embraced the ICC. By ''similarly situated,'' we mean that these countries regularly engage in international peacekeeping efforts. These countries play a similar, if lesser, international role to the United States and face a comparable risk of political prosecutions.The domestic politics of other states, including China and Russia suggest similar political institutional obstacles. Russia, for instance, (which has signed the ICC Treaty), must address or amend two key provisions in its 1993 Constitution: that international courts cannot replace its national courts and the right to

pardon. It has become clear though, that the Duma and Dimitri Medvedev, the President of Russia (and the Prime Minister Vladimir Putin) do not necessarily favor ratification of the ICC treaty. These political preferences, as some have suggested, arise from the Chechnya conflict, which Russia insists remains an internal matter (Tuzmukhamedov 2005: 621). Meanwhile, China has insisted that the Court remain free of political bias and that ''the Court will win the confidence of non-Contracting Parties and wide acceptance of the international community through its work'' (Amnesty International 2008).

Our approach, which focuses on the relationship between domestic politics of the United States and the ICC, follows a growing tradition of international relations literature that locates the source of foreign policy preferences squarely in the realm of domestic politics (Fearon 1994; Milner 1997; Raustiala 1997; Martin 2000). As we shall show, the American discourse regarding the Court shifted from sophisticated discussions of jurisdictional constraints and the implications of ratification for American foreign policy to the familiar refrain about the specter of politicized prosecutions. This subtle shift in the language used by elected officials in the US government gave the American public a simple and clear-cut way to voice their opposition which defied deeper discussions about the jurisdictional limitations of the Court. This lack of discourse worked to the benefit of those opposed to the Court. Indeed even Bolton suggested, that ''America's posture toward the ICC should be 'Three Noes': no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to 'improve' the ICC'' (Bolton 2001: 180).

In the first section, we address the initial efforts to undermine the Court by US policymakers, beginning with the legal concerns expressed at the Rome Conference, followed by an assessment of the devolution of these concerns into the hostile policy of disengagement. Here, we describe the jurisdictional structure of the ICC, including complementarity, and discuss the side agreements including bilateral immunity agreements (BIAs) and status of forces agreements (SOFAs). Thereafter, we show how these legal demands and strategies were grounded in Senatorial logic and the narrow public debate of the ICC in the United States. We propose that the false legal pretenses underlying the electoral logic of the Senate provides a robust explanation for US hostility as well as for the absence of any actual political deliberation about the Court. This assertion is tested on the Senate votes regarding the ICC in 2001 and 2002. These votes are the only instances where the US Senate has taken up the ICC. Lastly, we discuss the

reasons the United States should support the ICC, despite the abject failure to engage in a dialogue about this issue in the Senate.

US opposition: Legal objections

There are two dominant bodies of scholarship that explain US resistance to the ICC. The first approach focuses on the Court's broad jurisdiction, particularly over the nationals of non-State Parties. Adherents of this approach argue that US resistance to the ICC is an appropriate response to the Court's unprecedented jurisdiction (Ailslieger 1999; Scheffer 1999, 2001; Morris 2001).[1] The second approach concerns the controversial role played by the UN Security Council in the ICC's affairs. Here, the Security Council affords the United States a dominant role in the prosecution of international justice, one that is unlikely to be matched in the ICC and the United States (Schabas 2004; Ralph 2005). At the heart of both of these approaches lies the argument that US personnel could face politically motivated prosecutions in the ICC.

Theories that rely on the jurisdictional structure of the international court to explain US opposition begin with the premise that the ICC possesses unparalleled and overly broad jurisdictional authority, far beyond that of any other international court. Morris (2001) compares the jurisdictional structure of the ICC to the International Court of Justice (ICJ), the Tribunal of the Law of the Sea, and the Dispute Settlement System in the World Trade Organization. As Morris notes, the mandate of the ICJ is limited to cases in which the Court has clear consent from the states involved in the dispute.[2] While the ''jurisdiction of the ICJ . . . is quite thoroughly consent based,'' the authority exercised by the chief prosecutor of the ICC does not rely on consent (Morris 2001: 20).

Article 12 of the Rome Statute allows the chief prosecutor of the ICC to exercise jurisdiction over nationals of non-Party States if they have committed an offense on the territory of a State Party. Morris (2001) takes issue with the ICC's ability to exercise jurisdiction over the citizens of states that are not parties to the Rome Statute. She argues that neither of the traditional bases of jurisdiction – delegated universal jurisdiction nor territorial jurisdiction – serve as effective legal foundations for the ICC's exercise of authority over nonparty nationals. A delegated universal jurisdiction theory suggests that because states are beginning to employ universal jurisdiction to try those accused of crimes against humanity in other countries domestically, universal jurisdiction for the ICC is consistent

with customary international law. She insists that this approach neglects the important distinction between states using universal jurisdiction to try those accused of crimes against humanity and a global court attempting to do the same (Morris 2001: 43). Morris also notes a lack of precedent establishing territorial jurisdiction as a sound basis for the exercise of jurisdiction by a global court over states that are not a party to it (Morris 2001: 47). She concludes that the mandate of the ICC, which allows the Prosecutor to exercise jurisdiction over non-Party States, far exceeds fundamental principles of international law (Morris 2001: 66).

David Scheffer, the former US Ambassador-at-Large for War Crimes Issues, echoes Morris' concerns and frequently has argued that the ICC must strike a balance between the need for prosecution of the world's worst criminals, while also respecting the sovereignty of Member States (Scheffer 1999*a*, 1999*b*, 2001). He also refers to the Court's ability to investigate nationals of non-Party States as ''the single most fundamental flaw in the Rome Treaty that makes it impossible for the United States to sign . . . '' (Scheffer 1999*b*; England 2001; Scharf 2001). Scheffer also argues that US opposition to the ICC is a legitimate response to the far reaching and extraordinary mandate of the Court. As he puts it:

> The U.S. legal position [during the Clinton administration] was that customary international law does not yet entitle a state, whether as a Party or as a non-Party to the ICC Treaty, to delegate to a treaty-based International Criminal Court its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory or otherwise under the principle of universal jurisdiction, without first obtaining the consent of that individual's state of nationality either through ratification of the Rome Treaty or by special consent, or without a referral of the situation by the Security Council. (Scheffer 2001: 65)

Critics of Scheffer's position have suggested that since non-Party States are potentially exposed to the jurisdiction of the Court, the United States would be better off ratifying the Rome Statute and having a greater influence over the institution (Gallarotti and Preis 1999: 53; Scharf 2001; Van de Vyver 2001: 796; Van de Kieft 2002: 2367). In addition, the complementarity provisions mean that short of a collapse of municipal law and the system of military justice in the United States, the ICC will never have cause to exercise jurisdiction over American service personnel (Sadat-Wexler 1999: 244).

Scheffer refutes these assertions, arguing that the complementarity regime is not significant enough to buffer the United States against the exercise of jurisdiction over US service personnel (Scheffer 1999).[3] Article 12

could allow the ICC to exercise jurisdiction if American service personnel are accused of an actionable offense on the territory of a ratifying state, even though the United States is not a State Party to the Rome Statute.[4] The version of Article 12 that the United States proposed in Rome sought to close this loophole, and would have also required the consent of the state of nationality of the accused (Scheffer 1999: 20).[5] Scheffer (1999) suggests that ''The United States made compromises throughout the Rome process, but we always emphasized that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the Court would be imperiled'' (Scheffer 1999: 17). Essentially, Scheffer's argument is that Article 12 amounts to universal jurisdiction because consent is not required from the state, whose national has been accused of committing serious crimes.[6] In his view, only states that are party to a treaty should be bound by its terms (Scheffer 1999: 18).

Critics of this approach to explaining US opposition to the ICC suggest that the US position on the ICC remains insincere.[7] Michael Scharf (2001), for instance, uses evidence from the Rome Conference to argue that the United States' purported claim that the Court would exercise universal jurisdiction, is nothing more than a false pretense. He takes issue with Scheffer's (1999: 77) contention that US opposition to the Rome Statute is warranted because the drafters rejected the exercise of jurisdiction over non-Party States. Here, he identifies an inconsistency in Scheffer's claim about the US position. If the United States had sincerely been opposed to the universal jurisdiction of the Court for war crimes, crimes against humanity, and genocide, there should have been some challenge to the status of these crimes during the Rome Conference. Rather, Scharf (2001: 77) suggests:

> No one at the Rome Diplomatic Conference disputed that the core crimes within the ICC's jurisdiction – genocide, crimes against humanity, and war crimes – were crimes of universal jurisdiction under customary international law.

The United States was one of three states to submit alternate jurisdiction proposals at the Rome Conference. The US proposal would have required the consent of the state of the nationality accused of war crimes and crimes against humanity but not of genocide, essentially allowing for the Court to exercise universal jurisdiction over the crime of genocide.[8] This proposal, Scharf argues, reflects the US government's acceptance of universal jurisdiction, and therefore supports the claim that the United States never intended for the Court to have such broad authority (Scharf 2001: 77–8).[9]

Diminished US role in international prosecutions

Arguments that focus on the role of international politics in explaining US opposition to the ICC distinguish between the United States' potential role in the ICC and its position in the UN Security Council. As one of only five permanent members of the Security Council, the United States, along with China, Russia, France, and the United Kingdom possess the power to veto any resolution or proposal. Membership in the Security Council is provided on a rotating basis to other United Nations member states. Taken together, these rules assure that the United States will always sit on the Council, and that it can veto any proposal that it perceives to be hostile to its interests. In stark contrast, the United States would not retain any such special voting privileges in the Assembly of States Parties. Its interests and influence would be no different than those of other states. Thus, opposition to a new institution that limits the United States' ability to serve its own interests is not surprising.[10]

Schabas (2004*b*) explains that the original proposal for the Court's relationship with the Security Council, drafted by the International Law Commission (ILC) in 1994 was embraced by the United States.[11] In that proposal, the chief prosecutor of the ICC could not pursue an investigation into threats, breaches of the peace, or acts of aggression that were being "dealt with" by the Security Council, unless the Security Council decided otherwise. Had this version of the article made it into the final version of the Rome Statute, the Court would have effectively been subordinate to the Security Council, only able to accept cases when granted permission by the Security Council. Although not indicative of the Senate's preferences, Scheffer (1999) confirms that the Clinton Administration was receptive to this proposal:

> The ILC's final draft statute for the ICC addressed many of the U.S. objectives and constituted, in our opinion, a good starting point for far more detailed and comprehensive discussions. Though not identical to U.S. positions, the ILC draft recognized that the Security Council should determine whether cases . . . should be considered by the ICC, that the Security Council must act before any alleged crime of aggression could be prosecuted against an individual and that the prosecutor should act only in cases referred either by a state party to the treaty or by the Council. (Scheffer 1999: 13)[12]

However, this vision of the ICC as subordinate to the Security Council was dismissed by the Rome delegates in favor a more significant role for the Court. The final version of Article 16 vests the Court with the authority to pursue investigations, independent of the Security Council, though the Security Council may intervene or defer a case, by passing a resolution (Schabas 2004: 716).[13] Schabas (2004*b*) concludes:

> . . . the Rome Statute was an attempt to effect indirectly what could not be done directly, namely reform of the United Nations and amendment of the Charter. This unprecedented challenge to the Security Council accounts for the antagonism of the United States . . . (p. 720)[14]

US opposition to the Court, in this view, is dominated by realist concerns. Because the United States wields considerably more power in the Security Council and would never enjoy such power in the ICC, it remains hostile toward the ICC (Ralph 2005: 41–2). Nonetheless, both the ''overly broad jurisdiction'' and ''diminished US role in international prosecutions'' approaches represent the hostile elements of US opposition. In the next section, we show how these legal claims rapidly evolved into the realpolitik policy of disengagement, before moving on to assess how US realist concerns became embedded into the domestic structure.

From legal demands to realpolitik: US disengagement from the ICC

After the 9/11 attacks, and amidst public cries for avenging these attacks, the US Senate would take up several measures designed to enhance and facilitate the US mission of combating global terrorism overseas. In time, the American Servicemembers' Protection Act (ASPA), an anti-ICC bill, would provide the initial framework for preempting or mitigating the ICC's globalist threat to this mission. In many ways, the bill remains an important linchpin between the legal objections discussed in the preceding section, and the realpolitik of hostile disengagement. Although the bill has recently been whittled down by recent Congressional action, it has been complemented by two other strategies: UN Security Council Resolutions 1422 and 1483, and bilateral non-surrender agreements. Our argument in this and in the following section is that these strategies of disengagement cannot simply be explained in terms of a hostile US Administration nor American exceptionalism. Rather, US realist concerns became entrenched in the Senate via an electoral logic that has helped to reinforce these realist concerns. It should be noted that as of the writing of this chapter, the Bush Administration has seemed to warm up slightly to the ICC. In an April 2008 speech to Depaul University of College of Law, the US Legal Advisor, John Bellinger (2008) stated that ''the sooner both sides respectfully agree to disagree about the ICC as an institution, the sooner we will be able to focus on finding practical and constructive ways to cooperate. . . . '' Despite stating the Bush

Administration's [shared] commitment to promoting international justice, Bellinger also made it clear that the Bush Administration's view would persist for several years (into subsequent administrations). Given this statement and the limited overtures of their position (i.e., some restrictions have been waived on assistance to several countries that have not signed the Rome Statute), we need to frame their somewhat disinegenuous ''softened'' stance in terms of an entrenched domestic institutional logic.

Bilateral non-surrender agreements

In response to and in conjunction with Senate objections over the ICC, the United States has undertaken the negotiation of bilateral non-surrender agreements or bilateral immunity agreements (BIAs). BIAs are also referred to as Article 98 agreements and provide for the immunity of American service personnel from being extradited by member states to The Hague. Article 98 of the Rome Statute provides that the ICC cannot request extradition of an accused criminal from a state if that state has other conflicting obligations under international law. (Article 98 sections 1–2) Since the United States negotiated and secured the first BIA in August of 2002 with Romania, there have been more than 100 BIAs reached between the United States and other states.[15]

The most controversial element of these agreements is the method under which they have been secured, through the passage of the ASPA. On July 1, 2003, the United States announced that it would condition continued military aid for allies on their signature of BIAs. This amounted to $47.6 million in direct aid that the United States was threatening to withhold as well as $613,000 in military training programs (Becker 2002). Eventually, the US government offered waivers to twenty-two states that had neither signed a BIA nor ratified the Rome Statute. However, for those states unwilling to enter into a BIA with the United States and who directly defied US preferences by ratifying the Rome Statute, the United States withheld approximately $6.2 million in aid in 2004.[16]

On December 17, 2007, the US Congress passed a comprehensive Consolidated Appropriations Act, which contains the so-called ''Nethercutt Amendment'' (introduced by Former Rep. George Nethercutt). The amendment continues the Bush Administration's practice of coercing States Parties, by cutting off Economic Support Funds (ESF) to countries unwilling to enter into BIAs. When President Bush signed the bill on December 26, 2007, several countries lost millions of dollars in foreign aid assistance.[17] These economic

effects not only have further alienated the United States from the world but also have highlighted the tensions between the US Security Council veto and the US involvement in Darfur.

Status of forces agreements

The United States has used the Security Council as a forum to alter SOFAs to limit ICC jurisdiction of US peacekeepers involved in UN peacekeeping missions. For instance, as a condition for the continued mandate of the UN Mission in Bosnia, the United States sought permanent, blanket immunity from ICC jurisdiction for all UN peacekeepers. The international community was outraged. Koffi Annan sent a letter to then US Secretary of State, Colin Powell, decrying the US proposal and arguing that it risked altering the text of the Rome Statute, and that it would undermine the legitimacy of both existing international legal instruments (The Rome Statute) and the role of the Security Council.[18]

Resolution 1422, which was eventually passed in the Security Council, represented a compromise between the United States and the international community. The United States was granted blanket immunity for all US peacekeepers (not all UN peacekeepers as they had sought initially) for one year, with the possibility for annual renewal.[19] The resolution exempting US peacekeepers from ICC jurisdiction was renewed in July 2003. However, in June 2004 the United States did not seek renewal. Deputy US Ambassador to the United Nations, James Cunningham's explanation of the US government's decision not to seek renewal is telling: ''Because it has become clear over the past couple of weeks . . . [That] the members of the [Security] council are becoming increasingly uncomfortable with this kind of arrangement and we acknowledge that.''[20] Of course, the immunity granted to US personnel through the SOFAs is a redundant protection. Arguably, all that was conceded by failing to renew the categorical immunity was the ability to demonstrate to some domestic audience the degree of opposition to the ICC.

Blocking investigation referrals to the ICC in the Security Council

In addition to the broad erosion of whatever limited jurisdiction might exist for the ICC, the US government has also sought to prevent attempts by the Security Council to refer a situation to the ICC. Most recently, the US government stridently opposed a proposal in the UN Security Council

to use the ICC to try those accused of committing genocide, crimes against humanity, and war crimes in Darfur. Members of the Security Council have rallied against the US proposal and insisted that the ICC is the ''logical place'' for the Darfur trials to take place (Hoge 2005). The result was Security Council Resolution 1593, which, as the Introduction and Chapter 8 explain, stipulated immunity form ICC investigation and prosecution for military personnel of non-State Parties.

This is not the first time that the United States has attempted to use its strength in the Security Council to block the activities of the ICC. In December 2004, the United States attempted to block a resolution, supported by all of the European members of the Security Council that would have allowed the ICC to begin investigating human rights abuses in Burundi. The United States opposed the referral, even though the government of Burundi had requested that the ICC investigate the deaths of 150 Congolese refugees in August of 2004 (Zagaris 2005).

US opposition to the ICC has also involved the withholding of vital military aid from allies, and coercive pressure to sign BIAs. Still, the complementarity provisions of the Rome Statute make it extremely unlikely that US service personnel could ever be brought before the Court. As long as the United States maintains a functioning court system and can investigate claims of human rights abuses, such as those arising out of the Abu Ghraib prison abuse scandal, there is no conceivable scenario under which the ICC would have cause to exercise jurisdiction. Again, the purpose of the Court is to complement national courts, not to supercede them. International legal scholars have suggested that ''the majority of prosecutions for international crimes are expected to take place in domestic courts'' (Akande 2004). If the probability of American service personnel being brought before the Court is so slight, how can we explain the US government's strident opposition to the Court?

Our answer to this question is that US realist concerns are also borne out of an electoral logic of opposition. The following section therefore brings us to the domestic and/or Senatorial context of embedding these concerns and the relevant literature for assessing this process.

Theories of domestic politics

The influence of domestic politics on foreign policy has become ubiquitous across issue areas in international relations scholarship. Domestic political conditions have been used to explain outcomes as diverse as

state participation in international environmental agreements[21] as well as the lack of war between democracies (Maoz and Russett 1993; Russett 1996). At the core of this approach is the recognition that domestic political forces shape the formulation of foreign policy preferences (Milner 1997).

Lisa Martin (1999) argues that the role of legislatures in influencing foreign policy in established democracies is underappreciated (13). She evaluates the formal and informal ways the US Congress influences the formulation of US foreign policy with reference to executive agreements, economic sanctions, and US foreign food assistance. Even in the negotiation of executive agreements, which afford no formal role for the Senate, Martin finds that US presidents anticipate and calculate likely Congressional reactions. Congress can undermine the implementation of an executive agreement by denying appropriations to executive agreements or passing laws that explicitly overturn them. Accordingly, the President must anticipate the Congressional response to any international agreement and take steps to incorporate their preferences (79).

The influence of domestic audiences on the formulation of foreign policy has also been explored in international security and US trade policy. James Fearon (1994) demonstrates that domestic, democratic political audiences increase the potential costs to leaders for backing down in an international crisis and consequently allow democratic states to signal their intentions more clearly than autocrats (581). This insight has been used to explain one of the most robust and significant findings in international security – the democratic peace.[22] Democratic states are not immune to conflict. In fact, one of the findings of the democratic peace is that democracies are equally prone to violent conflict as non-democracies (Maoz and Russett 1996: 624). However, for roughly the past 200 years, democracies have almost never engaged in armed conflict with one another (Maoz and Russett 1996: 624). International political economists note the role that domestic interest groups affected by US trade policy play in the formulation of relevant policy (Grossman and Helpman 1994; Baldwin and McGee 1998).

This foreign policy approach can also be employed to explain US opposition to the ICC. Both supporters and opponents of the ICC have suggested that the ICC has the potential to be a valuable institution in promoting human rights norms.[23] Yet, a disconnect exists between the US government's rhetorical support for international human rights and its vehement opposition to the ICC (Van de Vyver 2001; Schabas 2004; Ralph 2005).

The electoral logic of US opposition: Embedding realist concerns

The Senate's opposition to the Court was based on the perception that the Court unduly threatened US sovereignty and its military personnel stationed overseas. Here, we argue that such opposition to the Court represents an electoral logic or political reality in which realist concerns now reproduce domestic political outcomes that are not favorable to international human rights norms. The lack of American public exposure explains, in part, the failure of policy-makers to engage in an open discussion about the merits of the Court. These domestic factors reflect what we believe is the further institutionalized grounding of US realist concerns. As David Scheffer the Former Ambassador-at-Large for War Crimes Issues explains: "Any arrangement by which a UN-sponsored tribunal could assert jurisdiction to prosecute Americans would be political poison in Congress . . . " (quoted in Lippman 1997).

Although only the Senate is responsible for ratification of this or any other treaty, the institutional structure of the House remains germane to our discussion of electoral logic, because of its consequences for the Senate's approach to the ICC. Specifically, the logic of lobbying for and appropriation of defense spending causes defense patronage to be dramatically diffused among House districts (Ray 1981; Derouen and Heo 2000). For example, when Rockwell began production of the B-1 bomber, it only spent 29 per cent of the development and production budget in its home state of California. Rockwell spread the balance of the project budget across 5200 subcontractors in forty-eight states touching hundreds of Congressional districts (Mayer 1991: 158–74).

The benefits of defense spending are of course not limited to the jobs and economic activity created by production alone (Nincic and Cusack 1979; Hooker and Knetter 1997). Indeed, military employment is assumed by many to be the principal military benefit sought by Congressional representatives because even small military facilities can bring millions of federal dollars into a community each year (Sasaki 1963; Arnold 1979: 95; Mencken 2004). House committee members are apparently able to increase the level of military employment in their districts by, among other strategies, wielding influence over the military bureaucracy (Arnold 1979: 119). Note, for example, The Director for Information Operations and Reports for the Department of Defense reported (DoD) in 2003 that there were 1,701,078 military and civilian jobs spread through all fifty states.[24]

In short, the budget process in the House leads to a diffused allocation of military patronage across House districts and thus across states. Moreover,

the lobbying strategy of defense contractors also leads to broadly diffuse allocations of defense expenditures across House districts and thus across states. While much more could be discovered about the manner in which the House geographically distributes defense spending, for our purposes we need only observe that defense spending is indeed diffuse. Because defense spending is diffuse, no state has a complete absence of military patronage whether production, employment, or both. Accordingly, all senators have some level of defense spending in their electoral spheres because of this widespread diffusion of the benefits of defense spending across House districts. Accordingly, every Senator has at least some constituents for whom matters of defense and defense spending are highly salient in terms beyond patriotism and security. Thus, despite the relatively narrow role the Senate might have in determining where defense resources are spent, each Senator has a constituency that has a direct economic interest in military patronage (Clotfelter 1970).[25]

Two critical observations about the Senate and Senatorial elections inform our argument. First, every two years one third of the Senate stands for reelection. Second, Senate incumbents enjoy a well-known and substantial advantage over their challengers (Gelman and King 1990; Collier and Munger 1994; Highton 2000; Ansolabehere and Snyder 2002). These two facts are important for our purposes because, when considered together, we can extrapolate that Senators individually would never seek out a potential issue that might help provide leverage to an otherwise disadvantaged challenger. Further, because one third of the Senate is functionally always running for reelection, the Senate collectively is unlikely to embrace an issue that starts debate with a large and hostile opposition. That is, Senators generally face an easy reelection unless there is some salient issue that could mobilize the electorate against them. Thus, both Senators individually and the Senate as an institution are risk and controversy averse.

Support for the ICC could easily be portrayed as support for the international prosecution of US military personnel. The nuances of complementarity provide for too complex of a rebuttal to the accusation of anti-patriotic policy positions. Policy that could be perceived as asking for a ''permission slip'' for our military actions or subjecting US military personnel to political prosecutions abroad is a politically untenable position for an incumbent or challenger.[26] Since the electorate could not have a sufficient amount of time and experience with the ICC between ratification and an election cycle to blunt accusations that support for the ICC was equivalent to nonsupport of the military, broad based support in the Senate simply is not likely to ever occur. This fear of providing challengers with an incendiary issue can also

account for the utter absence of meaningful Senate deliberation on the merits of the Court.

Votes in the Senate

In this subsection, we argue that Congressional opposition to the ICC is the result of the electoral logic of both the House and the Senate. Because defense spending is diffuse across House districts and thus across every state for every Senator, and because there exists a well-documented incumbency advantage in the Senate, Senators will be unlikely to jeopardize their relatively safe seats by supporting the ICC. Despite jurisdictional barriers that make prosecution all but impossible, support for an institution that could nominally prosecute US service personnel would anger a broad swath of their constituents. Again, our claim is that the source of opposition to the ICC among the American public is a lack of discourse regarding the jurisdiction of the Court. Our theory has two testable implications. First, in an effort to avoid endangering their relatively safe seats by voicing support for the ICC, Senators should generally vote against US cooperation with the ICC. Second, Senators that have won their previous races by very narrow margins, who are up for reelection in the near future, or who have a high percentage of DoD employees and expenditures in their state should generally be more opposed to the ICC then those Senators that won by a large margin, have a longer electoral time horizon, or have a low percentage of DoD employees in their states. In the following section, we evaluate these hypotheses with reference to specific Senators in the 107th and 108th Congress.

During this time, the Senate considered the only two significant votes taken regarding the ICC. Critically, the Senate has never considered an up or down vote on ratification of the underlying treaty either in committee or on the floor. This complete failure to engage the issue of the Court – even for the modest purpose of assessing its merits or flaws – indicates political dynamics at work beyond the simple merits of the Court. That is, no vote by any Senator is actually a vote in favor of the ICC. No Senator has even attempted to engage in a persuasive debate with the opponents. Thus, we face the difficult empirical challenge of demonstrating why the dog did not bark, as it were. Still, despite the paucity of direct evidence, we can infer a great deal from the anti-ICC votes taken when considered along with military patronage and electoral outcomes. The hostility toward, as well the silence about, the ICC can be attributed to this electoral logic.

As Table 1.1 shows, ASPA 2001 was introduced in the Senate in December of 2001. It justified US noncooperation with the ICC because of a claimed absence of immunity from prosecution regardless of US ratification status.[27] ASPA 2001 also claims that, since the crime of aggression has not yet been defined, senior elected American officials could be exposed to prosecution by the Court.[28] Because this law voices objection to cooperation with the ICC, we expect to find broad support in the Senate.

ASPA 2001, as Table 1.1 indicates, passed in the Senate by a wide margin 78–21 suggesting that Senators overwhelmingly objected to US cooperation with the ICC. Among those Senators with the closest races in their previous elections,[29] 87 per cent voted to oppose the ICC. There were twenty-three Senators that experienced such close races. Twenty of that group voted to oppose the ICC in the ASPA 2001 vote. Each of these twenty-three Senators voted the same way on ASPA 2001 and on ASPA 2002.

Although only 21 per cent of all Senators voted against ASPA 2001, generally Democrats were more likely to vote in favor of US cooperation with the ICC and hence against ASPA 2001. To get a better idea about the electoral motivations of votes on ASPA 2001, consider Mary Landrieu (D-LA) and Max Cleland (D-GA). Both Landrieu and Cleland voted against the general pattern of their fellow democrats and against US cooperation with the ICC in 2001. Both Senators' votes appear to be influenced by

Table 1.1. Senate Votes On the ICC

Legislation	Date	Summary	Result of Vote
American Service-members' Protection Act of 2001 (ASPA 2001)	Introduced in Senate December 7, 2001	Prohibits American cooperation with the ICC; Prohibits transfer of national security information to ICC; Gives advance authority to free American military detained in The Hague	Passes in Senate 78–21 Not voted on in the House
American Service-members' Protection Act of 2002 (ASPA 2002)	Introduced in Senate June 6, 2002	Prohibits American cooperation with the ICC; Prohibits transfer of national security information to ICC; Gives advance authority to free American military detained in The Hague	Passes House vote on May 23, 2002; Passes Senate vote 75–19–6 and signed into law by the President on August 2, 2002

reelection concerns. In their previous Senatorial victories, both won by extraordinarily small margins. Cleland won by a 1 point spread and Landrieu won by a statistically insignificant spread (0 points). Both were up for reelection in the year following the ASPA 2001 vote. In other words, they voted to oppose the ICC because they barely won their last Senate races and faced very short electoral time horizons.

In addition, Cleland had a relatively high percentage of DoD employees within his state. In the United States, 5.8 per cent of all DoD employees work and vote in Georgia. Of all the fifty states, Georgia has the fifth highest concentration of DoD employees. Almost all of the Senators with the highest concentration of DoD employees voted to support ASPA 2001 and ASPA 2002. The exceptions were Sarbanes from Maryland and Boxer from California who voted against both. Sarbanes was not running for reelection.

Table 1.2 lists those states with greater than 3.5 per cent of the DoD personnel as well as the Senatorial votes in 2001 and 2002. The two votes for each states' Senators for each year are represented on each side of the slash. For instance, in California, Feinstein voted ''yes'' while Boxer voted ''no'' in 2001 and 2002. Their votes are thus represented as YN/YN. The states with the greatest DoD expenditures along with the Senatorial votes in 2001 and 2002 are shown in Table 1.3.

Note that, while Kennedy joined Boxer and Sarbanes as outsiders voting ''no,'' Kerry, on the verge of a presidential run, voted ''yes'' both times. Otherwise, all the Senators in the seven states with the greatest DoD expenditures consistently voted ''yes.''

Levin from Michigan voted against ASPA 2001 but for ASPA 2002. His vote for ASPA 2002 insulated him from criticism for his vote against ASPA

Table 1.2. States with the Highest Percentage of DoD Employees

State	% DoD Employees in 2000	Senate Votes ASPA 2001/2002
California	10.4	YN/YN
Virginia	9.8	YY/YY
Texas	9.0	YY/YY
South Carolina	6.8	YY/YY
Georgia	5.8	YY/YY
Florida	4.6	YY/YY
Maryland	3.8	YN/YN
Michigan	3.7	YN/YY

Source: Department of Defense, Directorate for Information Operations and Reports. Available at: http://www.dior.whs.mil/mmid/mmidhome.htm

Table 1.3. States with the Highest Percentage of DoD Expenditures by the Federal Government in 2000

State	Percentage of DoD expenditures by Federal Gov. in 2000	Senate Votes ASPA 2001/2002
California	14.8	YN/YN
Virginia	11.3	YY/YY
Texas	9.9	YY/YY
Florida	5.3	YY/YY
Maryland	4.1	YN/YN
Massachusetts	3.9	YN/YN
Arizona	3.8	YY/YY

Source: Department of Defense, Directorate for Information Operations and Reports. Available at: http://www.dior.whs.mil/mmid/mmidhome.htm

2001. Like Levin, seven other Senators switched their positions between the 2001 and 2002 votes. Of the eight vote-switchers, five voted for the nearly identical ASPA 2002 after voting against ASPA 2001. Three who voted for ASPA 2001 then voted against ASPA 2002. By voting for ASPA at least once, each of the switchers could avoid paying an electoral price for opposing ASPA. These eight likely voted ''no'' once for the purposes of credit-claiming to some specific subconstituency group.[30]

ASPA 2002 contained nearly identical language to ASPA 2001. Both bills called for prohibitions on American cooperation with the ICC, on the transfer of national security information to The Hague, and gave advanced authority to the executive to free American military personnel detained at The Hague by any means. Just as in 2001, ASPA 2002 passed by a wide margin in the Senate with seventy-five Senators voting in favor, nineteen opposed and six abstaining. The bill was signed into law by President Bush in August of 2002. Among all of those Senators with the highest percentages of DoD employees in their states[31] 86 per cent voted against both ASPA 2001 and 2002. Our theory predicts that those Senators with a shorter electoral time horizon should be more inclined to vote against US cooperation with the ICC. Thirty-three Senators were up for reelection in 2002, just months after the ASPA 2002 vote. Of the thirty-three Senators up for reelection in 2002, 88 per cent voted to oppose US cooperation with the ICC. For ASPA 2002 vote, there were thirty-four Senators with a long electoral time horizon (up for reelection in 2006). Seventy-two per cent of those Senators with a longer electoral time horizon voted to oppose ASPA 2002.

The votes suggest that there is a far reaching and ubiquitous Senate opposition to cooperation with the ICC despite the virtual absence of

jurisdiction over US personnel. Opposition to the ICC is particularly intense among those Senators with short electoral time horizons, low margins of victory in their previous races, or high percentages of DoD employees and expenditures in their states. While these factors may conflate, what is inarguable is that the widespread opposition is driven by electoral logic rather than policy calculus. This electoral logic also is the source of the absence of meaningful consideration of the Court by the very policymakers responsible for any possible implementation.

Reengagement: US incentives to participate in the ICC

Having discussed the electoral logic of the US Senate, we can now turn our attention to the theme of disembedding the realist concerns via a reengagement with the ICC. There are at least three compelling reasons that ratification of the Rome Statute remains in the best interests of the United States. First, as already discussed, the abundant jurisdictional constraints of the Rome Statute functionally allow the United States to ratify the treaty without any real fear that American service personnel will be prosecuted. Specifically, complementarity means the Court can never be a venue of first concern. Moreover, the ubiquitous SOFAs and BIAs mean no prosecution of US personnel is feasible. Any claims that a politicized rogue Prosecutor could bring charges against American service personnel are undermined by these expansive jurisdictional constraints. Even if the United States were to ratify the Rome Statute, the Court simply could not exercise jurisdiction. Thus, the likelihood that American service personnel could ever find themselves facing indictment before the ICC is extremely low. In short, a consideration of the terms of the Rome Statute demonstrates that so long as potential violations of the treaty terms are or could be prosecuted by domestic or military courts, the ICC may not exercise jurisdiction over American service personnel.

The complementarity provisions (Articles 1 and 17) of the Rome Statute make the ICC unequivocally a supplemental system, not a substitute for domestic law. Additionally, by June 2008, over 100 signatories to the ICC had entered into BIAs which prevent them from extraditing US service personnel to the Court. The US government has also altered extant SOFAs to include immunity from the ICC for Americans involved in UN peacekeeping missions.

This multiplicity of jurisdictional constraints severely limits any prosecutorial ability to bring American service personnel before the ICC. The

point is not that the United States has or will not violate the terms of the Rome Statute. Rather, ratification of the Rome Statute is in the US interest because the United States can claim the moral high ground without fear that the jurisdiction of the Court will be exercised over American service personnel. Yet these jurisdictional constraints and barriers to prosecution have not limited the strenuous opposition to the ICC expressed by American politicians. Senator John Kyl (R-AZ) has suggested:

> It is no mistake that the majority of UN peacekeeping operations are conducted in countries that are non-democratic and whose leaders are hostile to U.S. policies. Leaving our leaders, troops and personnel vulnerable to arrest and use as political pawns would be a colossal mistake and one President Bush was right to avoid. (Kyl 2004)

President Bush has echoed Kyl's concerns, insisting that ''I wouldn't join the International Criminal Court. It's a body based in The Hague where unaccountable judges and prosecutors can pull our troops or diplomats up for trial (quoted in Lauria 2004). Comparatively, Senator George Allen (R-VA) argued:

> The ICC would erect an institution that would be superior to the state and federal governments thus holding dominion over the people of the United States. It would force our nation's systems of laws, courts and criminal justice to surrender authority and limit our government's control over the well being of American citizens. (Allen 2002)

These comments suggest that US politicians fear the seemingly unchecked power of the Prosecutor of the ICC. If the Prosecutor has a political agenda and US service personnel are subject to the jurisdiction of the Court, then ratification of the Rome Statute could be extraordinarily risky for the US government. Yet these concerns obfuscate the issue. Even if the Prosecutor acts disingenuously and initiates politically motivated investigations, ultimately, for a trial to take place jurisdiction must be established. Establishing jurisdiction by the ICC is difficult, particularly if the state harboring the accused is pursuing an investigation itself.[32] While the prima facie case against US ratification of the Rome Statute might be a strong one, further consideration suggests that the jurisdictional constraints of complementarity, along with BIAs and SOFAs, undercut the threat of a rogue Prosecutor.

Second, given recent US activities abroad, threats to exercise jurisdiction over US personnel, despite the jurisdictional constraints, appear unrealistic. Afghanistan, Iraq generally, and Abu Ghraib specifically, as well as the detention of prisoners in Guantanamo[33] all provide ample opportunity for political prosecutions in the ICC, yet none have been initiated. The argument

could be made that the ICC cannot exercise in these cases jurisdiction in these cases, since the US has not ratified the treaty. However, given the jurisdictional constraints, if the assumption that a rogue Prosecutor would ignore the absence of jurisdiction is accurate after ratification, it should hold now. That is, the claim that the Court would bring indictments, despite an absence of jurisdiction, has been undercut by the absence of any political indictments so far. The Court's disinterest in these American actions suggests that it is unlikely that the Court will ever attempt to bring US personnel before the Court. In addition to the procedural difficulty of establishing jurisdiction over the American service personnel, the Court has demonstrated a lack of interest in the recent activities of the United States. This lack of interest on the part of the ICC should serve to encourage US ratification of the Rome Statute, since it implies that prosecution of American service personnel at any point in the future is unlikely.

Third, given the ratification of the treaty by other similarly situated countries, we suggest that the United States, like its allies, should have more to gain than to lose from ratification. Specifically, the ICC could serve as the primary adjudicatory venue for terror prosecutions. It could be utilized to further any relevant US policy. The US government has similar incentives as any other western state, particularly those that are engaged in the ''War on Terror.'' Yet the European allies of the United States have embraced the Rome Statute and encouraged other states in the world to join. Take for example, the United Kingdom. After ratifying the Rome Statute itself in October of 2001 the British government was quick to congratulate twelve newly ratifying states in April of 2002. The British Foreign Secretary Jack Straw stated:

> This is an historic day for international justice and for the human rights of every citizen in the world . . . This government has always been an enthusiastic supporter of the Court. It is our belief that the global rule of law is stronger than the local rule of tyrants. (Global News Wire 2002)

The United Kingdom is a traditionally close US ally and has been one of the most ardent supporters of the ''War on Terror.'' Italy and Poland, which also sent troops to Iraq, ratified the Rome Statute in 1999 and 2001 respectively.[34] The Polish government expressed its support for US actions in Iraq suggesting, ''We are ready to use a Polish contingent in the international coalition to contribute to making Iraq comply with the U.N. resolutions . . . It's clear that the problem of existing weapons of mass destruction is a fact.''[35] These European states ratified the Rome Statute and have participated in the same global actions as the United States. That

the US government has remained opposed to the Court, despite the support of similarly situated allies, suggests that senatorial logic remains a rather unique causal factor of US opposition to the ICC.

Conclusion: Beyond the disconnect and US realpolitik?

In this chapter, we showed how US opposition constituted what we called an embedded realpolitik. Our argument was based on two premises: first, US legal objections embedded themselves in the domestic Senatorial structure of the United States; and second, because of electoral pressures, Senators were likely to oppose the ICC, despite the near impossibility of any US citizen standing for prosecution before the Court.[36] In our view, American exceptionalism remains one, albeit inadequate explanation of the US policy of disengagement. A more plausible explanation is one that shows how US opposition has been logically grounded in the domestic political structure. By examining the electoral logic of the United States, we were able to assess the incentive structure of senators and provide a countervailing set of incentives that would help to initiate a process of ''disembedding'' US realist concerns.

As we saw, Senatorial opposition to the Court also stemmed from a general lack of public discourse about the abundant jurisdictional constraints mitigating against any US citizen ever facing prosecution. As the debate among US policy makers shifted from discussions of jurisdiction and complementarity to the specter of politicized prosecutions, the American public lacked the willingness and opportunity to obtain genuine knowledge of the ICC. This translated into open hostility among the American public, and further solidified Senatorial opposition to the ICC. More importantly, it suggested a soft link between the earlier pretences of the Bush Administration and the rather pervasive lack of understanding of the many checks and balances of the Court.

We also concluded that the ICC has stalled in the Senate because the electoral risk of supporting it exceeds any marginal benefit from the potential for cheap talk about human rights or an additional mechanism for asserting US control over global events. This electoral calculus suggests we should not expect such opposition to wane over time, inspite of recent State Department Statements suggesting a warming up to the ICC and even the decision by the Bush Administration to ''boilerplate'' ICC provisions into the statute of the Iraqi High Tribunal. After all, good politics can and should trump ''good'' policy.

Notes

1. Scharf (2001) is a notable exception to this. He argues that the jurisdiction extended by the Court is firmly rooted in long-standing principles of international law and that US interests would be best served by ratifying the Rome Statute.
2. Contentious jurisdiction can be established in one of three ways: through a compromissory clause, making a declaration under the ICJ's optional clause or establishing a special agreement for a specific dispute. See pages 19–22. See also Ailslieger (1999: 87).
3. Gurule (2001) also makes this argument with a fascinating illustration of the potential for the ICC to exercise jurisdiction in a hypothetical scenario in which the United States launches missiles at a military target and misses, hitting civilians.
4. Bolton (2001) rejects the Court's purported ability to exercise jurisdiction over non-Party States, arguing that this fundamentally misconstrues the limitations of ''international law'' (pp. 172–3).
5. Leigh (2001: 126) argues in favor of this version of Article 12.
6. Scehffer (1999: 19) also argues that had the opt-out clause, included in the original proposal by the International Law Commission (ILC) in 1994 been included in the final draft of the Rome Statue the United States would have been more likely to have supported the Court. The opt-out clause would have allowed states to reject the Court's jurisdiction, where it was otherwise warranted with respect to war crimes and crimes against humanity. The opt-out clause would not have applied to genocide, thus allowing the Court to exercise automatic jurisdiction over the crime of genocide.
7. This approach is also undercut by the BIAs and SOFAs currently in effect. Much has been made of European states refusal to sign BIAs with United States, yet given the NATO Status of Forces Agreement (1951) this would be a redundant protection. For more on the NATO Status of Forces Agreement see Draper (1951) and Baxter (1958).
8. On the other jurisdiction proposals from Germany and Korea, see Kirsch and Holmes (1999: 5).
9. Schabas (2004: 710) bolsters this claim, noting that other tribunals in Yugoslavia, Rwanda, and Sierra Leone all have jurisdiction over US nationals, without dispute from the US government.
10. Ralph (2005: 41) makes this argument using international relations literature. Rudolph (2001) suggests that the politics of war crimes trials have been dominated by the interests of the most powerful states.
11. Report of the ILC on the Work of Its Forty-Sixth Session. May 2 to July 22, 1994. UN Doc A/49/10.
12. Scheffer makes a stronger claim to this effect in an interview with the *Washington Post*. For the *Washington Post* article, see Lippman (1997).

13. El Zeidy (2002) describes the US government's first attempt to use Article 16 to pass Security Resolution 1422.
14. Latore (2002) articulates the opposing view, suggesting given the United States' role in the world community participation in the ICC is ''necessary and appropriate.''
15. A complete list of signatories is available at: http://www.amicc.org/usinfo/administration_policy_BIAs.html Provided by The American Nongovernmental Organization Coalition for the ICC.
16. Additional information including country lists and the text of each of the BIAs is available at: http://www.amicc.org/docs/CGStableofBIAsbyICCstatus%2010-04.pdf
17. President Bush signs HR 2764 into Law. Information available at: http//www.amic.org/docs/White%20House%20Statement%2026%Dec%202007.
18. Text of the letter is available online at: http://www.globalpolicy.org/intljustice/icc/crisis/0703annan.htm
19. http://www.amicc.org/usinfo/administration_policy_pkeeping.html
20. Remarks by Ambassador Cunningham on the US decision not to renew SC Res. 1487 (June 22, 2004). Available at: http://www.amicc.org/usinfo/administration_policy_pkeeping.html#USstatements
21. Raustiala (1997) explains the US refusal to sign the Convention on Biological Diversity with reference to domestic politics, specifically by looking at the relationship between the executive and legislative branches of government, pressure from interested societal actors, and the political incentives of politicians.
22. For information on the democratic peace in international security see Maoz and Russett (1993). See also Bueno de Mesquita et al. (1999); Schultz (1999); Russett (1996); and Zacher and Matthews (1995).
23. For supporters of the Court see: Sadat-Wexler (1999); Leigh (2001); Latore (2002). For this view from an opponent of US ratification of the Rome Statute, see Scheffer (1999).
24. Report for 2003 available at: web1.whs.osd.mil/mmid/MMIDHOME
25. The electoral logic behind the saliency of defense issues may also be strengthened by the all-volunteer army as each state has volunteers in the armed forces. An in-depth analysis of this issue is beyond the scope of our project, but the results would not change our argument. That is, if the military personnel come from almost all the states, our argument is even stronger. If the military personnel do not come from all the states, our argument is not diminished because the other electoral pressures are sufficient to support our argument.
26. For a lengthy discussion of low-level rationality and the necessity of clear and concise communication signals, see Popkin (1991). Incumbent President George W. Bush frequently responded to criticism about the Iraq war from candidate Senator Kerry with an assertion that the United States would never seek a permission slip from abroad to protect itself. Invariably, this line was met with thunderous applause and assent.

27. See section 5 of the bill.
28. See section 6 of the bill.
29. Between a 0 and 5 point spread from the next highest vote getter.
30. None of the eight switchers responded to our inquiries regarding why they switched votes on virtually identical legislation.
31. At least 3.5 per cent of all US DoD employees. This includes the following states: Missouri, California, Florida, Georgia, Maryland, South Carolina, Texas, and Virginia. See Table 1.3.
32. There are two conditions under which the chief prosecutor may exercise jurisdiction: (1) if the territory on which the crime being investigated took place belongs to a ratifying state (Article 12.a); and (2) if the individual accused of a crime is a national of a state that has ratified the Rome Statute (12.b).
33. Gitmo is the vernacular for GTMO which is the abbreviation for the US Naval Station in Guantanamo Bay Cuba. For more on Gitmo, see www.nsgtmo.navy.mil
34. A complete list of ratifying states is available at: http://www.un.org/law/icc/
35. White House Press Release, ''Statements of Support from Coalition Members.'' March 26, 2003. Available at: http://www.whitehouse.gov/infocus/iraq/news/20030326-7.html
36. An obvious exception would be in the event a US citizen acted as a mercenary for some other country and was detained by non-US forces.

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From Realism to Legalization: A Rationalist Assessment of the International Criminal Court in the Democratic Republic of Congo

Eric K. Leonard and Steven C. Roach

The number of theoretical perspectives in International Relations has grown exponentially over the past decade. This explosion and the plurality that it represents is the result of many novel organizational frameworks and a rapidly changing world order. An issue that most, if not all theorists, including rationalists, continue to investigate is whether state leaders, can, in the context of new institutional rules, serve the best interests of world order. This issue raises an important question: what precisely does it mean to serve in the best interests of international society? Depending on the institutions or issue areas we are focusing on, interests can reflect the goals of states, nonstate actors, or international organizations. Our aim in this chapter is to focus on the objective relationship between institutional effectiveness and the interests of states, or, in the case of the International Criminal Court (ICC), non-State Parties and State Parties.

Focusing on state interests in this manner does come with a proviso: it leaves out or downplays the role of many actors that are expected to influence the actions and future development of the Court (i.e., NGOs). This is not to say that rationalists reject the role of such actors, but rather, that focusing on the constitutivity of needs, values, and beliefs takes us away from our central task of explaining the causal effects of institutions in the anarchical realm of the interstate system (Brown 2005: 11–16). Because state

cooperation will likely depend on the ICC's capacity to act in a consistent and fair manner, it is important, we argue, that we apply rationalist approaches to understand the relationship between norm causality and the capacity of the ICC to act effectively. In other words, rather than trying to work above and beyond realpolitik, we need to understand the difficult trade-offs involved between realpolitik and the matrix of politicized justice, including the loss of credibility of issuing arrest warrants in high-intensity conflict areas, and the conflict between the UN Security Council veto and the ICC's investigation in crisis areas, such as Sudan.[1]

Mainstream theory explains many of these trade-offs. And it does so in a manner in which we can better predict and explain the outcomes of conflicts between power politics (or the Security Council veto) and the ICC's goal of promoting peace. We also want to stress here the trade-off between the subjective knowledge that the other essays in this book provide, and the rationalist focus that this chapter offers. The latter focuses not on ethics or issues of legitimacy (agency: moral desire, political will, and choice), but on the functional traits of institutions, such as the delegation of state power. When states delegate their authority to global institutions, they also create additional normative constraints on theirs and other states' behavior. Thus, the more functional such institutions become, the more effectively they should be able to operate and produce stable patterns of cooperation.

The purpose of this chapter, then, is to apply rationalist approaches to the ICC in order to explain the effectiveness of the ICC, particularly in terms of its innovative institutional design and its role in the Democratic Republic of Congo (DRC). Unlike Caroline Fehl's chapter, which assesses how the ICC offers a test case for bridging the gap between rationalism and constructivism, we show how rationalist, mainstream theories explain an important dimension of realpolitik in the ICC's functional design. The chapter begins with a brief discussion of Realism, Neoliberalism, and legalization theory. Here, we analyze the limits of these theories in relation to the ICC, arguing that realism and neoliberalism fail to adequately explain the relationship between the effectiveness of the ICC and international norms. We also argue that legalization theory, while quite useful in explaining the matrix of politicized justice, does not adequately explain the relationship causal between the effectiveness and the *evolution* of the ICC. The final sections of this chapter focus on the DRC's self-referral in order to test and further ground some of the insights of these approaches.

Realism and neoliberalism

For Kenneth Waltz and neorealists, political ordering necessitates a particular behavioral pattern among states (Waltz 1979).[2] This pattern is predicated on the pursuit of self-interest, but is also due to the structural constraints of the system as opposed to the nature of human behavior. The structural tendency of this ordering is what Waltz calls ''balancing,'' the process in which states attempt to fulfill their egoistic desires in a relative manner. In contrast, traditional classical realists see the balance of power as the principal stabilizing mechanism of the international system. Despite these differing strands of realist thought, it is important to view realism as a unitary theory. This is because realism consists of foundational assumptions, or to use Lakatosian terminology, ''hard core'' assumptions of realist thought (Lakatos 1970; Nicholson 1998: 69–71).

At its core, realism is a power-based theory.[3] If actors, or more specifically sovereign states, wish to survive and fulfill some of their egoistic desires in the anarchical realm of international politics, then they must act according to the dictates of power. This quest for power will be distinct from other theoretical positions in its emphasis on not simply the acquisition of power, but on the relative power that each state maintains. From this very basic assumption, one discovers several other core assumptions of realist thought. First, sovereign states are the principal or privileged actors of global politics. Second, there is some disagreement among realists on what constitutes the unitary nature of the state, but the majority of influential realists accept this premise.[4] Third, the system in which these actors exist is anarchical in nature. Fourth, because of the previous assumptions, states act/react to protect their national security (which is their primary interest), thus leading to an ever-present state of mistrust and conflict and a minimization of moral–political behavior. We will return to this final point in the discussion of the DRC.

So how does realism assist us in understanding the formation process or institutional design of the ICC? At the surface, the explanatory value appears limited. The Like-Minded group of states and the Coalition for the International Criminal Court (CICC) advocated an independent court that would have universal jurisdiction (Bendetti and Washburn 1999: 20–1).[5] From a realist perspective, these actors desired a completely independent prosecutor who would possess the power to initiate investigations of the core crimes. The United States, however, viewed the broad

jurisdictional reach of the Court as simply unacceptable and potentially dangerous. As already noted, the ICC maintains jurisdiction over crimes committed on a state party's territory, or if the Security Council refers a situation that has taken place within the borders of a nonstate party (Rome Statute Article 12.2). This compromise did not necessarily favor the Like-Minded Group and the CICC's position, nor the United States for that matter; however it did suggest the perceived need to placate the United States because of its relative power within the global system. The Rome Conference delegates, for example, agreed to strengthen the principle of complementarity, establish and maintain a role for the Security Council, provide protective measures for national security information, include a large number of due process clauses, and approve a clear and comprehensive definition of the core crimes.[6] These compromises came about primarily because of the perceived need to accommodate US power (where that power did not infringe on the integrity of the Statute). Indeed, as one of the Korean delegates stated, ''It's as if we're being forced to choose [between] a court crippled by American requirements . . . or a Court crippled by lack of American participation'' (Weschler 2000: 103).

Nevertheless, one of the greatest fears of many of the Rome Conference delegates was that if the Court did not receive US support, it would simply become another League of Nations. On the other hand, as Charles Smith and Heather Smith have explained, ICC authorities and Rome Conference delegates remained unwilling to grant special protections to US military servicepersons stationed overseas. From a classical realist perspective, it could be argued that even the United States was willing, as a prudent actor, to accommodate some of the concerns of the delegates through diplomatic negotiations; while many developing states sought to address the hegemonic interests of the United States as a way of balancing their own demands for universal jurisdiction against US hegemony.[7] Neorealists such as Waltz cannot explain the nuanced dynamics of this bargaining process, since they treat states as bounded, self-help units, whose behavior can only be measured in terms of the distribution of capabilities. Accordingly, they ignore the complex realpolitik dimension of the ICC: the crucial influence of domestic political factors including the lack of cooperation of substate groups. This suggests that neither states nor the ICC are unitary actors per se, since conflicting interpretations can and often do produce unpredictable outcomes. In the DRC, as we shall see, the ICC Prosecutor's threat to exercise his *proprio motu* power may have triggered the state's self-referral;

while the political dynamics at the national level have threatened to alter ICC policies (more on this in the later sections).

Like neorealism, neoliberal institutionalism[8] also treats states as rational-unitary actors. Neorealists assume that relative gains are conditional, meaning that states tend to seek absolute gains. Hegemony, they contend, is not a requirement for cooperation among states; nor is it a dominant causal factor. If the hegemon's power declines the cooperative arrangement or regime that the international community created persists. This is because the international community has invested large amounts in the formation process of the regime; hence, they do not want to lose their investment. This might explain why US opposition has not unduly limited the development of the Court, but has prompted many to claim that the United States has lost an important opportunity to shape the Court. Yet, the more important limit of neoliberalism's explanatory power is a normative one: that the implementation of rules and procedures of global institutions require obligations and responsibilities that restrict the state's ability to maximize its interests, whether this means the pursuit of economic or political relative gains (vis-à-vis other states and domestic actors). In fact, the independence of the ICC could mean a liability of prosecution for state party leaders that may significantly alter the matrix of justice, or how the actors involved may seek alternative ways of influencing one another. This is certainly the case in Uganda, where, as the other contributors in this book explain, the ICC's involvement has shaped the interests and demands of the Ugandan government and the Lord's Resistance Army (LRA). If the Ugandan government's demands are likely to alter the policies of the ICC and vice versa, then we need to assess in greater detail the causal impact of norms and institutional rules of the ICC. This brings us to our discussion of legalization theory.

Legalization theory and institutional dynamics

Legalization theory first appeared in the special issue of the journal *International Organization*, authored by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. Legalization, these authors explain, ''refers to a particular set of characteristics that institutions may (or may not) possess'' (Abbott et al. 2000: 401). It consists of three so-called ''general variables'' of ''legalized regimes'':

obligation, precision, and delegation. The term ''obligation'' refers to the level of legal commitment of member states to uphold the norms of the regime (Abbott et al. 2000: 408–12). The primary means by which an institution is constructed with a low level of obligation is through the use of softening devices. These devices include contingent obligations, escape clauses, or opt-out clauses. If the principle of obligation is applied to the Rome Statute, one recognizes the relatively high level of obligation that exists. For instance, Article 86 discusses the obligation of State Parties to the Court, which also reflects how the effective application of the Rules of Procedure is predicated on state commitment to the institution. Perhaps more important is the lack of softening devices allowed under the Rome Statute. For instance, Article 120 stipulates that ''No reservations may be made to this Statute.'' The one area where the obligatory nature of the Statute is weakened is in regards to War Crimes. Article 124 states the following:

> Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [war crimes] when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time.

This opt-out clause remains one of the only softening devices contained in this Statute. Thus, it is empirically accurate to describe the level of obligation in the ICC as relatively high.[9] As a result, one can consider the Court as a highly legalized regime based solely on a very strong level of obligation.

The other generalized variable, precision, involves the level of ambiguity that surrounds the rules that define the institution. It provides a specific articulation of what is expected of member states and limits the amount of interpretation surrounding these rules (Abbott et al. 2000: 412–15). An institution or regime enjoys a high level of precision when the rules are clear, cogent, and do not allow for substantial opportunity for interpretation. In examining the ICC Statute, one recognizes the relatively high level of precision in regards to the Rules of Procedure and Evidence and the Elements of the Crime.[10] In this context, there is a significant precision concerning what constitutes a crime, the jurisdictional boundaries, the trigger mechanisms for investigation, the composition of the Court, the responsibility of states, the rules of the trial, the limits on

penalties, the means of enforcement, and the amendment process. An example of such precision includes the articles containing the crimes of genocide, crimes against humanity, and war crimes that fall within the Court's jurisdiction (Rome Statute Articles 5–8). These definitions are based on established international law; their functional capacity has already been tested in past legal proceedings such as Nuremberg, the former Yugoslavia, Rwanda, and others. As a result, the language surrounding each definition has already progressed through an evolutionary cycle that has resulted in very specific, detailed, and intersubjectively accepted understandings of these crimes.

If there is one area of the statute that lacks precision, however, it is the principle of complementarity, in particular, how assistance to states and the deferral of responsibility pose challenges to the independence of the ICC (''positive complementarity,'' see Stahn 2008). As the authors of legalization theory point out: ''imprecision is not synonymous with state discretion, however, when it occurs within a delegation of authority and therefore grants to an international body wider authority to determine its meaning'' (Abbott et al. 2000: 415). Positive complementarity is thus an example of the controversial and contingent nature of discretionary power exercised by the Court.

Another example of imprecision is the fourth listed crime, (albeit not enforceable because it lacks an encoded comprehensive definition and elements) aggression. According to the Rome Statute, ICC jurisdiction would extend to the crime of aggression, even though it remains unclear under what conditions this crime would be investigated, or whose competence would be involved in conducting such an investigation. Despite extensive discussions on this topic, the Assembly of State Parties do not appear any closer to adopting a comprehensive definition.[11] To the Court's credit, it was determined at the Rome Conference that ICC authorities would not initiate investigations on this crime without a precise definition (Rome Statute Article 5. 1, 2).

Like precision, delegation reflects an increasingly important dimension of global governance, notably the authority that institutions grant to third parties. Such authority concerns the ability of third parties to implement, interpret, apply rules, resolve disputes, and make future rules (Abbott et al. 2000: 415–18). Thus, delegation is high when member states agree to third-party independent arbitration to resolve disputes. The other component of this variable concerns the binding nature of regulations and the centralization of enforcement. In the case of the ICC, it is apparent

that a high level of delegation exists. Here, the process of decision-making begins and ends with independent actors making decisions that are in the best interests of international justice. These actors include the Office of the Presidency, the Office of the Prosecutor, and the elected Judges who are all expected to represent the interests of the Court. In the case of the Prosecutor and the Magistrates, these actors not only have independence from the member states when rendering decisions concerning jurisdiction, investigation, and judgment; but their decisions are also binding, at least statutorily, on all State Parties of the institution. The principle of complementarity, which some may consider a weakening of the delegation variable, actually enhances the level of delegation provided by the Court. The process of complementarity, as already noted, allows domestic courts to exercise jurisdiction over these crimes, but provides ultimate authority and interpretation as to how these cases are dealt with to the Court's independent actors. This level of interpretation, when it comes to issues of unwillingness or inability, exemplifies the high level of delegation accorded to this institution (Rome Statute Article 17).

The one area where the Court lacks a high level of delegation is in regards to the enforcement of their binding rulings. According to legalization theory, high delegation is also contingent on a centralization of enforcement. Because enforcement of the Court's decisions remains dependent on state cooperation, the independence, in regards to delegation, is somewhat limited.[12] Still, it could be argued that the high level of legal authority granted to the ICC, despite the lack of centralized enforcement, provides evidence of its high delegation.

According to legalization theory, then, a high level of legalization should create an effective institution – something we will return to in greater detail in the next section. However, because the theory remains a primarily descriptive approach to institutional formation processes, it is also limited in respect of the efficacy of norms and the political processes that generate many of the causal effects. According to Abbott, for instance, ''[there] is considerable difficulty in identifying the causal effects of legalization. Concerns about reciprocity, reputation, and damage to valuable state institutions, as well as other normative and material considerations, all play a role'' (Abbott et al. 2000: 419). But this lack in legalization theory also raises an important question: why, according to this theoretical perspective, did so many states seek to establish a global institution whose prosecutorial authority might infringe on their own sovereign interests? Legalization theory's answer is that states' interests (in this case the

establishment of a known and enforceable system of international justice) remain exogenously given to the Rules and Procedures of the international legal process, which means, in this case, that we can use the above variables to measure the external impact of institutional decisions on state behavior.[13]

The anayltical challenge, then, lies in linking the regulative force of proscriptive norms of the ICC with institutional effectiveness. This already assumes the commitment needed to enforce the rules of the institutions. As the Preamble of the Rome Statute states:

> [the ICC] affirms that *the most serious crimes of concern to the international community as a whole must not go unpunished* and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation; is determined to *put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,* and for the sake of present and future generations and to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.

The architects of the Court believed that in order for the ICC to be deemed effective or successful, it must provide a retributive form of justice, and serve as a deterrent for future perpetrators (Robinson 2006). As many observers of the Court have pointed out, such lofty goals may lead to disappointment and to the a belief that the ICC can serve as a panacea to replacing a culture of impunity with a culture of accountability (Wippman 2006: 101). We endorse, however, this conclusion: that the ICC must be viewed as an evolving institution that seeks to fulfill its goal of retributive justice via the development of policies aimed at enhancing the positive dimension of complementarity. In the next section, we shall examine how the DRC situation poses important challenges to this dimension.

Democratic Republic of Congo

In 2003, Congolese leaders established a new transitional government based on a power-sharing agreement reached in December 2002. The leaders represented the Inter-Congolese Dialogue – the government, the unarmed opposition, the Congolese Rally for Democracy (RCD), and the Movement for the Liberation of Congo (MLC). The agreement officially ended the "Second Congo War" (1997–2003) in which an estimated 3.3 million

people, many of them innocent civilians, had been killed (the ''First Congo War'' that took place in 1997 drove the Leader Mobuto Sese Seko into exile and led to the renaming of Zaire to the Democratic Republic of Congo). Joseph Kabila, the son of Laurent Kabila, who ruled the DRC from 1997–2001, emerged as the new leader of the new transitional government and would oversee the implementation of the new 2006 constitution (''The Constitution of the Third Republic''). Despite the peace agreement, human rights atrocities continue to be perpetrated in eastern Congo, particularly in the regions of the Ituri (Northeast) and South Kiva. The crimes perpetrated in these regions have been directed at the Hema, Lendu, the Mai-Mai, and the Pygmies, and include a systematic campaign of cannibalism against the Pygmies and hundreds of innocent civilians massacred near the town of Songolo in August 2003.

In an effort to head off the ICC's initiative to launch its own investigation into the situation, Kabila (self-) referred the situation to the ICC in March 2004. The self-referral was somewhat surprising considering that Kabila himself may have been responsible for some of these crimes and could be subject to investigation. But Kabila's decision, while signaling the government's willingness to work with international authorities to end the violence, was intended to summon the ICC's assistance, that is, to have the ICC pay the political and economic costs of trying the perpetrators (''positive complementarity''). As William Burke-White (2005: 565) points out, Kabila probably has less to worry in terms of being investigated and prosecuted since ''any crimes against humanity committed by Kabila likely occurred before July 1, 2002, and as yet, there is little evidence that he has been directly involved in any of the major issues in the Congo within the Court's temporal jurisdiction.'' If this is true, then it may mean that Kabila enjoys important political electoral advantages where the evidence of crimes committed by his rivals such as Jean-Pierre Bemba Azarias Ruberwa could in fact prove to eliminate the political competition (in May 2008, the ICC charged Bemba for committing crimes against humanity and arrested him in Brussels, Belgium a month later).

Whether or not Kabila has used the ICC as a political weapon for securing power, it is clear that the benefits of self-referrals, including the diminished challenges to admissibility (Article 17) and cooperation by the national government, have involved much needed legal assistance by the Court to the DRC and ''burden sharing'' between the ICC and the DRC. Such ''positive complementarity'' benefits show the importance of the ICC in helping to monitor and manage tensions between political factions, by providing more information of its operations in the area. As Burke-White (2005: 567)

explains of the DRC self-referral: ''Kabila's referral may well be indicative of a broader phenomenon of weak states self-referring situations to the ICC, when sitting governments can benefit from prosecutions but the political costs of prosecuting at home are too great to allow domestic action.'' It should be stressed here that the underdeveloped Congolese national judiciary lacks the needed legitimacy (impartial judges) to promote reconciliation. For unlike the situation of Uganda, where the recently failed peace agreement led to the adoption of a national court with a mandate to try LRA leaders, the Congo judiciary system clearly lacks the resources needed to provide an adequate judicial alternative (see Chapter 4).

On the other hand, the political dynamics at the domestic level may well force the ICC to respond in a cautious manner. As Burke-White (2005: 568) puts it: ''[Yet] at least in the Congo Case, it seems likely that all groups may not necessarily support ICC involvement. The danger in such cases is that the prosecutor will unwittingly or unintentionally play into the hands of the national government, and later the political dynamic within the target state in favour of one particular side.'' If this is true, then the ICC might wish to defer responsibility to the national government, in order to forgo the risk of escalating political tensions between the warring groups. However in the case of the DRC, the Kabila government has thus far cooperated fully with the ICC, and unlike the Ugandan situation has not pressed the ICC to drop its indictments (for peace). Should the ICC decide to investigate and prosecute Kabila, or other state leaders, the decision will certainly challenge the benefits of state-referral. Moreover, the perceived threat of investigation and prosecution by the ICC Prosecutor is quite likely to change the political dynamics of cooperation. If this were to happen, then we might learn a lesson from the International Criminal Tribunal for Rwanda (ICTR): where the national government refused to give ICTR investigators visas to enter the country, lest the ICTR agreed not to investigate governmental authorities.

As already noted, the ICC has proceeded aggressively with its prosecution of rebel leaders. Thomas Lubanga, the leader of the Hema rebel group, recruited several thousands of child soldiers who, along with his followers, murdered, raped and tortured victims. Lubanga's trial, as previously noted, was suspended by the Trial Chamber I in June 2008. The two rebel leaders charged with committing serious crimes, German Katanga and Mathiew Ngudjolo Chui, are, as of the writing of this chapter, being prosecuted for their alleged crimes committed near Borgo, Ituri on February 24, 2003 (the confirmation hearings got underway on June 27, 2008) (International Criminal Court 2008). It is perhaps fair to conclude that, at

this point, the ICC's operation in the DRC has largely minimized the political costs of holding potentially divisive national trials.

Given these events, we need to address the following questions: How does the institutional effectiveness of the ICC explain the minimalization of political costs? And how do the above-mentioned political benefits of self-referral help to explain the causal impact of the ICC's norms and rules (via the causal impact of its announcement to launch its own investigation). We address these questions below, by first discussing the applied limits of realism, before moving on to examine the difficult implications of the DRC for legalization theory.

Rationalism and self-referral

For realists and neoliberals one of the purposes of international law and international institutions is to serve the political interests of the world's most powerful states (Reus-Smit 2004: 15–18). As Robert Keohane puts it: ''International institutions exist because they perform valuable functions for states. They can make a difference, but only when their rules create specific opportunities and impose constraints which affect state interests'' (Keohane 1997: 489). As such, the establishment of a long-standing, binding set of legal principles remains more a hindrance to states than a benefit to their relative power. The claim that the ICC's effectiveness can only be measured in terms of the rational utility of states raises the question of how the DRC self-referral will alter the policies of the ICC. Will political conditions force the Prosecutor to shift his attention to state leaders by issuing indictments of these leaders? If this change of policy is in response to warring conditions and is intended to promote the Court's commitment to the rule of law, then how will the political costs and effects of this policy undermine its effectiveness.

From a realist perspective, there is only one way to answer these questions: to show that the rationale for self-referral is based on the acquisition of relative power; that any externalized threat to power will be met with a counterthreat that aims to secure the power base of the territorial state. If the DRC sought to take advantage of the benefits of self-referral, such as trust and voluntary cooperation, and if a shift in ICC policy runs counter to the terriorial state's self-interest, then any shift in ICC policy will necessarily undermine the causal impact of its actions and norms. The avoidance of this would require the ICC to maintain a (compromised)

consistent policy of pursuing nonstate leaders, in spite of evidence of the state's recent involvement. A sound policy, in this sense, begins with the Prosecutor's consistent application of the rules of the ICC, with the aim of promoting peace. In a June 2004 letter to the Ugandan President, for example, Moreno-Ocampo stated that ''My Office has informed the Ugandan authorities that we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analysing crimes within the situation of northern Uganda by whomever committed them'' (reproduced in Allen 2005: 45). As this statement and the DRC case suggests, the ICC may need to make additional trade-offs between serving the interests of justice (for the purposes of sustained effective operation) and expanding the margin of tolerance for acceptable political costs.

Trade-offs such as these will invariably involve the influence of NGOs and regional pressures within the matrix of justice. Determining the ICC's effectiveness in terms of state power (interests) may be an important dimension; however, it does not encompass the constitutive effects of these actors, the Judges of the ICC, the NGO community, among others. As such, a more complex, functionalist approach is needed to address these limits of realism. What is more, and to stress a point made earlier, the ICC, like the state is not a unitary actor; divisions within these entities tend to remain beyond the scope of realist explanations. As Jack Donnelly puts it:

> Realism . . . if it is our only tool—we will be woefully underequipped for our analytical tasks. . . . our vision of international relations will be sadly impoverished, and, to the extent that theory has an impact on practice, the projects we undertake in the world are liable to be mingled and misshapen. (Donnelly 2005: 54)

Treating states as unitary actors thus minimizes the utility of realism and neoliberalism. To explain the causal relationship between the ICC and the political dynamics at the domestic level, we first need to assess how the rules of global institutions provide a countervailing set of forces to destabilizing realpolitik effects. How, in other words, do ''legalized regimes'' provide functional incentives for states to uphold the rule of law and to use the benefits of self-referral to reinforce the need for consistent policies?

Legalization: Prospects and challenges

The conceptual framework of legalization, was in many ways, designed to answer this question. One of its principal goals, as already mentioned, is

to provide the conceptual tools for assessing the effectiveness of institutions. As Miles Kahler states: ''Legalization contains an implicit promise: compared to institutions that do not share the characteristics of obligation, precision and delegation, greater cooperative gains will be reaped by resolving collective action problems more efficiently'' (Kahler 2000: 673). If an institution is constructed with high levels of obligation, precision, and delegation, then according to this perspective, its prospects for future success will be enhanced. Since, the ICC, as we saw in the previous section, can be characterized as a highly legalized regime in this regard, then it stands to reason that its future effectiveness will require practical measures to promote its high degree of legalization. Here we need to return, in greater detail, to the role of each of the above general variables of legalization in explaining the effectiveness of the ICC vis-à-vis state participation. Let us begin with delegation.

According to Abbot, Keohane, Moravcsik, Snidal, and Slaughter, delegation is a key variable to the success or failure of an institution. It contains its own set of dimensions that determine the extent of its legalized effect: namely, independence, access, and embeddedness (Keohane et al. 2000: 458). Independence refers to the autonomy that adjudicators exercise in relation to Member States or national governments. One feature of this autonomy is a nonpolitical selection process for court officials, which allows for a long tenure, legal discretion for adjudicators in their pursuit of global justice, and provides the adequate resources to fulfill their mandate (Keohane et al. 2000: 459–62). Access reflects the range of opportunities for actors to influence the institution by submitting a claim. And finally, legal embeddedness refers to the level at which the international norms of the institution are enforced and contained within the domestic political–legal systems.

The political–legal neutrality of the institution depends on the level of delegation, which is indicative of the type or form of dispute resolution employed – either interstate or transnational. The interstate form of dispute resolution would entail low levels of delegation, while a transnational dispute resolution would initiate a high level of delegation and real constraints on member states. As Keohane states:

> What transnational dispute resolution does is to insulate dispute resolution to some extent from the day-to-day political demands of states . . . Political constraints, of course, continue to exist, but they are less closely binding than under interstate dispute resolution . . . For this reason, transnational dispute resolution systems have become an important source of increased legalization and a factor in both interstate and intrastate politics. (Keohane et al. 2000: 488)

In the case of the ICC, a relatively high level of delegation exists. In fact, the independence of the Prosecutor can be considered to be high owing to three factors: the democratic means of selection for court officials, the wide range of legal discretion given to both the prosecutor and judges, and the strong emphasis placed on member state cooperation. The Rome Statute also provides for significant access to the Court by nonstate actors (although this nonstate access is primarily through the Prosecutor), and suggests a high level of embeddedness in terms of the strict requirements for incorporating the principles and provisions of the ICC into domestic public law. The one caveat, we would add to this application of legalization is that while the Court appears to embrace a transnational dispute resolution method in terms of its rules of procedure, it is difficult, at least at this point, to determine if the Prosecutor's *proprio motu* powers will engender cooperation, or induce a self-referral, as we have seen with the DRC. Much of this will depend on the state's willingness to work with the Court and external pressures.

Nevertheless, according to legalization theory, the effectiveness of the ICC refers principally to its level of delegation and dispute resolution capacity. Since the ICC utilizes a transnational dispute resolution, the political nature of the self-referral should play only a minimal role in the Court's ability to accomplish its goals. And if one looks closely at the recent events in the DRC, it is apparent that the Prosecutor has sought to overcome the politicization of the case – at least in regards to the state's apparent political objective of managing electoral competition.

In short, a highly legalized and effective institution, with a quasi-transnational dispute resolution mechanism, should help to minimize the influence of realpolitik.[14] And while the analytical and descriptive value of legalization may take us beyond the limits of realism, it also suggests that the normative vision of the Court, especially as this relates to addressing victims' needs, extends beyond its analytical design (and other rationalist approaches for that matter). If this is true, then the causal impact of proscriptive norms will need to be further weighed against the constitutive factors that lie beyond the analytical scope of legalization theory. This, however, should not unduly minimize the contributions of rationalist approaches. Rather, it should call attention to the need for a balanced methodological assessment of the effectiveness of the ICC, in which nonscientific theories help to complement the scientific contributions and to address the increasing complexity of politics in international criminal law.

Conclusion

In this chapter, several rationalist approaches were employed to explain the relationship between the institutional design and effectiveness of the ICC. In particular, we sought to frame the limits of realism, and to show how legalization helped to move us beyond these limits by explaining some of the causal effects of the ICC. Our discussion of these issues led us to conclude that high levels of delegation, transparency, precision, and obligation, while helping to limit the imposition of realpolitik on the ICC's actions, cannot fully explain why states will cooperate with the Court, nor whether states will effectively alter the policy of consistency in prosecutorial decisions and negotiations between the state and the ICC.

Realists may be correct to believe that the lego-political process will remain grounded in realpolitik, but they are wrong to assume that there are fixed limits to an institution's capacity to promote long-term peace through accountability. Scientific, reductive frameworks also pose particular limits to our understanding of the politics of the ICC (social agency or the choice and desire of the Prosecutor). As the subsequent chapters in this book show, the legal process of the ICC is complicated by many open-ended ethical and political factors, including who and when to investigate and prosecute, and how the Court must address the needs of the victims of gross injustice.

It may be true, as Fehl shows in this book that the dynamics of the ICC permits us to reconcile constructivist assumptions with rationalism. However, as we have argued in this chapter, politics remains wedded to realpolitik, and because this inconvenient marriage involves unavoidable trade-offs, we also need to work more constructively within a scientific framework to measure and further ascertain these effects of realpolitik. Constructivism and critical theory will thus need to play a role in helping us to move beyond some of the limits of scientific theories. But this need should be balanced against scientific objectives. It is this larger synergistic task that can and should be advanced in the spirit of complementarity and for positing a cohesive, pluralistic theoretical approach.

Notes

1. For the purpose of this chapter, realpolitik is defined as the use of power, typically material power, to affect political outcomes.

2. Other, less prominent forms of realism include defensive realism, offensive realism, and neoclassical or postclassical realism. For further discussion of realism and all of its disparate forms, see Brown (1992) and Donnelly (2000).
3. The principles of realism can be derived from numerous texts however, at the heart of this theoretical perspective is Hans Morgenthau's *Politics Among Nations*. The assumptions contained in this section are generated primarily from this text.
4. In particular, some of the classical realist literature accepts a differentiation of opinion amongst the domestic actors within the state. However, it is only reasonable to generalize that realist theory accepts the unitary nature of the state.
5. See Macedo (2006), for a definition and discussion of universal jurisdiction.
6. Scheffer (1998: 1–2) describes the objectives that the United States felt it achieved during the Rome Conference.
7. As Weschler (2000: 106) explains, the CICC was particularly distraught over this compromise.
8. International relations scholars refer to neoliberal institutionalism by several different titles. These include: neoliberal, institutionalism, contractualism, functionalism, and pluralism. Within the confines of this chapter, we will refer to this theory as either ''neoliberal institutionalism,'' ''institutionalism,'' or ''neoliberalism.''
9. One other area that one may consider a ''softening device'' is Article 16 which discusses the UN Security Council's ability to defer any investigation for 12 months with the ability to renew. However, if one examines this Statute relative to other human rights treaties and/or international treaties in general, it is clear that the ICC has a very high level of obligation.
10. Access to all three documents is available on the official ICC website: http://www.icc-cpi.int/about/Official_Journal.html
11. The Special Working Group on the Crime of Aggression was formed at the Rome Conference for the specific purpose of proposing an acceptable definition of the crime of aggression. For information on this working group and the progress they have made, see Assembly of States of Parties (2002, 2003).
12. The Court's reliance on state cooperation is most evident in its ability, or inability, to bring the accused before the Court. Without the use of state military and police units, the Court would not have the ability to prosecute. The Court is also reliant on member states for enforcement of their decisions, in which guilty parties must be detained within member states. Finally, the Court also relies on states for funding, although not exclusively. The Court does allow for voluntary funds but the majority of Court financing comes from member states.
13. Sterling-Folker (2000) explains the premise of exogenously given interests in much greater detail. Drawing on the work of Keohane, Sterling-Folker shows that neoliberals believe that interests are given, but that institutional

preference on how to achieve these interests is not. This is where cooperation is most important, because without it state's interests cannot be fulfilled.

14. It is important to reiterate that because the Court is still in a developmental stage, a definitive validation of legalization theory arguments is not possible. However, it appears that in the case of Uganda, many of their hypotheses are at least causally defensible.

Part II

Constructivism, Legitimacy, and Accountability

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3

Explaining the International Criminal Court: A Practice Test for Rationalist and Constructivist Approaches

Caroline Fehl

The International Criminal Court (ICC) has been the subject of a heated political and academic controversy ever since 1998, when the states convened at the UN conference in Rome decided to create the new Court to prosecute aggression, genocide, war crimes, and crimes against humanity.[1] The political conflict between the United States and a coalition of countries supporting the ICC has attracted much international attention. The United States, although initially supportive of the Court, voted against the adoption of its statute, the Rome Statute, at the 1998 conference (Rome Statute 1998). While the Clinton Administration remained critical yet passive toward the ICC, the Bush Administration adopted an openly hostile stance, seeking to undermine the operation of the Court through a series of multilateral and bilateral diplomatic efforts. The political conflict revolves largely around questions of *institutional design*, specific provisions in the Rome Statute concerning the ICC's operation. The crucial ''design'' issues over which the United States and the pro-ICC coalition split in Rome are the degree of independence conveyed to the ICC and its Prosecutor by the Rome Statute, and the reach of its jurisdiction. The principal American objection, as Charles Smith and Heather Smith have explained, is that these provisions could enable states hostile to the United States to abuse the Court and turn it against US military personnel in overseas missions (Wedgwood 1998; Rubin 2000; Bolton 2001; CRS 2002).

The academic debate on the subject mirrors the focus of the political controversy on institutional design and on the future effects of the Court. Most contributions discuss – often from a very normative perspective – how much an international court can generally contribute to bringing perpetrators to justice and deterring future atrocities, and how effective the ICC will be in performing these tasks given its specific institutional design (Pejic 1998; Cassese 1999; Gallarotti and Preis 1999; Teitelbaum 1999; Farer 2000; Popovski 2000; Griffin 2001; Kissinger 2001; Rudolph 2001; Smidt 2001; Smith 2002).While the question of the Court's future effects, intended and unintended, is undoubtedly important, this chapter approaches the topic from a different perspective. Unlike most previous analyses, it seeks to *explain* both the establishment of the ICC and its institutional design. By including the Court's controversial institutional design into the explanatory focus, a crucial puzzle is addressed: Why was the new institution designed in such a way that it failed to gain the support of the one country which is, by all accounts, most important for enforcing its future decisions? While much of the research on the preparation and negotiation process touch upon these questions (Ferencz 1998; Kirsch and Holmes 1998; Arsanjani 1999; Hebel 1999; Morton 2000), they remain largely descriptive and fail to offer an explicit theoretical framework.[2]

This chapter looks at two groups of theories for potential explanations: rationalist theories of international institutions, and the constructivist literature on the subject. It confronts theoretical arguments from both perspectives with the evidence given by participants and observers of the ICC process. The purpose of this approach, however, is not a competitive theory testing in order to demonstrate which theory is correct or inherently better. Rather, the chapter aims at an illustrative assessment of how helpful different theories are as analytical tools for identifying the relevant explanatory factors in a specific case, and especially how they can be usefully combined.

As the earlier discussion on legalization theory showed, rationalist approaches assume that states are strategic unitary actors, and that they create institutions in order to solve strategic cooperation problems. Whereas earlier rationalist analyses of international institutions have focused on the broad questions of how institutions matter and how they come about, scholarly attention has shifted more recently to questions of institutional design. The puzzle now is why institutions take on particular forms, such as specific membership and voting rules. The constructivist work on international institutions discussed in this chapter is characterized by an emphasis on logics of action other than instrumental

rationality, by an interest in the constitutive effect of institutions and in how institutional choices are shaped by long-term normative and conceptual developments. In analyzing the case of the ICC, this chapter first applies the arguments put forth in the rationalist literature and identifies the limits of this rationalist account, then proceeds to ask how its shortcomings can be alleviated or overcome on the basis of constructivist approaches.[3] Unlike Leonard and Roach, I focus principally on institutional design theory. Thus, the study seeks to contribute – in the relatively new research area of institutional design – to the efforts in the discipline to bridge the gap between rationalism and constructivism and to combine the two perspectives for concrete analytical purposes.

The study is structured as follows: the first section sketches the historical evolution of international criminal justice up to the adoption of the Rome Statute, and the ensuing political conflict. The second section outlines the theoretical framework, introducing rationalist and constructivist approaches to international institutions. The following two sections apply arguments from both perspectives to the ICC case, explaining successively the Court's establishment and the most contested design features of the Rome Statute. Since the ICC constitutes a new element in the larger international atrocities regime, it is explained with reference to preexisting institutional arrangements. In the subsequent section, discussion of several recent developments help to further support these arguments. The concluding section summarizes the findings of the analysis. Both rationalist and constructivist theories can account for certain aspects of the institutional outcome, complementing each other in different ways. From a rationalist point of view, the ICC's establishment can be explained with a cooperation problem in criminal justice between national courts, and with the high costs of existing UN tribunals. The first argument can be deepened by a constructivist analysis of normative developments in the field of human rights that explain the consensual *identification* of the problem in international criminal justice by the international community. The second argument can be complemented by an alternative constructivist explanation that focuses on legitimacy deficits of UN tribunals. Regarding institutional design, hypotheses put forth by rational design theory help explain the crucial institutional design trade-off between an independent court and US support that the participants of the Rome Conference faced. Yet a constructivist argument – emphasizing the role of ''norm entrepreneurs'' and international norms of treaty-making – is a necessary complement that explains which particular point was eventually picked on this trade-off curve.

Between rationalist and constructivist perspectives on international institutions

As the previous chapter explained, the early regime literature focused on a specific type of cooperation problem: enforcement problems. An enforcement problem is a situation in which all actors could profit from cooperation, but face individual incentives to defect. A specific type of enforcement problem is the ''public good'' problem: When individuals cannot be excluded from the consumption of a good – such as a liberal economic order (Kindleberger 1986) – they tend to ''free-ride,'' so the good is undersupplied. According to the neoliberal argument, international institutions can alleviate cooperation problems in different ways: by centralizing monitoring, by centralizing enforcement – which includes the central provision of a public good – (Oye 1985: 20; Snidal 1997: 489),[4] as a forum for strategies of issue linkage (Keohane 1984: 89–91), and by reducing the transaction costs of repeated international negotiations (Keohane 1984: 90).

Recent rationalist research on international institutions has turned to more detailed questions of *institutional design*, i.e., to the question why institutions take on particular forms. Koremenos, Lipson, and Snidal (2001) develop a set of causal conjectures on the rational design of international institutions. Abbott and Snidal (2000) seek to explain variation of international legal institutions on the continuum between hard and soft law. These recent theoretical contributions disaggregate the core hypothesis of regime theory – ''international institutions are created to solve cooperation problems'' – on both the independent and the dependent variable side. On the independent variable side, Koremenos, Lipson, and Snidal take into account more complex cooperation problems, such as multiple equilibria, power asymmetries, and uncertainty. On the dependent variable side, the institutional explanandum now includes membership size, voting rules, flexibility arrangements, the issue scope covered by an institution, and the like.

As we have seen, the *centralization* of tasks in an international institution is interpreted by regime theorists as a response to enforcement problems. Rational design theorists point out that centralization can vary; it can be restricted to monitoring, but also includes decision-making and sanctioning. According to rational design theorists, centralization of decision-making increases with the severity of the enforcement problem, but is limited by *sovereignty costs* (Abbott and Snidal 2000: 439–40; Koremenos, Lipson, and Snidal 2001: 771). The sovereignty costs of centralized decision-making vary across issue areas and among actors. They are highest if

an issue ''touches [upon] the hallmarks of (Westphalian) sovereignty,'' such as a state's relation to its citizens and territory (Abbott and Snidal 2000: 437). They are higher for powerful states and lower for weak states (Abbot and Snidal 2000: 448).

Whereas in some cases, such sovereignty costs may preclude the centralization of decision-making altogether, this need not be the case when individual states are able to retain *control* over the decisions of the centralized institution through voting rules and veto powers (Koremenos, Lipson, and Snidal 2001: 772). Another factor that tends to increase individual state control over an institution is *uncertainty*. Uncertainty makes it hard for states to assess the future consequences of their design choices and leads them to increase control (Koremenos, Lipson, and Snidal 2001: 792). Finally, incorporating the insight from earlier regime theory that institutions are ''shaped largely by their most powerful members'' (Keohane 1984: 63; also see Krasner 1976), rational design theorists predict that powerful states tend to have asymmetrical control over an institution. This can be reflected in weighted votes or special veto powers (Koremenos, Lipson, and Snidal 2001: 791).

The same factors that tend to increase individual control according to rationalist theory – sovereignty costs and uncertainty – can also result in the introduction of flexibility provisions, such as temporary or permanent opt-out regulations (Abbot and Snidal 2000: 445; Koremenos, Lipson, and Snidal 2001: 793f). Such flexibility provisions can be interpreted as a control resource that can be activated in ''emergency'' situations.

Constructivists do not agree on what the rationalist–constructivist debate is all about (Fearon and Wendt 2002). My argument is that the assumption that the main disagreement is less about epistemology than about ontological questions.[5] To sum up the most important differences, constructivists emphasize that actors are embedded in social structures that have a *constitutive* effect on them – shaping their world views, identities, and interests – and that actions can be driven by logics other than instrumental rationality: by a ''logic of appropriateness'' or a communicative logic.

It is impossible to identify the constructivist theory of international institutions; constructivists look at international institutions from different perspectives. For the purpose of this chapter, it seems helpful to broadly distinguish two approaches: One is interested in the *constitutive effects* of institutions on actors, the other looks at constitutive norms and intersubjective structures as *explanatory factors* for actors' choice of institutional rules. The two perspectives also differ slightly in their definitions of international institutions.

The first perspective is shared by a group of theorists interested in the constitutive effect that international institutions have on actors, i.e., states (Finnemore 1993; Finnemore and Sikkink 1998; March and Olsen 1998; Risse, Ropp, and Sikkink 1999). Theorists in this group tend to understand institutions as (sets of) norms, a ''norm'' being defined as a ''standard of appropriate behavior for actors with a given identity'' (Finnemore and Sikkink 1998: 891).

This definition differs from the more general definition of institutions as ''sets of rules'' given in the next section in that it already indicates the *constitutive effect* of institutions on actors' identities that these constructivists seek to explore. The general argument is that some institutions are so widely accepted within a group of states that they have come to be constitutive of its identity. A state who wants to define itself as a member of the community must act in accordance with the standard of appropriate behavior in the community (Finnemore and Sikkink 1998: 902). Thus, actors often follow a logic of appropriateness rather than an instrumental logic of consequences, performing the actions required by a given norm in a certain situation rather than maximizing utilities (March and Olsen 1998: 951).

With regard to the *creation* of international norms, many norms scholars emphasize the role of norm entrepreneurs, such as transnational networks of NGOs that lobby states to redefine their interests so as to support the respective norm (Finnemore and Sikkink 1998; Risse and Sikkink 1999). Here, the constructivist moment lies in the process of persuasion, which contradicts the rationalist assumption that states act on the basis of fixed preferences.

The second, less prominent constructivist perspective on international institutions looks at normative developments that influence states' choice of particular institutions. The focus is less on constitutive effects of the institution itself than on previous normative and conceptual developments that explain the creation and design of the institution. This implies that an institution as set of rules can be distinguished from constitutive norms, or from an institution with constitutive effects. One example for such a perspective is John Ruggie's early work on ''embedded liberalism,'' where he shows how underlying norms of social welfare, shared by the community of states and defining their self-understanding, governed their choices of institutional rules in the world financial system (Ruggie 1982).[6]

More recently, Alexander Wendt has put forth a similar argument, in a constructivist comment on the theory of rational institutional design (Wendt 2001). He argues that states may design individual institutions according to a logic of appropriateness, so as to conform with, or not to violate, certain preexisting norms (Wendt 2001: 1024–7). The norms that Wendt

refers to as examples are not substantive norms about a particular issue – as in Ruggie's approach – but norms about appropriate institutional designs, such as the belief that it is fair to give one vote to each state, and about the appropriate modalities of institutional design, such as a specific style of treaty negotiations. Finally, Wendt emphasizes intersubjective conceptual developments. One of his criticisms vis-à-vis the rational design approach is that the cooperation problems treated as independent variables by rational theorists are never objectively given but need to be *intersubjectively identified* by a community of states in the first place. This intersubjective consensus generally presupposes certain communicative and conceptual developments.

How can we put to use this diversity of constructivist perspectives on international institutions for the analytical purpose of this article? It is conceivable that in any individual case study, we can identify all, none, or just a few of the factors emphasized by different constructivist approaches. In looking for the explanation of an institution such as the ICC, we might or might not find Finnemore's and Sikkink's norm entrepreneurs involved in its creation and design. We might find normative or conceptual developments explaining the creation and design of an institution, as pointed out by Wendt. Although, the institution itself might not have constitutive effects, underlying norms that influenced its creation could still be attributed to the constitutive effects of other, preexisting institutions. In sum, the position advocated in this chapter is that different constructivist perspectives should not be treated as mutually exclusive, but as a heuristic pool of explanatory factors that can guide our attention to relevant factors in a particular case study.

In a final remark on the constructivist approaches presented here, it should be emphasized that they all deal with *international* norms that are shared in the international community. Like rationalist regime theory, they must be distinguished from domestic-level constructivist approaches that focus on national or subnational norms as explanatory factors, as they are employed in Berger's and Katzenstein's analyses of German foreign policy (Berger 1996; Katzenstein 1997), or Kier's work on strategic cultures (Kier 1997).

Evaluating rationalist and constructivist explanations of the International Criminal Court

How are we to evaluate the validity of rationalist and constructivist explanations in the case of the ICC? As already indicated, the purpose

of this chapter is not a competitive theory test. Rather, it seeks to explore, in an individual case study, how much each of the theoretical perspectives contributes to our understanding of the case, and how the different approaches can be usefully combined to gain a range of complementary explanations. The view that rationalism and constructivism can indeed be combined as analytical devices is not shared by all participants of the rationalist–constructivist debate (March and Olsen 1998: 952–4). According to Alexander Wendt (2001), they can be regarded either as theoretical ''rivals'' that can be tested against each other, or as complementary. One way of combining the two perspectives is to use a constructivist approach to add causal depth to a rationalist account, in explaining the normative and conceptual developments that influence states' definition of their preferences. Constructivism thus identifies the norms defining the ''game,'' whereas rationalism explains how it is solved (Wendt 2001: 1027). This article subscribes to the latter model, yet assumes that such a ''two-step analysis'' is not the only way of combining the two perspectives. It is equally possible that the two perspectives provide alternative explanations of an outcome, but without being mutually exclusive. States might follow both their material interests and given norms in taking certain institutional choices. Furthermore, it need not always be rationalism that ''solves the game''; it is also conceivable that a constructivist approach helps explain a choice within the constraints set by instrumental calculations (March and Olsen 1998: 953).

After clarifying the relationship between rationalist and constructivist approaches, we can turn to their empirical application. In evaluating explanations derived from the two different perspectives, it is important to judge by the appropriate standards. While rationalist theories make a strong claim to formulate falsifiable hypotheses, the constructivist approaches discussed above do not. Only with regard to rationalist theory, it is therefore appropriate to ask whether its predictions hold in the case of the ICC, and whether its hypotheses are specified clearly enough.[7] In addition, we must also ask whether rationalist independent variables were not only given but indeed influential in the ICC's creation and design process; this question can only be answered on the basis of a process-tracing approach. Constructivist arguments cannot be subjected to a ''right or wrong'' test, but we can also ask how much the factors they emphasize mattered in the ICC's creation and design.

Explaining the creation of the International Criminal Court

The rationalist explanation

According to rationalist theory, international institutions are explained by strategic cooperation problems, and by the useful functions they fulfill in alleviating these problems, such as facilitating issue linkage; centralizing monitoring, and enforcement; and reducing transaction costs. Two rationalist explanations can be given for the establishment of the ICC as a new element in the regime of international criminal justice: One argument refers to enforcement problems arising with prosecution in national courts, the other one to high transaction costs incurred in the more recently created system of ad hoc tribunals.

The problem with national courts: International criminal justice as a public good

According to an argument by Kenneth Abbott (1999), the ICC solves an enforcement problem in international criminal justice: The worldwide punishment and deterrence of atrocities, Abbott argues, is in the interest of all states, especially in order to avoid costly interventions. But punishment and deterrence constitute public goods which are undersupplied in a regime that relies exclusively on decentralized prosecution in national courts. When faced with the opportunity to prosecute a high-level perpetrator on the basis of universal jurisdiction, an individual state has incentives not to proceed with the investigation, although it might be generally interested in bringing perpetrators to justice. These disincentives stem from the diplomatic costs that such an investigation can entail: The state of nationality of the perpetrator may protest the prosecution, and seek to mobilize international opposition against it. States are reluctant to bear these costs unilaterally, given that others would equally profit from the deterrence effect. In centralizing prosecution with an international institution, this cooperation problem can be overcome (Abbott 1999: 374–5). Mayerfeld makes a similar point, characterizing the universal jurisdiction regime as ''anarchic enforcement'' of human rights (Mayerfeld 2003: 111–14).

How convincing is this ''public good'' argument? The undersupply of prosecution in national courts is beyond doubt. The literature is full of cases where state governments intervened with national courts to drop charges against foreign high-level perpetrators, in order to avoid diplomatic trouble, as in the case of the former dictator of Chad, Hissene Habre (Brody

2001), or – in a more complex way – with investigations conducted under the Belgium Statute.[8] One particularly prominent example is the case of the late former Chilean dictator Pinochet: Circumventing a pending Spanish extradition request, the British government released Pinochet from British custody on the grounds of ''bad health.'' The decision was generally attributed to the pressure exerted by the Chilean government (Roht-Arriaza 2001).

Despite this and many more examples that illustrate well the public good problem, two objections can be made to such an explanation of the ICC: First, the argument remains somewhat shallow since it presupposes that states have an agreed-upon common interest in the prosecution of atrocities. Yet mass-level atrocities and limited exercise of universal jurisdiction have existed for decades without the international community making a great effort to provide the ''public good'' of international justice. It seems therefore reasonable to conclude that a *consensual perception* of the ''cooperation problem'' was not always given. Following Wendt's suggestion discussed in the preceding chapter, we could add causal depth to the rationalist explanation in analyzing – from a constructivist perspective – the conceptual and normative developments that lead states to intersubjectively identify the public good of international criminal justice.

The second objection arrives at a similar conclusion: Although the enforcement problem with universal jurisdiction cases in national courts cannot be denied, it is really a second-order problem that did not occupy a prominent place in the debate about an ICC. The argumentation of the ICC's supporters has always focused on the failure of national courts to prosecute perpetrators in their *own* country, not nationals of *foreign* countries. It was this ''culture of impunity'' toward states' own nationals that the ICC was meant to redress (Kittichaisaree 2001: 41; Roth 2001: 150; Pejic 2002: 23). This problem, however, cannot be framed as a strategic cooperation problem, since it is generally not due to international pressures that a state fails to prosecute its own nationals. The public good problem only explains why universal jurisdiction in national courts was not considered a viable alternative to an international court. A constructivist analysis of international normative developments thus also seems best suited to explain how states came to agree on tackling the problem of impunity in *other* states.

The second rationalist argument for the explanation of the ICC focuses on deficits not in the prosecution of perpetrators at the national level, but in the system of more recently established ad hoc tribunals. By the end of the 1990s, with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in

place and new tribunals under consideration for Cambodia and East Timor, it was felt among the members of the Security Council that the negotiation of new ad hoc tribunals with increasing frequency would soon exceed the Council's financial and time resources; observers diagnosed an acute ''tribunal fatigue'' (Morton 2000: 65; also see Scharf 1999). According to the leader of the US delegation at Rome, David Scheffer, a permanent court was expected to save costs, and thereby increase the likelihood and the deterrence effect of future prosecutions (Scheffer 1999: 23). From a rationalist viewpoint, these observations indicate that the ICC was meant as an instrument to reduce the *transaction costs* of international criminal justice.

This argument also helps explain the timing of the ICC's establishment. That the UN process had already been revitalized in 1989 and the decision to proceed with an international conference was only taken in 1994, after initial experiences with the new tribunals. This second rationalist argument, however, takes the existence of the UN tribunals as a given. As will be shown in the next section, their establishment cannot be separated from a long-term normative development that also strengthened support for the project of the ICC.

The constructivist explanation

Constructivist approaches emphasize different factors that can help explain the establishment of an international institution: Some theorists stress the influence of norm entrepreneurs, persuading states to support an institution. Others look at constitutive international norms as explanatory factors. Here, we will develop two constructivist explanations of the ICC's establishment that complement the two rationalist arguments discussed above.

The first constructivist explanation can deepen the rationalist argument that states created the ICC in order to solve a public good problem in international criminal justice. In looking at the normative developments preceding the ICC's establishment, one can explain how states came to intersubjectively identify the ''public good'' of prosecution and deterrence. As pointed out before, the ICC project stagnated for decades despite the occurrence of atrocities and the failure of national courts to deal with them. One precondition for overcoming this stagnation was certainly the end of the Cold War, ending the political gridlock in the United Nations (Ferencz 1998: 4). However, scholars such as Christopher Rudolph stress another development that contributed to the creation of both the UN

tribunals and the ICC, and that started long before the end of the Cold War: the proliferation and increasing worldwide acceptance of human rights norms (Rudolph 2001: 681).

Since the 1970s, a number of new human rights conventions have been adopted, and ratified by states.[9] In the course of this process, human rights norms reached what Risse and Ropp (1999: 265) term ''prescriptive status,'' a state of almost universal acceptance. According to a constructivist perspective, these universally recognized human rights norms are more than just formal institutional rules. They have come to define the identity of the ''community of liberal states'' and of its members (Risse and Sikkink 1999: 8). A similar argument is made by sociological institutionalists, who view human rights as part of the pervasive Western-style world culture that has been spreading over the past decades (Boli 1987; Finnemore 1996: 332). This does not imply that all states that ratify a human rights norm automatically *comply* with it. But, it means that human rights norms are a standard of appropriate behavior for any state which seeks to view itself, and be viewed by others, as a respected member of the international community. Human rights norms can thus be characterized as constitutive. The growing normative consensus on human rights norms as a defining characteristic of the international community can explain that massive human rights violations, as well as impunity for the perpetrators of these crimes, were increasingly perceived as a collective problem of just that international community.

The problem with this argument, however, is that it is difficult to find evidence for the constitutive effect of norms. Risse suggests that the only method currently available is to interpret communicative statements of the actors (Risse 2003: 118). Such analyses have already been undertaken by a number of constructivist scholars, demonstrating how human rights became a key motif in the identity discourse of particular states and groups of states (e.g., refer to the contributions of Risse, Ropp, and Sikkink 1999; or Lutz and Sikkink 2000).

There is also some evidence that constitutive human rights norms contributed to a greater demand for the prosecution of atrocities. For instance, there has been an exponential increase, since the 1970s, in judgments of national courts making some kind of reference to ''human rights'' (Rudolph 2001: 681). Furthermore, according to a broad scholarly consensus, it was the emotional calls by Western publics upon the ''the international community'' to ''do something'' about human rights violations in Yugoslavia and Rwanda that triggered the establishment of the two ad hoc tribunals (Crawford 1995: 407; Rudolph 2001: 661–2). That both

the creation of UN tribunals and of the ICC were influenced by such considerations, is illustrated by the following statement by US delegation leader David Scheffer:

> The fundamental reason for these [UN] courts is the international community's resolve and potential to respond to the international crimes of genocide, crimes against humanity, and war crimes and ensure that the leading perpetrators of these crimes are brought to justice . . . . With the end of the Cold War and the growing number of democracies and pluralistic societies committed to the advancement of human rights and the rule of law, it simply is no longer tenable either among democratically elected political leaders or among the publics they serve to tolerate impunity for the commission of such international crimes. . . . There are many different mechanisms that the international community is exploring and using to respond to genocide, crimes against humanity, and war crimes. . . . The permanent International Criminal Court is needed at one extreme of this spectrum of mechanisms. (Scheffer 2002: 51–2)

This constructivist analysis of international norm changes underlying the creation of international tribunals could be complemented by a liberal theoretical argument that emphasizes rational actions of substate actors: Some argue that from the perspective of Western national governments, the establishment of international tribunals was simply the least costly measure to pacify a national public agitated by touching media images of victims and refugees (Neier 1998: 129). However, since the reaction of the public can itself be explained by normative changes that lowered the tolerance for massive human rights violations, it seems fair to treat the argument as constructivist at the aggregate level of the state.

In sum, the argument as developed so far has focused on the influence of constitutive norms on the interstate level on the establishment of the ICC. But what about the role of norm entrepreneurs stressed by some constructivists? The crucial role of national and transnational activists in persuading states to adopt new norms has been demonstrated in constructivist studies for almost every single one of the human rights norms that have in turn influenced states' sensitivity toward atrocities (Keck and Sikkink 1998: ch. 2; Risse 2002: 264). Yet as far as the ICC itself is concerned, lobbying by NGOs was less pronounced *before* the preparation phase of the Rome Conference. Although the lawyers' organizations were slightly more active, most NGOs lacked active programs to support the establishment of an ICC and failed to monitor the respective discussions at the United Nations in the early 1990s. The NGO Coalition for an International Criminal Court (CICC) – that turned out to be extremely influential in the later

negotiation process – was founded only in February 1995 (CICC 2003*b*). The ICC was primarily a state-led project until the decision for the new institution had been taken in principle. NGOs' strong activities later in the process will be discussed in greater detail in the last section.

The legitimacy of international tribunals

Before turning to the explanation of the ICC's institutional design, a second constructivist argument about its establishment must be discussed briefly. According to the rationalist account, it was also the high costs of the UN tribunals that strengthened support for a permanent ICC. From a constructivist perspective, an alternative explanation can be given that stresses another advantage of a permanent court vis-à-vis the ad hoc tribunals: that it was not only expected to be cheaper, but also more legitimate. The ad hoc tribunals, set up by the UN Security Council for individual cases, have always been vulnerable to charges of victors' justice, especially from former Serbian leaders (*Guardian* 2001; Sadat 2002: 31; see Peskin 2000 on legitimacy problems of the ICTR). The following statement by Louise Arbour – the then Chief Prosecutor of the ICTY – on the occasion of the ICC ratification campaign start, shows that these problems also played a role in the support for a permanent court:

> Irrationally selective prosecutions undermine the perception of justice as fair and even-handed, and therefore serve as the basis for defiance and contempt. The ad hoc nature of the existing Tribunals is indeed a severe fault line in the aspirations of a universally applicable system of criminal accountability. . . . Not that the impunity of some makes others less culpable, but it makes it less just to single them out. It therefore runs the risk of giving credence to their claim of victimisation, and even if it does not cast doubt on the legitimacy of their punishment, it taints the process that turns a blind eye to the culpability of others. The broader the reach of the International Criminal Court, the better it will overcome these shortcomings of ad hoc justice. (Arbour 1999)

From a legal point of view, ad hoc tribunals violate the ''principle of legality,'' the relevant laws and corresponding penalties by being adopted only after the commission of crimes (Kittichaisaree 2001: 13–15). Most legal scholars, however, agree that following the precedent set by the Nuremberg tribunal, this violation does not shed doubt on the overall legality of such tribunals (Kittichaisaree 2001: 20). As already noted in Chapter 1, the *ex post facto* endorsement of the Nuremberg principles by the UN General Assembly is an important source of legitimacy. Regarding

the recent UN tribunals, the Appeals Chamber of the ICTY itself upheld the legality of the tribunal's establishment in 1995, in dismissing a motion by defendant Dusan Tadic that questioned its legality.[10] The tribunal's view is shared by numerous legal experts (Sherman 1996).Whatever their justification, political and legal doubts about the tribunals' legitimacy could never be silenced entirely. This seems to suit the constructivist argument that states create institutions according to a logic of appropriateness.

It is ultimately hard to decide whether considerations of legitimacy or cost-saving were more important in the decision to establish the ICC. The statements quoted in this chapter suggest that the cost-argument was more prominent with the permanent members of the Security Council, whereas the legal and associated NGO community attached greater weight to the legitimacy issue.

Explaining the institutional design of the International Criminal Court

Contested design features

When the PrepCom was charged in 1996 with preparing an international conference on the establishment of an ICC, this signified a broad consensus in the United Nations that such an institution was desirable in general. It was only in the negotiations about the ''design'' of the new institution – in the PrepCom and in Rome – that the consensus started to fall apart. Among the numerous state coalitions that formed around particular issues, two groups were especially influential: the so-called ''like-minded group'' (LMG), composed of Canada, most European countries, and many developing countries, that advocated a strong and independent court; and the group of permanent members of the Security Council (P-5), that thought to restrict the Court's powers, with the United States taking the most critical position (Kirsch and Holmes 1999: 4). The United Kingdom was an interesting case in between: It had been part of the P-5 in the PrepCom negotiations, yet joined the LMG shortly before the Rome Conference after the Labour victory in the 1998 elections; France also shifted its position during the process.

What were the contested issues? The first major conflict at the Rome Conference concerned the ''trigger mechanisms,'' that is, the question who would be entitled to start an investigation. Article 13 of the Rome

Statute states that a case can be referred to the Court by the UN Security Council – acting under the authority conferred to it by Chapter VII of the UN Charter – or by any state party, or it can be initiated by the prosecutor of the ICC (''*proprio motu*''), with the previous consent of an independent Pre-Trial Chamber (Article 15). At the Rome negotiations, a number of states led by the United States sought to restrict the right of initiative to the Security Council, notably to prevent an independent prosecutor (Scheffer 1999: 14). Other states – such as India, Mexico, and Egypt – opposed any role of the Security Council in the ICC's investigation decisions (Kirsch and Holmes 1999: 4).

A second contested provision in the Rome Statute that is closely connected to the issue of trigger mechanisms was Article 16, granting the Security Council the right to defer any case, by a regular decision, for a period of one year, but with the possibility of renewing the veto indefinitely. Article 16 was fiercely opposed by many states, but unsurprisingly advocated by the permanent members of the Security Council, although they would have preferred a ''negative veto'' for each of the permanent members (El Zeidy 2002: 1509–12).

A third issue, which turned out to be decisive in losing US support, came to the forefront of the debate after ''the battle against an independent prosecutor had been lost'' (Kirsch and Holmes 1999: 8). Alternatively, the United States now thought to achieve – to summarize a complex legal issue – that the ICC's jurisdiction would not extend to nonparties of the Court (Scheffer 1999: 18). The final statute, however, allows for jurisdiction over the nationals of nonmembers, provided that the state of territory – within whose borders the crimes were committed – is a party to the statute (Article 12). In the case of Security Council referral, the ICC's jurisdiction covers all UN member states. Although, Articles 17 and 18 provide for the complementarity of the ICC's jurisdiction vis-à-vis national courts, cases are admissible if the state which has jurisdiction is not ''genuinely'' investigating them. The unwillingness of a state to investigate a case can be determined by the Pre-Trial Chamber (Article 18).

A final controversial issue was the introduction of opt-out provisions in the statute: the statute allows states to opt out of the ICC's jurisdiction on war crimes for a transitory period of seven years (Article 124). Whereas some states opposed any kind of opt-out, other states including the United States demanded a 10 years opt-out for all core crimes except genocide (Lietzau 2001: 127).

The controversial issues in the ICC Statute can be framed well within the categories of institutional design employed by rationalist design theorists:

centralization, control, and flexibility. The conflict about trigger mechanisms and the Security Council veto was about the delegation, i.e., centralization of decision-making powers: Would the ICC Prosecutor be able to decide on new investigations, or would (certain) states have a say in that decision? At the same time, the conflict about veto powers was also about control. Furthermore, keeping control was also the central US concern in the debate about the reach of the ICC's jurisdiction – albeit the issue is somewhat unusual in that it concerns the control retained by nonmembers. Finally, the opt-out provisions are classical examples of flexibility clauses in international treaties.

The rationalist explanation

The rationalist theory of institutional design comprises several hypotheses which could explain the degree of centralization, control, and flexibility that characterizes the ICC's design. These hypotheses state that centralization of decision-making decreases with sovereignty costs, that control and flexibility increase with sovereignty costs and uncertainty, and that power asymmetries result in asymmetrical control of the institution by major powers.

Methodologically, judging whether rationalist hypotheses hold requires a comparison with the design of preexisting institutions in international criminal justice, notably the ad hoc tribunals, since rational design theory provides only relative, not absolute measures of dependent and independent variables (''more uncertainty – more control''). Such a congruence test, however, would be insufficient without demonstrating that rationalist independent variables not only covary with dependent variables, but were indeed influential in participants' discussions.

The following analysis suggests that sovereignty costs, uncertainty, and power asymmetry did matter in the design negotiations. Most observers viewed powerful states' concern for sovereignty as the main obstacle to the creation of a strong ICC that would be beyond the control of individual states (Lee 1999: 141; Morton 2000: 66). Sovereignty costs were emphasized by all major powers, but especially by the United States. US delegation leader Scheffer warned months before the conference that ''the ... bedrock of international law [is the] threshold of [national] sovereignty.'' (cited in Ball 1999: 202). The key US concern was that the ICC would assert jurisdiction over US military personnel in overseas missions, for committing crimes on the territory of an ICC member state (Scheffer 1999: 18). As

a result, a key domain of US national sovereignty, jurisdiction over its own citizens, would be undermined. If we compare this situation to the conditions under which the ad hoc tribunals were established, it is clear that sovereignty costs were a new factor: The states who designed the UN tribunals did not initially expect to be *themselves* subject to their jurisdiction, although this expectation was partially proven wrong in the case of the ICTY.[11]

The problem of sovereignty costs was closely interrelated with the factor uncertainty. Fears that the ICC could be turned against the United States to prosecute US service members result from uncertainty about the future operation of the Court. Many US critics of the Court voiced concerns that it could be politicized by rogue states or a biased prosecutor, an ''international Kenneth Starr'' (Ball 1999: 206; Sewall and Kaysen 2000). Uncertainty also concerns the unforeseeable political circumstances of future US military operations. Again, uncertainty in the case of the ICC is much higher than in the design process of the UN tribunals, since the tribunals' jurisdiction only covers a narrowly circumscribed range of cases.

Power asymmetry also mattered, insofar as it created asymmetrical sovereignty costs. In line with Abbott's and Snidal's theoretical argument, the United States argued that because of its unparalleled worldwide influence, it is more likely to be the target of ICC abuses and can afford less than other states to have its freedom of maneuver restricted by the Court (Scheffer 1999: 12). Other powerful permanent members of the UN Security Council, especially China and Russia, shared the American position. Comparing the ICC to the UN tribunals, it is apparent that power asymmetries are also a novum in the design process: While the tribunals were set up by the Security Council, with only the powerful permanent members having a veto in the process, the Rome Conference involved a broad range of actors with vast power differences as equal participants. Although this issue shows that the rationalist independent variables all mattered in the process, some caution is warranted. A closer look reveals that it is problematic to treat sovereignty costs and uncertainty as objective and constant factors. In fact, they appear to be highly subjective, and subject to reevaluations at the domestic level. For example, the United Kingdom initially supported US objections, but joined the LMG after the 1998 Labour victory. Sovereignty costs and uncertainty are also contested within the United States: Many American legal experts doubt that the abuse of the ICC against US military personnel constitutes a real danger in practice (Roth 1999: 27–9; Sewall and Kaysen 2000). Several studies point out that the critical stance of the United States toward the Rome

Statute has been shaped especially by the Pentagon (Ball 1999: 188–93) and individual Congress leaders (Pace 1999: 196; Slaughter 1999: 12). The evaluation of sovereignty costs and uncertainty in the United States could usefully be analyzed with a constructivist perspective that focuses on *domestic* norms. For example, Shepard (2000) discusses the influence of American exceptionalism on the ICC policy of the US administration. The rationalist framework, however, does not deal with these domestic underpinnings of sovereignty costs; this underspecification of independent variables is a first major drawback of rationalist design theory, shedding doubt on its claim to formulate falsifiable hypotheses.

Moreover, even if we disregard this first objection to the rationalist account, the congruence test of rationalist hypotheses reveals a further puzzle: Since sovereignty costs and uncertainty were much higher for the states involved in the ICC's design than for the members of the UN Security Council that set up the ad hoc tribunals, we would expect the ICC design to be characterized by a much lower degree of centralization, higher degree of control for individual states, and higher flexibility. Furthermore, as there are considerable power asymmetries between the states involved in the Rome Conference, we would expect control over the new institution to be asymmetrical. These rationalist predictions, however, can only partly be verified: True, the statutes of the UN tribunals lack the flexibility provisions of the Rome Statute. The ICC Statute also grants some asymmetrical control to the Security Council, yet not to its individual members. Remarkably, decision-making on investigations is not less centralized with the ICC than with the tribunals, since both institutions dispose of an independent prosecutor.

Although, the objections of powerful states as well as some concessions made to them – notably the Security Council veto and the flexibility provisions – can be explained with reference to sovereignty costs, uncertainty, and power asymmetries, these concessions were apparently not far-reaching enough to gain their support for the new institution. Rationalist theory expects the members who are most important for an institution to achieve major design concessions (Koremenos, Lipson, and Snidal 2001: 792). It thus represents a puzzle that most states were unwilling to make sufficient concessions to the one country whose support would be most important for rendering the future operation of the ICC effective in practice: the United States (Rudolph 2001: 680). Given its unparalleled power and influence, as well as its role in dealing with past international tribunals, the United States is likely to be in a crucial position to ensure the detainment of alleged perpetrators, either directly as part of a

peacekeeping force, or indirectly by pressuring foreign governments to extradite perpetrators. The statement by one US official that ''the only way to get war criminals to trial is for the United States to take a prominent role'' (cited in Rudolph 2001: 680) might seem somewhat exaggerated, since the support of the state where the alleged criminal is present could also be secured in other ways. Yet, enforcement did certainly become more difficult in the absence of US participation. Was this a rational decision?

One rationalist counterargument could be the following: If too much tribute was paid to sovereignty and support by the powerful, the ICC would fail to solve the problem of impunity that is was meant to address. One NGO representative warned that the amendments sought by the United States would create ''a loophole the size of the Grand Canyon that any rogue state would drive right through'' (cited in Rudolph 2001: 680; also see Scharf 2001: 382). On the other hand, making the concessions demanded by the United States would not have completely undermined the operation of the Court. In cases that are consensual within the Security Council, it would still have been possible to bring perpetrators to justice, since the United States did not object to jurisdiction over all UN members in case of Security Council referral.

There was obviously a trade-off between two different cooperation problems that call for contradictory design solutions. Would states, for instance, favor an institutionally powerful ICC that solves the enforcement problem in international criminal justice, yet lacks the support of the powerful? Or would they opt for an ICC that pays tribute to the concerns of the powerful regarding sovereignty costs and uncertainty, yet contains some loopholes? This trade-off is generally described as the central dilemma of the Rome Conference (Kirsch 1999: 8; Pace 1999: 207; Rudolph 2001: 678–80). However, it is a major weakness of rationalist theory that it does not explain why actors picked a certain point on this trade-off curve. Rationalist hypotheses on institutional design thus remain underdetermining.

The constructivist explanation

A rationalist explanation of the ICC's institutional design, it was argued, leaves us with the puzzle why states opted for an independent court although this meant losing the support of the United States. A constructivist perspective can shed some light on this puzzle. According to many observers of the conference, it was largely due to the lobbying activities of NGOs at the conference that contested provisions, notably the *proprio*

motu power of the prosecutor and the jurisdiction over non-State Parties in certain cases – were included against US opposition (Arsanjani 1999: 23; Kirsch and Holmes 1999: 4–5; Davenport 2002/03).

How were these NGO norm entrepreneurs able to imprint their demands on the institutional design of the ICC? Their activities ranged from meetings and discussions with the delegations of like-minded states and assigning legal advisors to small and inexperienced developing country delegations to pressuring unsympathetic delegations by ''shaming'' them in the media (Arsanjani 1999: 23). While NGOs had been less active in lobbying for the Court prior to the PrepCom sessions, their sudden involvement into the statute negotiations was so massive that Davenport describes it as a hijacking of the process (Davenport 2002/03: 23).

However, it would have been hardly possible for NGOs to convince a majority of countries of their positions if states had not already been receptive both to the general involvement of NGOs in the process and to the demands put forward by them. This receptiveness – especially on the part of the LMG – is in turn attributed by some observers to a newly evolving international norm of treaty-making, the so-called ''new diplomacy'' approach (Pace 1999; Davenport 2002/03; Edgar 2002; Nel 2002). Contrary to the lowest common denominator style of treaty negotiations practiced in the Cold War era, the new approach assumes ''that it is better to have a workable, effective treaty that lacks the support of some important countries than a bad, inefficient regime with universal support'' (Pace 1999: 205).

Along with this substantive preference for strong treaties, the new diplomacy is marked by certain procedural characteristics (Davenport 2002/03: 23–5; Nel 2002: 156): The central one is the involvement of NGOs in the negotiation process, and states' openness to that involvement. Davenport drastically warns against a tendency of ''replacing the leadership of the United States and other world powers with that of nongovernmental organizations and smaller states'' (Davenport 2002/03: 25). Furthermore, it is typical of the approach to conduct negotiations within a very tight time frame, in order to force a compromise. A last element is the bundling of a package by the conference leadership, which is presented to the participants as a whole at the end of the conference, with no possibility for individual states to request an unbundling. This ''take it or leave it'' approach was pushed through in Rome by the ''Committee of the Whole'' against an attempt by the US delegation to reopen discussions on the last day of the conference (Kirsch and Holmes 1998: 35; Nel 2002: 157).

The concept of new diplomacy is relatively new; little systematic research has been conducted yet on how this new norm developed and to what

degree it influences different types of international treaty negotiations.[12] Work on the emerging new diplomacy approach to treaty negotiations could also profit from the earlier literature on "institutional bargaining" that seeks to correct the neglect by conventional rationalist regime theory of the *process* of regime formation and design (Young 1989, 1994; Skodvin 1992). The constructivist argument focusing on the new diplomacy norm has some overlap with these earlier process-based critiques, but also contains some contradictory assumptions and hypotheses.[13] The theoretical vigor of the constructivist argument could be enhanced by spelling out in detail these similarities and differences, as well as their respective implications for the analysis of regime negotiations.

Developments after Rome

While the focus of this chapter is on explaining the ICC's establishment and institutional design, the developments that have taken place since the adoption of the Rome Statute in 1998 provide an opportunity for reevaluating the central arguments advanced in the above analysis in the light of new evidence: including the escalation of the international controversy over the ICC under the Bush Administration.

The analysis offered in the previous sections raises two questions concerning ICC-related developments since 1998: Firstly, are the underlying factors that led to the ICC's creation still present and strong, suggesting continued international support for the historical project of ending impunity for the gravest crimes through a permanent ICC? And second, how has the critical design trade-off of the Rome Conference between strong rules and strong state support continued to shape the further development of the Court? In addressing these questions, this section analyzes the (constructivist) role of legitimacy and politicized norms, as well as some key design factors.

At first sight, the high number of signatures and ratifications of the Rome Statute, and the speed at which the entry-into-force threshold of sixty ratifications was crossed, seem to indicate that there is little reason to worry about international support for the Court. The ICC has been receiving continuous declaratory support by individual governments, regional organizations such as the EU and the Organization of American States, and the UN General Assembly.[14] The first Security Council referral of a situation – the Darfur conflict – to the ICC has been welcomed widely as a key event in cementing the Court's authority (Washburn and Punyasena 2005; Cassese 2006: 436).

And yet, the normative developments that were argued above to have prepared the way for the establishment of the Court have not remained unchallenged. The first challenge has been to the international consensus that severe human rights violations should be punished under all circumstances. The problem lies less in diminished support for human rights norms as such, but more in the debate about potential destabilizing consequences of criminal accountability for peace processes.

Although, the academic debate on this issue has long accompanied the ICC's development (Farer 2000; Scharf 2000; Snyder and Vinjamuri 2003/04; Blumenson 2005/06; Gilligan 2006), policymakers in the late 1990s tended to emphasize the mutually reinforcing dynamics between justice and peace, as in the Canadian statement at the Rome Conference: ''Without justice, there is no reconciliation, and without reconciliation, no peace'' (Axworthy 1998). Yet, the potential tension between the two fundamental goals of justice and peace has become much more visible and politically explosive in the ongoing debate about the ICC's first cases, particularly the case of Northern Uganda. The repeated refusal of the rebel Lord's Resistance Army (LRA) to enter into peace talks with the Ugandan government unless the ICC dropped its arrest warrants for LRA leaders appears to lend support to critics who have warned that the prospect of prosecution could prolong wars and human rights violations because it makes perpetrators cling to power (Bassiouni 2006; *Guardian* 2007; Essoungou 2007). The jury is still out on whether the Ugandan peace process will progress alongside the ICC's attempts to ensure criminal accountability. But, there is a clear danger that challenges such as the Ugandan one could chip away at the fundamental normative consensus underlying the ICC's creation.

The difficulties of the Uganda case also point to a second problem which has plagued the ICC's early work, in this country but also in other cases: the challenge of politicized justice. Three out of the ICC's four current cases – Uganda, the Democratic Republic of Congo, and the Central African Republic – are voluntary self-referrals by governments seeking to hold accountable rebel groups accused of crimes on their national territory. It is easy to see the pragmatic motivation for the Prosecutor's choice to accept these cases – they are simply easier to investigate in practice than cases taken up without the consent and cooperation of the concerned state (Kaul 2005: 375). However, critics point out that such cases of self-referral, which were not even considered likely by the Rome Statute's drafters, risk drawing the ICC into political struggles in a one-sided manner. If the Court becomes active at the request of governments to investigate

crimes committed by their adversaries, although *both sides* of the conflict are accused of crimes, this ''might lead to states using the Court as a means of exposing dangerous rebels internationally, so as to dispose of them through the judicial process of the ICC'' (Cassese 2006: 435; also see Arsanjani and Reisman 2005: 386–96). Legal scholars, for instance, have argued that the first Review Conference of the ICC Statute would provide an opportunity to strengthen the ''corrective power'' of the ICC and its Prosecutor in handling obviously biased self-referrals through clarifications in the statute or in the Rules of Procedure and Evidence (Kreß 2004: 947).

A related legitimacy problem for the Court has been its dependency on the UN Security Council. Despite the precautions taken in this regard by the drafters of the Rome Statute, the ICC's practice to date has underlined the factual difficulty for the Prosecutor to act without Security Council support: If the Prosecutor cannot rely on the cooperation of concerned states, as in the cases of self-referral discussed above, his most realistic chance of effectively conducting his investigations will be through a Security Council referral, and/or with the help of UN peacekeeping forces mandated by the Council (Arsanjani and Reisman 2005: 399–400; Gallavin 2006). This dependency, in turn, means that concessions to the Council members' special interests will be hard to avoid in practice – as is evidenced by Resolution 1593, which makes several references to immunity for non-State Parties (Condorelli and Ciampi 2005; Happold 2006). In short, both self-referrals and reliance on the UN Security Council pose challenges of politicized justice to the ICC, which both boil down to the same fundamental problem: The practical difficulty of the ICC Prosecutor to effectively use his *proprio motu* power, which was viewed by the drafters at Rome as a key remedy to the legitimacy problems plaguing previous ad hoc tribunals.

If the ICC is thus currently facing a double challenge to the normative foundations underlying its establishment in 1998, the problem of great power opposition which hampered the Rome negotiations has equally been exacerbated by the Bush Administration's diplomatic campaign against the Court. The strengthening US opposition to the Court demonstrates, on the one hand, the continued impact of perceived sovereignty costs, as is suggested by ''rational design'' theory. On the other hand, it is also that even the Prosecutor's nonexercise of his *proprio motu* power and his refusal to investigate alleged British war crimes in Iraq (Kheiltash 2006) has failed to allay US concerns about the court. This observation underlines the ideological character of perceived sovereignty costs, and suggests

that this factor may have been an even more important motivation of US opposition than uncertainty about the court's future behavior.

The Bush Administration's challenge to the Court meant that ICC supporters continued to be confronted, in the years following the Rome Conference, with the dilemma of whether they should accommodate or resist US demands. It is important to note, however, that this dilemma was not identical with the ''design trade-off'' that like-minded negotiators faced in Rome. In the conflict with the Bush Administration, there was little to gain for the ICC itself by accommodating American concerns, since the United States did not offer any direct or even indirect support for the court in exchange for nonsurrender agreements or acquiescence to its UN Security Council initiatives.[15] In terms of the ICC's effectiveness, the only rational choice for court supporters was to reject all US demands, given the unquestionable negative impact of US policy on the Court's practical work (Johansen 2006).

The *new* dilemma for court supporters lay in weighing support for the ICC against the potential costs in *other* policy areas they had to face as a result of US threats (see Introduction). Regarding Resolution 1422, the choice was between granting immunity to US peacekeepers, and endangering the Bosnia mission (see Introduction). In the case of NSAs, particularly those pro-court states *not* exempted from sanctions qua alliance status – as the NATO allies were – had to face considerable economic costs if they tried to stand up to US pressure. The new US policy thus effectively transformed the issue-specific design dilemma of the Rome negotiations into a wider strategic game in which states' choices to resist the United States' anti-ICC policy could have repercussions in unrelated policy areas.

Thus far, the track record of this linkage strategy has been mixed. Resolution 1422 was renewed once, but a second renewal attempt failed to gain sufficient support in 2004. With the Darfur referral, the United States for the first time effectively supported the work of the Court, although it also managed to ensure an exemption for non-State Parties (see above). While many countries concluded NSAs were under US pressure, many refused to do so even in the face of sometimes painful economic consequences.[16] The EU adopted not only a set of guidelines stating that the US-proposed agreements were inconsistent with the Rome Statute; it exerted active pressure on third countries, above all candidates for EU membership, to reject the US requests (Thomas 2005; Groenleer and Van Schaik 2007).

These various examples of resistance to the US campaign illustrate the continued power of normative principles in hardening the resistance of many states to US requests. Nongovernmental norm entrepreneurs were

again extremely vocal in lobbying against concessions to the United States, exerting considerable public pressure on governments notably in the European context (Thomas 2005: 35; Groenleer and Van Schaik 2007: 983). The continued widespread support for a ''new diplomacy'' unconstrained by lowest common denominators and ''great power vetoism'' (Nel 2002: 156) continued to be echoed in statements such as the following by the EU Commissioner for External Relations, Ferrero-Waldner (2005):

> Whatever course of action the US Administration decides to follow, a steady increase in the number of ratifications and consistent steps towards the universality of the Rome Statute will further demonstrate that the Court is a reality which nobody, including the US, can afford to ignore (emphasis in original).

While the continued impact of norm activists and of an emerging ''new diplomacy'' norm can explain the limited success of the US strategy to a large degree, it is worth noting that there were also ulterior motives of play for some actors involved rather indirectly in the controversy: Some of the economic losses incurred by ICC supporters in Latin America and Africa were offset by US regional or global rivals such as Venezuela or even China, which is itself an ICC opponent (CGS 2005; CRS 2006). These observations suggest that the strategy of transforming the ICC controversy into a larger political ''game'' backfired in part for the United States, a concern echoed in US Secretary of State Condoleezza Rice's public admission in March 2006 that the US position was ''the same as shooting ourselves in the foot'' (Rice 2006).

In sum, in the years following the adoption of the Rome Statute in 1998, the normative developments that have contributed to the establishment of the ICC have been confronted with the forces of realpolitik in various ways: Both the accountability principle as such and the ICC's political legitimacy have been challenged by the political complications of the ICC's first cases. Increasing US pressure has transformed the ICC controversy into a wider political power game, and has tested the strength of NGO norm entrepreneurs and of the emerging ''new diplomacy.'' While the ICC has thus far appeared able to raise to these various challenges, they are likely to persist in the future.

Conclusion

The establishment of the Court can be explained partly with two rationalist arguments: First, states faced a public good problem in international criminal justice, having disincentives to prosecute perpetrators in national

courts on the basis of universal jurisdiction; the ICC solves this problem by centralizing prosecutions. Second, the ICC lowers the transaction costs incurred in a system of ad hoc tribunals established by the UN Security Council. A constructivist perspective can, in turn, complement the rationalist arguments in two ways: First, the public good argument remains too shallow if one does not explain how states came to perceive impunity for atrocities as a common problem in the first place. A constructivist perspective in this manner emphasizes the constitutive effects of human rights norms, which have come to define the identity of the community of liberal states, and have strengthened demand for the prosecution of atrocities. Understanding states' rational interest in prosecuting atrocities as a socially constructed one also sheds light on a problem that the Court has faced in its early work: The political complications surrounding the first ICC cases have challenged the normative consensus on ending impunity by highlighting potential tensions between prosecuting atrocities and supporting the peace processes that follow them. Second, a constructivist approach provides an alternative to the argument of cost-saving. The ICC was expected to be not only cheaper than a regime of ad hoc tribunals, but also more legitimate – although the ICC's early work has demonstrated the difficulty for the Prosecutor to exercise his *proprio motu* power and thus maintain his political neutrality in practice. The alternative motivations of saving costs and strengthening legitimacy, however, are not mutually exclusive. The evidence suggests that both considerations of costs and legitimacy influenced the decision for an ICC, with different actors driven by different motivations.

Regarding the institutional design of the ICC, the track record of rationalist arguments is mixed: As expected by rational design theorists, sovereignty costs, uncertainty, and power asymmetries played a role in the negotiations about the statute, and can explain both US reservations of powerful states, and some minor concessions made to the United States. However, if one assesses the validity of rationalist hypotheses by comparing the ICC design to the UN tribunals, it is puzzling that centralization, control, and flexibility of the ICC differ only slightly from the tribunals, despite a strong variation in rationalist independent variables. Most importantly, rationalist theory cannot explain why most states were unwilling to make sufficient concessions to secure the support of powerful states, which seems essential to the ICC. From a rationalist point of view, one could argue that there is a design trade-off between an independent court that disregards the sovereignty costs of the powerful and therefore lacks their support, and a court that satisfies their concerns, yet contains

loopholes that can be exploited by perpetrators. Nevertheless, it is a weakness of rationalist design theory that it does not tell us which point states will pick on such a trade-off curve.

A constructivist perspective can also resolve the indeterminacy of the rationalist explanation: The persuasive lobbying activities of NGOs as norm entrepreneurs were an influential factor in deciding the design trade-off in favor of an independent court. NGO influence, in turn, depended on states' openness to both the involvement of NGOs into the negotiations and the positions advocated by them. This openness seems to be part of a newly evolving norm of international treaty-making, the ''new diplomacy.'' Both NGO influence and states' commitment to this novel diplomatic approach can also help explain why many court advocates resisted the considerable pressure of the Bush Administration to grant de facto exemptions to the United States through Security Council resolutions and bilateral agreements.

In sum, the result of the ''practice test'' is positive for both rationalist and constructivist approaches, in the sense that both perspectives proved useful to identify and describe relevant explanatory factors in the ICC case. However, rationalist theories – particularly the rational design approach – make a stronger theoretical claim than the constructivist approaches discussed in the paper, since they claim to formulate strictly falsifiable hypotheses. Yet it is doubtful, according to the analysis, whether the rationalist approaches applied in this chapter can live up to that claim. Rationalist independent variables, such as sovereignty costs and uncertainty, were shown to be highly subjective variables, with domestic-level changes both of interests and ideas potentially leading to reevaluations. A better specification of variables would be necessary to render rationalist hypotheses truly ''falsifiable.'' Furthermore, rationalist theory faces the problem – already discussed above – that it cannot predict the likely trade-off between two cooperation problems that call for contradictory design solutions.

It was also a goal of this chapter to explore how rationalist and constructivist theories can be combined. Three approaches proved viable in the preceding analysis: First, a constructivist perspective can deepen a rationalist account by explaining how interests and problems that rationalism takes as given are shaped by normative and conceptual developments: In our case, constitutive human rights norms explain the problem perception in international criminal justice. Second, both perspectives can provide alternative explanations of an institutional outcome, which need not be mutually exclusive, such as the cost and legitimacy arguments that both influenced the decision for an ICC. Third, a constructivist approach

can sometimes resolve an indeterminacy of the rationalist account, in the ICC case the ''design trade-off'' faced by negotiators. This last variant could be interpreted as a reversed two-step, the constructivist approach solving the game defined by the rationalist approach.

Additional theoretical arguments could be integrated into the explanation of international institutions such as the ICC. For example, liberal approaches that focus on substate explanatory factors – both from a rationalist and a constructivist perspective – were excluded from the analysis. Yet, they could shed further light on some aspects of the ICC's establishment and design, for example, on domestic (re)evaluations of sovereignty costs (constructivist arguments), or on the interaction between governments and national publics in the face of atrocities abroad (constructivist and rationalist arguments). Furthermore, especially the rationalist design perspective lacks a theory of the *negotiation process* itself. While a constructivist explanation focusing on an evolving ''new diplomacy'' norm addresses this shortcoming to some degree, it remains underdeveloped and could usefully incorporate insights from earlier theoretical work on institutional bargaining. Despite these limitations that point to the necessity of further theoretical integration work, the theories applied in this chapter have been demonstrated to be useful analytical tools that guide our attention to the relevant factors explaining a specific institution.

Notes

1. The crime of aggression falls within the ICC's jurisdiction in principle; but because, as already noted in this volume, no consensual definition of aggression was reached at the Rome Conference, the Court will not exercise jurisdiction over this crime until a definition has been agreed upon (Article 5 of the Rome Statute of the ICC).
2. Exceptions to this are the studies by Abbott (1999), Cohen (1997), and Rudolph (2001).
3. This proceeding merely serves to structure the analysis; it neither implies that the ''first cut'' of the analysis must necessarily be rationalist nor that constructivism is superior to rationalist approaches.
4. That institutions provide centralized enforcement need not contradict the basic assumption of anarchy that underlies the original enforcement problem. Rationalist theorists distinguish between states' ''myopic self-interest'' in a particular issue from its ''farsighted'' interest in maintaining cooperation in general (Keohane 1984: 99). Furthermore, ''central enforcement'' through international institutions does not imply that they have own coercive power.

Often, international institutions merely legitimize decentralized sanctioning (Keohane 1984: 89), or rely on decentralized enforcement of centralized decisions (Koremenos, Lipson, and Snidal 2001: 772).

5. This position is advocated, among others, by Checkel (1998) and Risse (2003). Fearon and Wendt take a similar view yet argue that the two different perspectives do not even entail an a priori ontological commitment, but should be treated more loosely as analytical lenses that emphasize different aspects of political life (Fearon and Wendt 2002: 53). Fundamental epistemological differences between rationalism and constructivism, on the other hand, are emphasized by, e.g., Guzzini (2000) and Kratochwil (2000).
6. Ruggie employs the term ''norm-governed regime change'' as a short cut for his thesis that concrete institutional rules were adjusted to new world economic conditions in the 1970s so that the (unchanged) underlying norm of embedded liberalism would continue to be implemented. Both underlying norms and institutional rules were considered components of a regime in the early regime literature.
7. Note, however, that this does not constitute a full-fledged ''theory test,'' because the validity of the theory is evaluated in only one case.
8. In Belgium, the exercise of universal jurisdiction recently lead to a backlash against the national universal jurisdiction law. The extremely comprehensive Belgian legislation provided the basis not only for investigations against numerous former dictators, but also for the filing of complaints against former US President George Bush and Israeli Prime Minister Ariel Sharon. As a result of external political pressure, the law was repealed on August 1, 2003 (New York Times 2003) – which will, however, benefit not only Bush Sr. and Sharon, but also all potential suspects whose cases have no direct connection with Belgian nationals. Human rights activists hope that the establishment of the ICC ''may [. . .] relieve some pressure from Belgium'' (HRW 2003*b*).
9. The graphic only includes the most important human rights norms, the so-called ''bodily integrity'' norms that can fall under the jurisdiction of the ICC. As early as the late 1980s, most states had ratified at least one of the fundamental human rights norms represented in the diagram, though not each state had ratified all of them. It should be noted that the sharp increase in ratifications in the early 1990s is mainly due to the proliferation of newly independent states, not to new ratifications by ''old states.''
10. Decision of October 2, 1995 (ICTY Appeals Chamber 1995). The Appeals Chamber affirmed the authority of the Security Council to establish a tribunal under its Chapter VII power, the situation in Yugoslavia posing a threat to international peace.
11. On May 14, 1999, ICTY Prosecutor Carla del Ponte established a Committee to review the NATO bombing campaign against the Federal Republic of Yugoslavia. A criminal investigation into possible NATO offenses was ultimately not opened because the Committee concluded in its final report that there was insufficient

evidence to do so (Committee Established to Review the NATO Bombing Campaign 2000).

12. The only comprehensive volume on the issue (Cooper, English, and Thakur 2002) provides a largely atheoretical, descriptive overview of the ''new diplomacy,'' focusing primarily on the ICC negotiations and on the second paradigmatic case, the ''Ottawa Process'' leading up to the ban on landmines, but also identifying elements of the new approach in issue areas such as small arms reduction, children in armed conflict or international labor standards.
13. For instance, while Young's characterization of international regime negotiations is based on the prevailing condition of unanimity in these negotiations (Young 1994: 120), the ''new diplomacy'' with its attack on ''great-power vetoism'' reintroduces a majoritarian element (Nel 2002: 156). On the other hand, the institutional bargaining perspective stresses the importance of ''equity'' considerations for actors in institutional design negotiations, i.e., their general preference for an institutional design that does not disproportionately favor the big players (Young 1989: 368, 1994: 122). A similar argument is made by students of the ''new diplomacy'' to explain the unwillingness of ICC negotiators to give in to American demands for exemptions and special prerogatives. Another overlap is the emphasis placed by institutional design and new diplomacy approaches on the crucial importance of leadership, which is not the exclusive domain of state delegations (Young 1991; Cooper 2002).
14. For example, UN General Assembly Resolutions A/RES/53/105, A/RES/54/105, A/RES/55/155, A/RES/57/23, A/RES/58/79, A/RES/58/318, A/RES/59/43, A/RES/60/29, A/RES/61/15, A/RES/62/12; European Parliament Resolution P5_TA (2002)0082; OAS Resolutions AG/RES. 1770 (XXXI-O/01), AG/RES. 1900 (XXXII-O/02), AG/RES. 1929 (XXXIII-O/03), AG/RES. 2039 (XXXIV-O/04), AG/RES. 2072 (XXXV-O/05). AG/RES. 2176 (XXXVI-O/06), AG/RES. 2279 (XXXVII-O/07).
15. Interviews with EU officials in Brussels (July 2006) and New York (March 2007).
16. For instance, Costa Rica publicly rejected the US request for an NSA although it faced a loss of $500,000 worth of aid as a result (Kelley 2007: 584).

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The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court

Michael J. Struett

The legitimacy of the International Criminal Court (ICC) depends ultimately on its capacity to persuade observers that the exercise of its powers to investigate, prosecute, and punish violations of international criminal law (ICL) is consistent with the application of rules that are universal in nature. Both in legal theory and actual practice, the ICC's rules must be seen to apply equally to everyone for the communicatively rational justification of the ICC to be sustained overtime. As the contributors to this volume argue, there is good reason to be concerned that the political structure of the ICC, including its reliance on powerful states in the international system, will threaten its capacity to dispense justice in a way that diverse observers agree is principled and just. In particular, the early investigations undertaken by the Court, and in some ways the Court's very design, suggest that the ICC will tend to focus on prosecuting alleged perpetrators from weak and failed states, and not persons from advanced industrial societies. For the ICC's legitimacy to grow overtime, and indeed, for the discursive legitimation of ICL as a system of universal justice to succeed more broadly, the ICC must avoid an outcome that perpetuates the global inequalities between powerful and relatively weak states in the international system.

This chapter builds an understanding of the authority of the ICC by showing how such authority is grounded in the capacity of legal institutions to argue [discursively] that they are engaged in applying universal norms. The approach to the logic of argumentation employed here builds on the work of Friedrich Kratochwil (1999) and Thomas Risse (2000) in extending the theory of communicative action to the legitimation of the rules and norms that are constitutive of the international community, including most formally, international law itself. It is difficult to argue that ICL norms have been enforced impartially since the end of the Second World War. Certainly, no such impartial enforcement existed prior to that time. While some have been punished in trials that gave serious consideration of evidence and respected due process, as at Nuremberg, before the International Criminal Tribunals for the former Yugoslavia and Rwanda, and in a variety of other forms; it is equally true that many other individuals guilty of heinous international law crimes lived out their lives without facing serious justice.

The notion that the enforcement of ICL could become the institutionalized enforcement of universal norms stands in striking contrast with most of what we think we know about international criminal tribunals, specifically, or the exercise of power in international relations generally. Even today, in the wake of recent and ongoing trials of former heads of state for violations of ICL, the prevailing view remains that such efforts continue a legacy of victor's justice.[1] Starting from a traditional realist point of view, the record of war crimes trials can easily be read as confirming the idea that ICL is enforced almost exclusively by the powerful against the defeated.

Alternatively, Kingsley Moghalu argues that the phenomenon of international war crimes tribunals can best be understood from the perspective ''of a pluralist international society of states which have common institutions, rules, and shared values, but also conflicting and contrasting tendencies'' (Moghalu 2006: 171). The main insight Moghalu develops from his application of the English School approach is the idea that international criminal justice efforts in the contemporary international society of states create a tension between the order-creating functions of that society and its justice pursuing functions, by giving precedence to justice over order.[2] This is particularly true if a strictly liberal legal attitude is taken toward war crimes trials. If all technical violations of ICL were pursued to the ends of prosecution and conviction without consideration for the actual balance of power between states, war crimes trials might indeed be disruptive to the general end of maintaining international order, (and the particularly Western liberal project of maintaining an international order dominated by advanced industrial democracies).

The conduct of diplomacy and even the practice of realpolitik itself could be impaired if, for instance, Former US Secretary of Defense Donald Rumsfeld, or other leaders in similar positions, could not follow policies that they believe were necessary to preserve the national security of the United States and its allies.

Moghalu also argues in *Global Justice* that the various successes and failures of international criminal justice over the last sixty years suggest that in fact, the legal liberals are naïve, war crimes trials are only pursued when they can be squared with the maintenance of the order in the society of states. As one illustration of his argument, he asserts that the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecutors ultimately chose not to indict the military and/or civilian leaders of the North Atlantic Treaty Organization (NATO) for alleged violations of war crimes law in 1999. For Moghalu, it is obvious these prosecutions did not go forward because of the fact that the ICTY itself depended on the political, economic, and military support of the United States (Moghalu 2006: 61).

I am largely persuaded by much of Moghalu's argument that national interests and power have tended to shape the conditions under which ICL is enforced. His recognition of the role of the society of states allows him space to acknowledge that international law norms do sometimes influence events in world politics, but the tension between legal norms and power politics is kept clearly in view. I am, however, considerably more optimistic that the institutionalization of the ICC places ICL in a position where its claim to be enforcing universal norms will be strengthened. Skeptics of such enforcement through institutionalization claim that too much due process and impartiality may not be the guarantor of legitimacy (Drumbl 2007); that excessive due process can, in fact, trigger perceptions of convoluted, so-called ''foreign legalism'' that discredit international courts, instead of legitimizing them. My argument is that the discursive legitimacy of the Court provides a way of understanding the universalizing effects of legalism, and that the permanence of the Court ensures that reasons and arguments (discursive strategies) will be formulated in response to any negative perceptions of foreign legalism.

Essentially, this is because the ICC officers are in a position to develop substantial discursive separation from the pressures of realpolitik. Because the ICC's structure allows its officers considerable independent authority from the pressures of the officials of the state governments that created it in the first place, those officers are in a position to (discursively) argue for the fair imposition of ICL standards with less need to bend to the realities

of interstate power politics. To a lesser extent, I think the same was true of the officers of the International Criminal Tribunals created by the UN Security Council in the 1990s. Accordingly, I think that Moghalu's interpretation of the decision by Del Ponte not to prosecute alleged NATO crimes is uncharitable. While it is true that NATO and its member states were critical to the overall success of the ICTY, it is also true that the crimes they were accused of were not crimes of deliberate intent, and on the face, were much less abhorrent than many other war crimes potentially within the ICTY's remit (including many alleged crimes by Yugoslavians that the ICTY had insufficient resources to pursue). A persuasive argument can be made that prosecution for NATO's alleged offenses would not have been consistent with the fair application of international law, even if evidence could have been marshaled against some individuals. Risse points out that the real issue when distinguishing between strategic and communicatively rational forms of action is not whether or not power relations are absent in a discourse, but to what extent they can explain the argumentative outcome (Risse 2000: 524–32). This is a crucial insight. If arguments are won based on reasons and not appeals to power, then the underlying power relations are less important.

In the discussion below, I will raise further examples of the ICC Prosecutor's capacity to resist the pressures of realpolitik. I argue that despite considerable practical challenges that the ICC faces in successfully developing its own authority through the logic of argumentation, early experience suggests the ICC may gradually succeed in developing its own legitimacy. Because the Judges and Prosecutor of the ICC have essentially no executive authority of their own, they are entirely reliant on their capacity to make persuasive discursive arguments that their work is not in fact an effort by one part of the international community to impose its power on another. This creates an interesting pressure on the officials of the ICC to engage in political strategies marked by communicative action as opposed to strategic action. Indeed, the officers of the Court, the Prosecutors, and Judges have an affirmative duty to engage in the discursive legitimation of ICL as a universal exercise. This duty is supported and further reinforced by sufficient guarantees of continuity in office that they cannot be retaliated against for making statements that offend the interests of politically important members of the international community. Other actors in the international political system thus are likely to find it necessary to respond to the communicative actions of the ICC's officers. In this concerted way, the existence of the ICC itself tends to institutionalize a discourse in world politics about the extent to which ICL norms are

being impartially and universally enforced. So long as that discourse remains focused on the objective question of whether or not particular acts are serious violations of ICL that deserve punishment by the ICC, that claim toward universality is considerably advanced. While it is undoubtedly the case that politics will continue to influence who is punished, as well as when and if they are arrested, the existence of the ICC ensures that the dialogue about the universality of ICL norms will remain on substantially firmer ground than it was in the period from 1945 to 2002.

Discursive legitimacy

In the discussion about establishing a new permanent international tribunal to enforce ICL, a core set of actors chose deliberately to pursue a court that could be justified to the greatest possible extent on rational grounds, and not primarily on an appeal to force. In that context, negotiations over particular treaty provisions had to be grounded in principled normative reasons.

But why should this be the case? To answer this question, I shall review Kratochwil's understanding of the conditions that permit normative discourses on grievances between human beings, in order to show what is meant by the notion of advancing "principled arguments" about the development of the international criminal legal system. Kratochwil's analysis demonstrates that in order to have a discourse about grievances, the participants must first accept the universalization of their claims (Kratochwil 1989: 142). If I claim the right not to be treated in a certain way, there is necessarily an implicit promise that I will not in the future treat others in the same way. But this universalization is not in and of itself sufficient; some substantive content must be added. The parties in the dispute must have sufficient equality of status to allow them to plead their cases on the merits, rather than via an imposition by force or other superior resources. Finally, the participants in the discourse must share some substantive moral values at the start, which the simple rule of the categorical imperative cannot by itself provide. This is in effect the Habermasian notion of a "lifeworld" that provides the background conditions for a rational discussion of facts *or* values. Kratochwil suggests some of the principles identified by Pufendorf as "laws of nature."[3] These include (1) no one should hurt another; (2) people should treat each other as equals; and (3) people should offer help when they are reasonably able to do so (Kratochwil 1989: 140–1). These criteria provide grounds on which it is

possible to have a discourse about the validity of norms. The criteria *do not* lead to preordained outcomes, but do suggest rules that permit some discourses to be marked out as rational; Kratochwil shows that in practice these are necessary minimal conditions for a discourse on grievances. Because of this grounding in shared values, some prospective norms resonate in the context of a rational discourse, while others do not.

In every day social practice, people frequently discuss the validity of social norms. This is particularly true of legal norms, but arguments are also made to justify moral norms and informal norms. In practice it is possible to give reasons that are understood to justify or challenge the conclusion that a particular norm is valid in some society. In daily life people justify normative claims all the time. Consider the norm, ''it is justified to kill in self-defense if one's own life is threatened.'' In practical, everyday discourse it makes sense to assert that this is a ''valid'' norm, and to give reasons for that claim.

Political scientists sometimes try to explain the existence of norms in purely utilitarian terms. This is inadequate as Habermas and Kratochwil note. As Durkheim first began to describe, in modern societies, the prescriptive force of norms is justified as a claim to legitimacy that can be redeemed discursively (Kratochwil 1989: 97). Kratochwil's analysis demonstrates persuasively that the prescriptive force of norms depends on the degree to which those norms can be justified through rational argument (1989: ch. 4). The Theory of Communicative Action developed by Habermas and others provides a framework for understanding such discursive practices and the grounds for considering that some normative claims are more valid than others.

Communicative action is characterized by actors who want to reach an understanding with one another about facts or norms, and they are willing to give reasons for the validity of their claims if they are challenged by other participants in the discourse. The participants in turn understand that they have the freedom to challenge the validity of other speakers' claims, and indeed an obligation to do so if they do not agree with the validity of what is uttered. The only reasons that count for justifying claims are those kinds of reasons that all the participants together find acceptable.

With strategic action, in contrast, actors are not concerned if the reasons that are persuasive for them are not shared by others. Strategic action is characterized by purposive-rationality. Actors pursue goals, and may try to influence other actors' behaviors, but not by reaching rational agreement about what is the case or what ends ought to be pursued (Habermas 1996:

118–20). Of course, the concepts of communicative action and strategic action are ideal types, but we can look at observed discursive practices in the world and determine whether or not they approach a communicatively rational orientation or a strategic orientation.

For the ICC, interaction between states and UN organs and agencies with the Prosecutor's office will be essential for the Court to complete its work. The Court will have little or no effective means to coerce the needed level of cooperation. Instead, it has to rely on buy-in by states and other actors to the justice-seeking mission of the court. Such buy-in is unlikely to be forthcoming if the ICC is perceived as applying a double standard in its work, prosecuting violations in only certain countries or by certain types of violators (i.e., Militias or rebels but not states). Thus in order to be effective, the ICC must constantly be prepared to argue that its work represents a genuine effort to impose universal codes of conduct across all times and places within its remit. In other words, the ICC, like most contemporary court systems, will justify its actions in communicatively rational terms (Stone Sweet 1999). Because strategic behavior and reasoned argument are ideal types, the question to ask is not whether actors behave in one way or the other, but which mode captures more of their behavior in a particular situation (Risse 2000: 18). Others will criticize the ICC's work whenever they perceive that it falls short of promoting universal enforcement of norms. In turn, the ICC Prosecutor and Judges will reply implicitly or explicitly to such criticisms in their public remarks or written filings before the Court. Accordingly, the very existence of the ICC institutionalizes a communicatively rational discourse about the rules of ICL and the fairness of their application in practice.

Politics and NGOs in the ICC

There is little doubt that the activities of the ICC will pose implications for politics. The ICC has jurisdiction over violent crimes that frequently occur during civil conflicts that involve a sitting government. The ICC Prosecutor therefore investigates situations where persons in positions of power may be linked to the commission of ICC crimes. There are important limits to this intrusive potential of the ICC. The ICC was designed as a court of last resort that will only act when other options for prosecution have been exhausted. Still, politics is inherent in the work of the ICC.

In fact, the rules of the ICC Statute give the Prosecutor substantial discretion to consider whether or not pursuing justice is wise in a particular

political context. The ICC's rules and its need to work with state governments provide checks on the Prosecutor's authority, lessening the likelihood of the capricious exercise of the Prosecutor's discretion (Danner 2003: 524–32). This balance resulted from the contributions of non-governmental organizations (NGOs) to the negotiations that led to the Court's establishment (Struett 2008). Those organizations were sensitive to the need to balance an empowered independent judiciary with the complex political issues that arise in trials dealing with mass violence (Bass 2000). Human rights groups, religious communities, and lawyer's associations around the world unfortunately have a great deal of experience with the challenges of bringing political leaders to trial for mass crimes. Their voices contributed to an ICC Statute with enough judicial independence to end impunity, but with procedural rules that limit the likelihood of prosecutions that are politically motivated, or that unnecessarily intervene in the judicial and political processes of sovereign states.[4] These institutional design elements are the key to my argument that the ICC officers will face a recurring need to argue discursively that they are engaged in enforcing universal norms.

Only experience will demonstrate whether or not the ICC can be effective in securing justice without preventing peace. NGO participation in the ICC discourse facilitated the development of a set of rules that have gained legitimacy with states, particularly through NGO contributions to the principles of permanency and complementarity in the Court's design. As a result, the ICC has the authority to bring international law criminals to justice, but also the discretion to delay or defer to domestic legal processes or truth commissions when so doing serves the ends of peace and justice.

Opponents of the ICC complain that its Prosecutor is unaccountable, and has too much latitude in deciding which cases to prosecute.[5] Supporters argue that this prosecutorial independence is the crucial strength of the Court's design because it weakens the ability of states to block particular prosecutions for political reasons (Gurmendi 1999). The principles of permanence and complementarity in the ICC's design create a structure that enable and limit the Prosecutor's discretion. It is this balance that institutionalizes the capacity of the ICC's officers to make communicatively rational arguments that they are engaged in pursuing the enforcement of universal norms. The Court's permanence, including its authoritative definition of crimes in the Statute, holds out the promise that like criminal acts will be punished alike in the future, even if the perfect achievement of universal enforcement of norms cannot be achieved today. The court's complementarity features establish that the ICC is a court of last resort, meaning the ICC is to be used only when other

mechanisms for ensuring accountability for ICC crimes are not available. The exercise of the ICC Prosecutor's discretion is defined and constrained by these principles. Both principles were developed by states negotiating the Statute of the ICC in broad dialogue with NGOs. The breadth and openness of this discourse are responsible for the careful balance of prosecutorial discretion that resulted in the Rome Statute for the ICC.

As already noted, the ICC Statute is constituted as a multilateral treaty.[6] Like all of international treaty law, the Court was established on the basis of the consent of sovereign states. Yet NGOs played a crucial role in the negotiations that led to the drafting of the ICC Statute (Pace and Schense 2002). NGOs have little formal legal role in drafting treaty law, and some observers note that NGOs have a ''legitimacy deficit'' because it is not always clear who they represent, how they are funded, and their internal decision-making procedures usually lack transparency (Castelos 2003).

Nevertheless, NGOs have an important attribute that allowed them to make a unique contribution to the overall legitimacy of the legal system embodied in the ICC Statute. NGOs attempt to influence political outcomes by advocating their view of the public interest. As advocates of the public interest, they rely on rational arguments that can be justified through principled reasons (Boli and Thomas 1999). Of course, the leaders and members of NGOs may have private interests, such as increasing group membership and funding, individual career motivations, or personal friendships, for pursuing particular courses of action. Still, NGOs do not decide public policies on their own accord, in national or international fora. This simple fact means that in order for NGOs to be effective they must persuade other decision-makers, and consequently, they are uniquely disposed towards giving reasons that logically support their preferred outcomes. In the negotiations on establishing an ICC, this mode of discursive persuasion was particularly efficacious (Struett 2008). Arguing about norms that could be defended as equitable, and therefore just, was at least as important during the ICC Treaty negotiations as bargaining about which norms various states would be willing to accept. NGOs tend to use persuasion based on reasons that appeal to a broad base of interlocutors, precisely because they often rely on rational arguments to achieve policy change. Arguing based on reasons that are accepted by a broad audience is particularly effective in establishing the legitimacy of rule systems (Habermas 1996).

Since the ICC is a permanent court, it can avoid many of the criticisms of *ad hoc* war crimes tribunals and build on their successes over time (Griffin 2001). This permanence strengthens its pretensions to be enforcing universal

norms, and as such, it is logically in a position to command greater legitimacy. The second crucial feature is the ICC Statute's careful deference to national legal systems. If the ICC attempted to provide a universal solution to all future mass crimes committed, it would be more vulnerable to criticisms that it was overreaching and unaccountable to local populations. Instead, the ICC was designed to encourage national governments or even regional associations to bring the perpetrators to justice in line with local political conditions, and to exercise its authority only when local conditions allow impunity. The balance struck in the design of the ICC may not be perfect. A number of observers have already criticized the design of the institution. Below, I examine those critiques, but conclude that the balance struck between prosecutorial independence and accountability in the design of the ICC Statute is one that logically permits the court to build on its own successes, and learn from its failures, while building its own legitimacy by institutionalizing a communicatively rational discourse about the universal application of ICL. As I have already suggested, the ICC's design gives its officers an incentive to engage in a communicatively rational discourse about bringing international law criminals to justice; this dynamic is the key to building the legitimacy and the compliance pull of the Court over time.

The compliance pull of modern legal systems rests simultaneously on two forces. One is the probability of enforcement through sanctions that motivate individuals to comply with the law. The other is the assertion of the rational validity of the law, as embodying norms that diverse individuals can agree ought to be obeyed for the general good of all concerned (Habermas 1996). For international law, including international humanitarian law and international human rights law, the legitimacy of the legal order has historically suffered from a lack of enforcement and of clarity and consensus about how international legal norms apply to particular circumstances. Thomas Franck has noted that the heavy reliance of the international legal system on voluntary compliance offers an opportunity to build a world legal order primarily on the basis of consent rather than coercion (Franck 1988: 710). Thus, political and legal theorists from various perspectives have argued a key factor in establishing the legitimacy of rule systems is ensuring that every person impacted by the rule must have a voice in the process that leads to the adoption of a rule. Having voice is not merely the opportunity to speak, but an assurance that claims will be taken seriously and responded to as part of a rational communicative process (Gutmann and Thompson 2004).

In the next section, I shall discuss some of these claims and criticisms of the ICC's main features. I argue that the permanency and complementarity

principles in the Statute create a balance between prosecutorial constraint and independence. These two principles operate to constrain the Prosecutor from unwise prosecutions that are insufficiently sensitive to local political conditions, even while those same principles grant the Prosecutor enough independence to ensure prosecutions take place when relevant politicians are reluctant. I further claim that an ICC Prosecutor who uses his authority in a capricious way will likely find that the result is the ineffectiveness of the Court itself, but not the detention of persons unjustly accused, or the disruptive interference of the ICC in local or international peace-building efforts.

Major criticisms of the Court's design

Three main criticisms of the ICC

Criticisms of the ICC's design have focused on three main issues. The first criticism is that the court will be insufficiently sensitive to local political concerns including the need to reestablish political order in the wake of mass violence. The second is that the Rome Statute creates new legal obligations for non-state parties to the treaty in violation of international law. A third criticism is that the ICC Prosecutor and Judges are insufficiently accountable to others, and therefore the exercise of the ICC's powers could be anti-democratic and subject to abuse.

The possibility that the ICC will intervene in ongoing political conflicts with insufficient regard for the impact of criminal prosecution on other public policy values is among the most serious objections to the structure of the ICC. The Prosecutor's *proprio motu* power to initiate investigations and trials is at the center of this objection to the Court's design. Critics argue that this feature amounts to placing the ICC outside of any controlling political context (Czartnetzky and Rychlak 2003). The ICC Prosecutor, with the consent of the ICC Judges, is in a position to legally pursue cases without support from political authorities in the state in question. Proponents counter that the ICC Statute only allows for the Court to take jurisdiction if there is no genuine local investigation or legal proceeding. However, the ICC Prosecutor and Judges retain the authority to determine that a domestic legal proceeding occurred merely for the purpose of shielding the accused. Alternatively, when the Security Council refers a situation to the ICC, as it has with Darfur, the Prosecutor may find that he is tasked to investigate crimes with little or no support for carrying out

those functions from the territorial state or the international community. In those cases, the ICC has the option to be patient in pursuing investigations and trials. I discuss the Sudan situation in more detail below.

Decisions about when to prosecute mass atrocities are often controversial, particularly when conflicts are perceived between the goals of pursuing justice and promoting the stability of new regimes (Kritz 1995). Of course, the ICC Statute makes clear it is not the only mechanism for achieving justice for the victims of mass crimes. The ICC Statute's complementarity provisions mean that the ICC is only to be used as a court of last resort. Truth Commissions, trials in national courts, and even *ad hoc* international courts may all be used from time to time as mechanisms for holding people responsible for the most egregious violations of human rights. The ICC's complementarity provisions ensure that national tribunals or courts in third-party states may continue to play an important role. Still, the existence of the ICC as a possible option for achieving justice for victims of massive political crimes is changing the dynamics of discussions about how to deal with alleged perpetrators in positions of power.

Another central objection to the ICC's design is the fact that the Court could conceivably try and punish citizens of states that have not ratified the court's Statute (Scheffer 1999). As noted in the first chapter of this book, it has been argued that the Statute unfairly creates legal obligations for states that have not accepted the treaty. If citizens of non-State Parties commit crimes on the territory of State Parties, or if the Security Council refers a situation to the Court, as has now happened with respect to Sudan, the court can try the citizens of states that have not accepted the treaty. The Sudanese government has argued that the Security Council referral is an inappropriate extension of the UN body's legal authority, notwithstanding the ICTY and ICTR precedents. Legal scholars continue to debate whether or not this amounts to violation of the international law rule that treaties should not create obligations for non-State Parties (Scharf 2001: 52; Amann 2004).

The final concern that the ICC Prosecutor is unaccountable is closely related to the concern that the Prosecutor will be insufficiently sensitive to local political considerations when deciding whether or not to prosecute particular cases. The ICC Prosecutor or individual Judges, as noted in the Introduction to this book, can be removed from office for misconduct by the Assembly of State Parties, which is formally the highest authority within the Court.[7] Each State Party has one vote in this body. But this extreme penalty will be used only rarely, and in any case gives only very limited voice to the societies that are most directly involved in an ICC investigation.

The United States, as we have seen, claimed that because it often puts its own forces in harm's way in order to defend world order, it should not be subject to international prosecution before the ICC (Orentlicher 1999). This approach was unacceptable for the vast majority of states and NGOs involved in the process. Because they wanted a court that could argue it was applying a legitimate rule system backed by reasons, it was logically unacceptable to grant de facto exemption to a single powerful state, or to a group of states such as the permanent members of the UN Security Council.[8] For other states to accept the sort of exemption that the United States sought, they would have needed to accept as a matter of principle that war crimes and crimes against humanity should not be punished if they are carried out by powerful states seeking to maintain the existing international order. Such a position is logically inconsistent with the norm that these crimes should always be punished and would violate the reciprocity principle that Justice Robert Jackson eloquently enunciated in his opening statement at the Nuremberg trials (Persico 1994: 137). This criticism of the ICC remains, and many have argued that a real danger exists that the ICC will only impose justice in the developing world, as an agent of the developed states (Franceshet 2002). While this danger is a real one, the existence of the ICC also helps to create a discursive space that will enable people to criticize such injustices by comparing alleged offenses with the definitions of crimes in the ICC Statute.

Rules thus have legitimacy when diverse members of a society can agree in the abstract that such rules are fair to all concerned, before particular interests come into play. Diplomats representing states, find it difficult to take this abstract position, behind Rawl's famous ''veil of ignorance'' (Rawls 2001). The authority of a state delegate involved in international negotiations turns on her claim to be the official representative of a particular set of interests, a government, and its people. NGOs enjoy no such assumption of representative legitimacy. NGOs' only source of power is the persuasive force of their arguments. Their influence during the ICC negotiations rested on their expertise in the area of ICL and in their ability to analyze and quickly disseminate their views about the logical problems with particular mechanisms that were proposed for the court's operation (Struett 2008).

For instance, NGOs lobbied for and won approval for the ICC to have a strong, independent Prosecutor. States remain primarily responsible for enforcing ICL under the complementarity provisions of the ICC Statute. But in order to ensure that serious atrocities would not continue to go unpunished because the relevant states were unwilling or unable to act,

states accepted that the new international institution should have substantial powers. Under the ICC Statute, the Prosecutor with the permission of Judges of the Pre-Trial Chamber is authorized to bring charges on his own authority.[9] This procedural independence means that decisions to prosecute are at least partially isolated from the short-term political pressures of interstate politics.[10] Such independence, as we shall see, underscores the importance of the principles permanency and complementarity.

The principle of permanence in the ICC Statute

The ICC is intended to achieve a greater degree of institutionalization than other *ad hoc* mechanisms in order to punish or hold perpetrators to account for atrocities. This is because it is a permanent supranational entity, with sitting Judges and independent Prosecutors. Consequently, the ICC has the opportunity to build operating procedures, to create shared expectations in the world community over time, and to support its authorities' claim to be enforcing universal norms. Each time the Prosecutor or a Judge makes a decision about whether or not particular acts count as violations of ICL, they issue a discursive claim to be enforcing enduring legal norms. Others can criticize particular decisions on the grounds that too few or too many cases are being prosecuted, but in so doing they engage in the institutionalization of the discourse about the meaning of ICL.

The institutional permanence of the ICC will thus tend to strengthen the norm that the acts criminalized in the Statute should always be punished. The International Military Tribunals at Nuremberg and Tokyo never fully escaped the charge that they only imposed ''victor's justice'' and not the impartial rule of law (Chihiro, Ando, Onuma, and Minear 1986: 29; Kirchheimer 1995: 330–74, 368–71; Ratner and Abrams 2001: 190). Reports from the former Yugoslavia suggest that many citizens there continue to question the ICTY's legitimacy (Cibelli and Guberek 2000). If a criminal norm is universally recognized, it is valid even if not always punished. But *ad hoc* tribunals are too inconsistent to persuade doubters that the norms are really universal principles, and not just propaganda of the powerful punishing the defeated.[11] Truth Commissions or special courts established in times of transition often face this problem. The claim that the enforcement of ICL is the implementation of universal principles is suspect when courts are established by powerful outsiders in conflict-torn societies, or by newly established regimes within a society in

transition. In the future however, the ICC need not face this charge because it represents an institutional commitment to ensure that certain crimes are punished regardless of the prevailing political situation.

The ICC's permanence is also central to the Court's ability to claim legitimacy. Here the consistent application of law to future cases is a logical necessity of this claim and for the rationality of our normative rules (Alexy 1989: 65–79). Of course, no legal system created by human societies can expect to punish every violation that occurs. Indeed, the ICC is much less ambitious. It is designed as a court of last resort that will punish these crimes only when national legal systems fail to do so. The upshot is that permanence by itself will not ensure the perception of legitimacy of the ICC. It must also embody a set of procedures and norms for deciding which cases to prosecute, which a diverse observer can recognize as fair and just. Accordingly, the provisions of the Rome Statute that provide for its procedural jurisdiction are crucial to understanding how the ICC will interact with national, regional, or *ad hoc* international processes for attaining justice in response to mass atrocities.

ICC negotiators were careful in defining the crimes in the ICC Statute to limit themselves to crimes that were already recognized as part of either customary or treaty-based international law. NGOs were insistent on this point during the negotiations. They understood that focusing only on existing crimes would strengthen the legitimacy of the ICC, and they reminded state delegations that it would be wise to avoid creating new international crimes (Amnesty International 1997). Given their commitment to ending impunity for the individuals responsible for such acts, human rights NGOs were insistent that the ICC should have jurisdiction over the core crimes even when there is no link to an international conflict (Amnesty International 1997). Near the end of the Rome Conference, states, including Russia, China, India, and Mexico argued against giving the ICC jurisdiction over crimes committed during internal armed conflicts (Kirk 1998).

Still, for ICL, as it was practiced in the twentieth century, the promise that future crimes would be treated remained extremely tenuous. Tribunals rarely have been established, and the perpetrators of many atrocities escaped criminal accountability (Bass 2000). The political challenges to the ICC are different than those that constrained the establishment of *ad hoc* war crimes tribunals. The difference is the permanence of the ICC. This means that time tends to serve the interests of justice rather than impunity. *Ad hoc* courts, particularly after World War II, depended on the imposition of superior force from the outside to document the crimes that

had occurred (Kirchheimer 1995). In the case of the former Yugoslavia, local cooperation was ensured in large part through outside coercion by the Western powers.

At the other end of their life-cycles, *ad hoc* courts create an incentive for accused persons to try to delay their trial by avoiding capture, in the hope that the tribunal will eventually shut its doors. This problem is illustrated by the current debate about phasing out the work of the ICTY. While states have urged the ICTY to finish its work rapidly or to face a withdrawal of future operating funds, the Prosecutor and other court officials struggle to operate as quickly as possible, and warn of the travesty of justice that might occur if indicted suspects, such as Ratko Mladić, remain at large when the court closes (Moreno-Ocampo and Bensouda 2006: 9).

The permanent ICC, on the other hand, can afford to be patient. With its rules and Judges and officers in place, it can gradually build a case prior to capturing a suspect. This means that even without total cooperation from the military or police forces with control over the territory where evidence exists, witness testimony and documentation can nevertheless accumulate gradually when opportunities arise for the Court to do so. The ICC can indict suspects and wait for a politically appropriate time for a state to arrest the suspect and/or turn over evidence. As the ICTY has shown, even intermittent and half-hearted cooperation with international prosecutions over time can lead to the detention of many suspects and the production of sufficient evidence for prosecution.

The advantage of the ICC's permanence in this respect, and its relationship to the exercise of prosecutorial discretion, is illustrated by the ongoing efforts of the ICC Prosecutor Moreno-Ocampo to investigate the commission of ICC crimes in Sudan. While some rebel forces in Darfur and the government of Sudan agreed to a peace agreement on May 5, 2006, violence has continued in that region, accelerating with the initiation of new hostilities by the government of Sudan on August 28, 2006. Moreno-Ocampo has openly stated that his early strategy was to interview victims and witnesses of alleged crimes only when they are outside Sudan, where their safety and security can be reasonably assured as is required under the Rome Statute (Moreno-Ocampo and Bensouda 2006: 9). This policy has led to criticism, including a formal *amicus curiae* brief by Antonio Cassese, which argues that the ICC Prosecutor should request the aid of the Sudanese government in taking testimony within Darfur. The Prosecutor responded publicly and in detail, with two central assertions justifying his strategy.

First, he argued that it was not the obligation of the ICC Prosecutor's office to provide security generally in the region of Darfur, because that

was fundamentally the responsibility of the Sudanese government, and the UN Security Council operating in cooperation with regional organizations, such as the African Union. Second, he noted that the inability of his office to conduct interviews in Darfur at present was not preventing the overall effectiveness of the investigation. He noted that his office had been able to gather and organize over seven thousand individual pieces of information, and that they had been able to conduct two investigatory interviews with high-ranking individuals in the government of Sudan (*Ibid.*, 10). This is an example of the way that a discourse is institutionalized that will constantly challenge the legitimacy of the strategies pursued by the ICC in enforcing ICL.

The people of Darfur by all accounts continued to suffer massive human rights atrocities in 2006 and 2007, as they had for several years. Ocampo was certainly correct in his assessment that his office would be unable to protect witnesses in Darfur at the time. Nevertheless, the permanent institutionalization of his office allows him to exercise his prosecutorial discretion in such a way that he is able to preserve evidence for future trials of those who are ''most responsible'' for ICC crimes. Given the likelihood that some perpetrators of ICC crimes are currently in positions of power in the Sudanese government, it is remarkable that Ocampo's investigation has proceeded as far as it has. The failure of the international community to deploy sufficient resources to protect civilians in Darfur is as tragic and inexcusable as it is predictable (Smith 2002). But this tragedy also illustrates the value of the ICC's permanence. If the international community remains unwilling to act through more substantial intervention in Sudan, at least the ICC provides some minimal level of deterrence because it promises that eventually, perpetrators of mass crimes may be brought to justice.

Still, it would have been presumptive of the ICC founders to assert that the ICC was the best institution to deal with every situation. This recognition is embodied in the complementarity provisions of the ICC Statute. NGOs with on-the-ground experience in conflict situations recognized this reality, and so worked with states to develop the ICC's principle of complementarity in a balanced way that would lessen the likelihood of continued impunity for these crimes, but still be deferent to local societies.

The principle of complementarity in the ICC Statute

As we saw above, a crucial concern of some critics with the ICC has been that the court will be insufficiently attentive to local political situations in

deciding which cases to pursue. Since the court is not directly accountable to the existing authorities in societies where it investigates and prosecutes war crimes, genocide, or crimes against humanity, there is concern that it will not sufficiently consider other values, such as establishing peace and order, as it pursues justice. The complementarity principle in the ICC Statute provides some relief against these concerns, because, to the extent that local societies have legitimate legal procedures for achieving accountability, the ICC will not exercise jurisdiction. In terms of what Carsten Stahn has called ''positive complementarity,'' that is, complementarity that involves sharing the burden of administering justice through cooperation, discursive legitimacy remains a critical approach for understanding the reasons for and against deferring responsibility (Stahn 2007: 89). Thus, while it is true that ''deferred responsibility'' raises important normative issues of the Court's impartiality and independence, it has been the ICC's steadfast commitment to prosecute, as we shall see in the Uganda case, which has played an important role in bringing the warring sides together. Such commitment constitutes, in my view, an important universal claim against the ICC's becoming an instrument of despotic national governments, or a potentially disingenuous means of pursuing justice.

Nonetheless, each time a new court is established in the wake of mass human rights crimes, concerns emerge about who should be prosecuted, for what acts, and whether or not amnesties should be granted in exchange for truth. The justice of *ad hoc* tribunals is a function of the political forces that are willing to impose trials at a given point in time. Consequently the punishment that is meted out often is perceived as political and unjust. Because many arguably similar cases are not tried, charges of political selectivity are a recurring problem. The net result is that for groups who feel trials have unfairly been imposed on their leaders, international tribunals have scant legitimacy. Still, because of its permanence, there is reason to think the ICC can avoid the perception of selectivity, if the procedures for selecting cases are defensible and implemented fairly. The crucial issue is whether or not the Prosecutor exercises his discretion in a way that is widely perceived as acceptable.

Because the Prosecutor and the ICC more generally will need state cooperation to carry out arrests and detain suspects, there are built-in incentives for the Prosecutor to act in ways that can be justified to a broad set of outside observers. This fact forces the ICC Prosecutor and Judges to provide systematic justification for the choices about how they choose to employ the ICC's complementarity provisions. As the Statute anticipated, resource constraints mean that the ICC must focus on only a

few cases, and the Statute provides that they select persons responsible ''for the most serious crimes of international concern (Article 1).'' This decision obviously requires subjective judgment, but the need of the court for outside support creates a strong incentive for the court's officers to define the criteria for making that judgment in a way that is consistent over time. The existing discussion about the Court's discretionary authority in pursuing some cases, but not others, in Sudan and Uganda, provides an example of the types of discourse that we expect to see as a result, and those examples are discussed below.

Analysts have noted that pursuing justice for the victims of authoritarian regimes sometimes conflicts with the goal of strengthening democratic institutions (Kritz 1995). Some scholars conclude that where democracy itself is at risk from an authoritarian backlash, and the reformers are too weak to undertake prosecutions, it is best to forgo justice and allow democracy to gain strength without directly threatening the deposed forces (Huntington 1993: 124, 231). International prosecutions of human rights crimes have been described as challenges to the sovereign authority of states because international legal efforts to prosecute human rights crimes may threaten the delicate political bargains that are often struck between outgoing authoritarian regimes and reformers, or between rebel forces and sitting governments. For instance, in early 2001, there was a debate over the wisdom of the ICTY's indictment of Milosevic.[12] The Serbs surrendered Milosevic to the ICTY, but that move resulted in a political crisis that nearly toppled the government.

Partially because of NGO insistence, the Rome Statute only allows states to refer *situations* to the ICC Prosecutor's office, and not individual criminal acts. This ensures that if a government is engaged in conflict with an armed group within the borders of the state, and ICC jurisdiction is invoked, crimes committed by the government can be considered by the Prosecutor's office as well as crimes against the government. Even when national circumstances force pragmatic concessions on the issue of dealing with violations that occurred during the outgoing regime, it is not legally necessary for the international community to recognize, defer to, or respect any national compromises that the transition government may be forced to make (Kritz 1995: 47–48). The crucial challenge facing the ICC Prosecutor in exercising discretion about the pursuit of particular cases is precisely this decision about when the ''interests of justice'' will best be served by pursuing prosecution.[13]

If international courts pursue cases of past atrocities, it makes little sense for aggrieved domestic groups to retaliate against other domestic actors.

A wise ICC Prosecutor will allow groups that do cooperate with international investigations to do so quietly and when necessary out of the public eye. But this must be balanced against the need to develop evidence using public sources that can be crossexamined by the defense in open court. Indeed, this desire for internationalization of criminal prosecutorial responsibility was a reason why many conflict-ridden states supported the creation of the ICC. One reason dictatorial leaders maintain power is to ensure their own immunity from prosecution. But international accountability poses a fundamentally different set of challenges, because whether or not the dictator gives up power in the domestic society, he cannot travel abroad without fearing the police power of other states.

The existence of a permanent international judicial institution now modifies considerably the relationship between international law and domestic decisions to provide amnesty or prosecute. The ICC Statute is silent on the question of recognizing amnesties issued by national courts, partly because NGOs pressured states to ensure that all human rights leaders would be prosecuted (Dugard 2002: 700). If amnesties are issued only in an effort to shield the accused, as in Pinochet's case in Chile, they could be considered by the ICC as legal proceedings designed to shield the accused from prosecution, therefore providing legal grounds for the ICC to take up the case. In a case like that of the South African Truth and Reconciliation Commission, where amnesties were traded for truth, the ICC is probably not legally barred from prosecuting a case, but would have discretion to defer to the national legal process. The ICC operates with substantial resource constraints, and the experience of the Court's first years suggests that there will be no shortage of cases the ICC might investigate. Resource constraints mean that the Prosecutor will need to defer to any local judicial processes that come anywhere close to meeting international standards for providing accountability. In many cases, failure to have a legally compelling and just accounting and punishment for past violations may increase the likelihood that aggrieved social groups will take it upon themselves to avenge the past in violent ways (Becker et al. 1995). This suggests that pursuing criminal justice may be important not only for achieving retribution, but also for laying the groundwork for social reconstruction.

Uganda

In Uganda, we already have witnessed the development of a sophisticated discourse about whether or not the ICC is effectively prosecuting all of the

most serious crimes in the regions, whether or not it is sufficiently sensitive to local concerns, and whether or not local judicial remedies would be more appropriate. In December 2003, Ugandan President Yoweri Museveni referred the situation in Northern Uganda to the office of the Prosecutor. In justifying this self-referral, the Ugandan government stated:

> ''Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice. Uganda pledges its full cooperation to the Prosecutor in the investigation and prosecution of Lord's Resistance Army (LRA) crimes, achievement of which is vital not only for the future progress of the nation, but also the suppression of the most serious crimes of concern to the international community as a whole. (Quoted in Branch 2006: 182–3)

One reason for the self-referral was that the Prosecutor had threatened to use his powers *proprio motu*. Like the DRC government, the Ugandan government preferred the idea of being able to control the process, to some degree. As already noted, the ICC has pursued prosecutions against five of the top leaders of the LRA, a group that is accused of a range of war crimes and crimes against humanity, including acts of sexual slavery, rape, enlisting child soldiers, attacks on civilians, cruel treatment, pillaging, and murder. Over the last several years, the LRA's leaders have made the ICC's prosecution a central issue in the peace talks (2006–08) between themselves and the Ugandan government (Branch 2007: 184). The ICC has come under considerable pressure by the Ugandan government to drop its charges, but has received pressure from the advocates of justice to keep the arrest warrants in place.

For their part, the Ugandan authorities have proposed local justice systems that could provide an alternative to prosecution at the ICC (i.e., the traditional *Matoput* or Acholi traditional justice). In February 2008, they introduced a proposal that would establish the High Court of Uganda, which would incorporate a list of war crimes into a special section of the (national) Court's Statute. But as the ICC inquired into the specificity of the elements of these crimes, the LRA decided to break with the agreement. Nevertheless, on May 26, 2008, the Ugandan government officially established the national war crimes court, in an effort to further pressure the ICC to drop its indictments, though to little avail.

In light of these events, I believe that the exercise of the Court's discretion is legitimate. The pressure from the ICC is likely one of the reasons that the LRA is willing to negotiate in the first place. If the Ugandan government actually carries out trials that are not merely for the purpose

of shielding the accused from justice at a later date, it might be appropriate for the ICC to drop its own prosecution, but to do so in advance would be to succumb to political pressure, and sacrifice the commitment of the ICC to prosecute persons responsible for the most serious crimes of international concern.

Adam Branch has been critical of the ICC's indictment of the LRA leaders. He argues that the Ugandan government referred the case to the ICC in order to bring international pressure on its enemies in the LRA, and then foolishly, the ICC took the bait by issuing warrants for them while ignoring alleged violations of ICL by the Ugandan government (Branch 2007: 179–80). The problem with this thesis is that the Ugandan government, including its highest officials, remain liable themselves for prosecution at the ICC, because of their decision to refer the *situation* to the Court. This must necessarily constrain the military campaign by Ugandan officials, because they know, at anytime, if they violate international war crimes law, they too could be called to account. For its part, the ICC has to determine whether or not any such actions by the Ugandan government are serious enough to deserve the attention and resources of the Court. The fact that the ICC has not yet publicly made such a determination does not mean that it will not at some point in the future. Branch cites a claim by the Ugandan Attorney General that the Uganda People's Defense Force (UPDF) is not guilty of any crimes, and therefore they will not be tried (Branch 2007: 181). But that claim means that the Ugandan government itself has entered into the discourse about the legal limits on their own use of force. This is emblematic of the capacity of the ICC to (threaten to) use its discretionary power to institutionalize a universal discourse about ICL.

For the ICC to be legitimate, it must create the impression that war crimes, crimes against humanity, and genocide can be prosecuted regardless of who commits them, be they citizens of impoverished failed-states or great-powers, government officials or militia leaders. Even powerful states must open themselves up to judgement in theory. The Ugandan case does raise the fear that the need to cooperate with the government could lead to selective prosecution. But if particular individuals within the Ugandan government have committed, or commit in the future, truly horrendous international law crimes, it is likely that there will be some support from honest actors within their own government to bring such persons to account. Such ''cooperation'' from the territorial state may be secured only through diplomatic, economic, and even military pressure from other states. However, that pressure may come from a variety of states, and lack of cooperation from

the world's ''one remaining super-power'' is not by itself a bar to other states creating enough leverage to convince recalcitrant states to comply with the ICC (Luis Moreno-Ocampo and Fatou Bensouda 2006: 9). For this reason, there are substantial external political checks on the ICC Prosecutor and Judges. They will only be successful in bringing criminals to justice if they husband their moral authority and focus on charging law-breakers that have clearly violated international standards. If they are too aggressive, they risk losing international support, and the likely result is that they will be unable to carry out even basic investigative functions. As the number of states who ratify the ICC Statute rises, the number of those harboring fugitives declines accordingly. It is important to recognize that the ICC and its member states have the option of pressuring recalcitrant governments to cooperate.

The ICC remains entirely dependent on cooperating states to aid investigations and to arrest and surrender the accused to the court. Consequently, the officers of the ICC have an institutionalized need to engage in a communicatively rational discourse to persuade states and other observers that they really are engaged in the neutral application of universal rules. Political leaders of states retain authority to weigh for themselves whether or not a particular case ought to be prosecuted, given political concerns. Of course, State Parties to the Court have a *legal* obligation to cooperate with ICC requests for assistance. Nevertheless, the court remains constrained by the extent of the cooperation it can muster. The most effective way to secure prosecution is to focus on cases where the responsibility of particular individuals for gross violations of ICL is clear and abhorrent, and the prospects for achieving justice are real. If the overall political and justice concerns that prevail in a particular case weigh heavily against proceeding with prosecution before the ICC, it seems highly unlikely that a crusading rogue Prosecutor would pursue such a case. I am not at all persuaded that the cases against the leaders of the LRA are such a case. Formally, as we have seen, the Prosecutor can be removed by majority vote of the Assembly of States Parties in the case of misconduct (Article 46 Rome Statute). Far short of that extreme penalty, Prosecutors will have an ongoing need to promote the reputation and respect for their office in the global community. Without cooperation from states, the ICC Prosecutor will be powerless to investigate cases and detain suspects.

Because of the ICC's complementarity provisions, it is likely that many trials in the Court's first few decades will focus on perpetrators in developing countries. That pattern, if it becomes too entrenched, threatens the overall legitimacy of the ICC's claim to be carrying out its ''responsibility

to enforce'' universal rules. The permanence of the ICC and its definition of crimes however, allow outside observers to compare the particular acts of political and military leaders against the objective standard of the crimes enumerated in the ICC Statute. If ICC crimes are committed by leaders in developed states, and both national courts and the ICC fail to prosecute, the ICC Statute itself creates a platform for the victims of these crimes and their allies to critique the failure of justice.

Conclusions

Present developments regarding the ICC investigation in Uganda illustrate the potential of official ICC discourse to ensure that the principled enforcement of ICL remains a central concern of the international community. Great powers have substantial political interests with respect to Sudan, for instance, and perhaps would greatly prefer that war crimes law not be enforced in this case. China, in fact, has substantial commercial interests with the Bashir regime, including oil contracts that are vital to maintaining China's rapid pace of economic growth. The United States, while vocally critical of the genocide in Darfur, is not in a position to undertake a substantial military intervention in Darfur, and must also be concerned about Sudan's relationship with *Al-Qaeda* and other implications of the situation in Sudan for the US effort against terror suspects. The officers of the ICC in contrast, have used their positions to vocally insist that states should take action to pressure Sudan into surrendering the two individuals named in the ICC warrant. Judge Phillipe Kirsch, the President of the ICC, recently declared in a public speech that ''without arrests, there can be no trials. Without trials, victims will again be denied justice. The potential deterrent effect of the court will be reduced'' (Heilprin 2007: 2). As a result of these comments, both the Sudanese government and the Secretary General of the UN were effectively forced to engage in a conversation about how to ensure that justice would be done for victims in Sudan. Of course, such remarks are not enough to force Sudan to turn over the relevant individuals, but they do ensure that justice concerns will continue to be discussed at an international level. The Darfur situation, which is discussed in detail in Amy Eckert's contribution to this volume, is nonetheless illustrative of the type of discourse we can expect from ICC officials, and it demonstrates the capacity of ICC officers to ensure that justice for war criminals remains a central theme of the international discourse about how to deal with conflict situations such as Sudan.

Ad hoc efforts to enforce ICL in the wake of mass killings have succeeded in establishing the concept of *individual* responsibility for these crimes. However such trials have by definition occurred only irregularly, and consequently have struggled to establish the legitimacy of the normative order they seek to enforce. The negotiations that led to the development of the ICC Statute were characterized by an open discussion in which many NGOs took part. The rules, procedures, and crimes embodied in the ICC Statute are the result of a broadly consensual discourse. Because of its permanence, the ICC stands in a considerably stronger position to gain worldwide respect and legitimacy.

The complementarity principle gives broad powers to the ICC Prosecutor and Judges to determine whether or not their international jurisdiction should be exercised. If the Prosecutor determines that investigating a particular leader who is involved in ongoing hostilities is likely to reduce the chance of a negotiated peace settlement in the short run, he can decline to open an investigation. Experience shows however, that it will not always be wise to do so. Leaders who rely on mass violence to maintain power rarely modify their behavior of their own accord. The ICC also has the option of quietly collecting evidence and biding its time. It will be possible for the ICC to choose its moments for taking action. If the Prosecutor misuses his authority, the result will likely be isolation and weakness of the court. This reality is reinforced by the public scrutiny of the ICC Prosecutor's exercise of his discretion. If the Prosecutor's discretion is used wisely, the permanence and complementarity rules of the ICC mean that time is now on the side of justice, not impunity. The ICC Statute constitutes its own officers as official participants in the discourse on the practical application of ICL. As such, the Court's very existence tends to ensure that discourse continues about how to fairly hold individuals responsible for mass violence.

Notes

1. Jean Kambanda, the Prime Minister of Rwanda during the 1994 genocide in that country, was found guilty of both genocide and crimes against humanity, and was sentenced to life in prison by the International Criminal Tribunal for Rwanda (ICTR). Milosevic died in custody in 2006 while his four year trial for numerous counts of war crimes, crimes against humanity, and genocide was still in process at the ICTY. Saddam Hussein was executed in 2006 as following his conviction for Crimes against Humanity before the Iraqi Special Tribunal. Charles Taylor is currently on trial before the Special Court for Sierra Leone, for War Crimes and Crimes against Humanity.

2. On the understanding of the English School of Cosmopolitan Society generally, and the International Criminal Court particularly, see also Buzan (2004).
3. Importantly these ''laws of nature'' are not derived from utility, formal logic, or metaphysical fiat, for Pufendorf, and Kratochwil, and myself, they rest on the fact that they are widely socially accepted as moral principles: ''The moral quality of an action, [. . .] results from the attitude people take toward the action, rather than in the act or its physical properties'' (Kratochwil 1989: 139).
4. For a list of the NGOs attending the Rome Conference see ''The Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Annex IV,'' reprinted in Bassiouni (1998: 109–12).
5. See for instance US Department of State (2002).
6. The Rome Statute of the International Criminal Court, UN Doc.A/Conf.183/9* is available at http://www.un.org/law/icc/statute/romefra.htm and is reprinted in Schabas (2001).
7. Rome Statute, Article 46.
8. Ken Roth of Human Rights Watch made this argument early at the Rome Conference, see UN Diplomatic conference of Plenipotentiaries on the Establishment of an International Criminal Court: Official Records Volume II. P. 113. A/Conf.183/13.
9. See Article 15, the Rome Statute.
10. Though making arrests and transferring suspects to the ICC may not be so isolated from political pressure, because the court will rely on states for these functions. Judges are not normally eligible for re-election. See Article 36, Paragraph 9, the Rome Statute.
11. Stalin certainly thought the purpose of the Nuremberg tribunals was to humiliate the defeated enemy, and shore up domestic support for the victorious governments, not to determine the innocence or guilt of particular leaders in the German war effort. See Persico (1994).
12. The first indictment against Milosevic was issued on May 24, 1999.
13. Article 53 of the Rome Statute, as noted earlier, gives the Prosecutor the authority to decline to pursue an investigation when such an investigation is not ''in the interest of justice.''

5

Anarchy is What Criminal Lawyers and other Actors Make of it: International Criminal Justice as an Institution of International and World Society

Jason Ralph

This chapter offers an explanation of why the International Criminal Court (ICC) was created and an interpretation of its significance. It is informed by English School and Constructivist theories to International Relations. The research agendas of these two approaches are multifaceted and there are various ways in which the two overlap (Reus-Smit 2002). One of these is the shared interest in the idea that states "conceive themselves bound by a common set of rules" and that the binding quality of these rules is reinforced by the observance of a common set of institutionalized practices (Bull 1995: 13). It is on this basis that Hedley Bull's account of international society can be seen as offering empirical evidence to support Alexander Wendt's (1992) observation that "anarchy is what states make of it." International order from this perspective is contingent not merely on a distribution of material power that incentivizes power-maximizing rational egoists to accept the status quo. Rather international order has a normative value and the "balance of power" is just one of many social institutions that help to identify appropriate behavior among states. Other institutions include diplomacy, international law, and war. Where diplomacy helps to facilitate normative consensus, law articulates that consensus, the balance of power (or a collective security arrangement) protects it, and war restores it after it has been challenged. As Bull's fifth institution, the great powers have additional responsibilities, which can sometimes justify their claims to rights that are

denied to other states. For example, the great powers might be justified in violating international law if the balance of power demands it.

The character of international society has changed radically since Bull first painted this picture in 1977. The change most relevant to our concerns of course is the emergence of international criminal justice as an institution of international society. International criminal justice can rightly be understood in these terms because like those institutions that Bull identified, it involves a set of practices that help to (re)construct the common consciousness on which international society and the ''logic of appropriateness'' (Risse 2000) is based. This might seem a strange claim to make if one reads Bull's *The Anarchical Society* without taking into account the context in which it was written. After all Bull (1995: 146) noted that the act of holding an individual criminally responsible for a violation of international law threatened the very idea of a society of states, which is based on the idea that states are sovereign and their representatives are immune from foreign or international prosecution. Yet, if one reads this warning in the context of the Cold War, and if one observes state practice since that time, one can more easily accept international criminal justice as an institution that Bull might now have recognized. The response of states to the events of the early 1990s in Rwanda and the former Yugoslavia showed that a consensus had emerged around the idea that certain policies (e.g., ethnic cleansing, genocide) were wrong and that individuals could be held criminally responsible for their implementation. Thus, a practice that Bull saw as dangerous was made possible in the 1990s because of the changed context. Indeed, the UN Security Council of that decade saw the crimes themselves as a threat to order. Contrary to Bull's original fear that the pursuit of justice would lead to disorder, international society in the 1990s developed the notion that in fact a culture of impunity was a greater threat to international peace and security.

English School writers would describe this shift in terms of pluralist and solidarist conceptions of international society. Bull's account of international society in *The Anarchical Society* recognizes that the common interest in securing order can only be attained if the rules governing state behavior recognize and respect moral pluralism. Sovereignty, noninterference and immunity for state officials from foreign or international prosecution are norms central to the construction of this kind of society. To change this, as state practice did in the 1990s, is to suggest that the rules of international society can reflect a ''thicker'' consensus. In this solidarist conception of international society sovereignty is contingent on the state being able and willing to uphold universally held notions of humanity. In

other words, sovereignty is replaced as the constitutional rule that underpins international society by what might be called complementarity, i.e., the insistence that state behavior is consistent with and helps to promote a culture of humanity. In a solidarist international society such as this, the secondary norms of non-intervention and sovereign/diplomatic immunity are replaced by state responsibilities to protect and prosecute.

Although *The Anarchical Society* offered a pluralist description of international society, it would be a mistake to label its author a pluralist. This is because Bull recognized that there was "nothing historically inevitable or morally sacrosanct" about the society of states, and, as Dunne and Wheeler (1996) point out, Bull began to recognize the need to respond to the demands for just change if the rules and institutions of international society were to maintain any claim to legitimacy. It is this focus on the interplay of normative reasoning and the rules that guide international conduct that links English School scholarship to what "Habermasian constructivists" (Reus-Smit 2002: 494) would call communicative action (Risse 2000). It not only makes English School scholarship acutely aware of those historical moments when norms and rules shift to better reflect a new reasoned consensus, it also (potentially) gives that scholarship the kind of critical edge that belies its rather conservative reputation. For instance, if one accepts as Bull did, that the rules of international society should change to reflect values based on a reasoned consensus, then one can more easily see through the rhetoric of those actors that defend the status quo because it guarantees them certain privileges. Furthermore, if one accepts, again as Bull did, that it is neither right nor prudent to promote particular values while claiming that they are universal, then one not only has the interpretive framework to be able to identify what in effect is imperialism, one also has the normative tools with which to criticize it.

So, how does this relate to the creation of the ICC? It is argued in this chapter that the ICC is not merely a response to a developed consensus on the idea that individuals could and should be held criminally responsible for acts that offended humanity, the ICC is also a response to what Wendt (2003) might call the "instability" of an international society that enabled unaccountable great powers to decide when and where international criminal justice was done and to effectively grant for themselves exceptions to the laws they applied to others. Where the former point explains the Court's status as the first permanent international criminal court, the latter explains why so many states thought it necessary to create the Office of the Independent Prosecutor and to invest it with the powers to investigate without prior authorization of the UN Security Council.[1] This does

not mean that this chapter supports Wendt's claim that a world state is inevitable. It does, however, find mileage in the argument that when institutions are no longer fit for the moral purpose of a society or when they no longer reflect its identity, then political pressures to design more suitable institutions at a different level often become irresistible. From this perspective, the ICC was created out of a need to recognize the victims of egregious human rights abuses as human beings by giving them access to a system of criminal justice, access that was previously denied by the institutions of international society. One might further argue that US opposition to the ICC, which recalls the advantages of the old (and unstable) society whereby individual states and the Security Council determined when and where international criminal justice was done, is more concerned about defending the attribute that secures its identity as a world leader, i.e., the privilege to decide when international criminal justice is a legitimate exception to the norm.

The chapter develops this argument in the following way: the first section elaborates on the social purpose of criminal justice and how its internationalization both responds to, and helps to reaffirm, a cosmopolitan consciousness based on the idea of humanity. The second section argues that as long as international criminal justice was the exception to the norm, and as long as the rules of international society granted the permanent (and unaccountable) five on the UN Security Council the right to decide the exception, justice would inevitably be tainted by the charge that it was selective. In this sense, the rules of international society were unstable and states responded by creating the ICC, which in effect turned the exception into the norm. Indeed, the third section argues that the Court's independence from the society of states leads us to contemplate that other aspect of English School theorizing, world society. It is argued that the Rome Statute in fact offers a vision of criminal justice that can operate in complete independence of states. If this vision did underpin practice, then one could conceivably claim that anarchy is not what states make of it, rather anarchy is what non-state actors like international criminal lawyers make of it. Furthermore, if this institutionalized practice takes place independently of states, one could no longer claim that criminal justice in this sense is an institution of international society. Rather, criminal justice would become an institution of world society where interhuman relations are no longer mediated by states. This takes some imagination and the qualifications offered in the third section make it clear that states continue to mediate those processes that help to construct the cosmopolitan consciousness, although they do not do so in the way

they used to. Rather than a revolutionary conception of world society which transcends statehood, therefore, it is more accurate to argue that the ICC helps to construct a Kantian conception of world society where cosmopolitan institutions like the Court complement the work of national and international institutions. The final section of the chapter argues that US opposition to the Court can be understood in Realist terms that emphasize the fact that the United States has lost the right to decide the exception to the norm. Yet, it also argues that the interest in maintaining this right is derived from, and therefore contingent on, a cultural need to be recognized as the leader (if not the sovereign) of the society of states.[2] In this respect, the act of opposing the ICC should also be understood as part of the process of constructing American national identity.

International criminal justice as an institution of international society

The social role played by criminal justice was nicely articulated by Emile Durkheim. He noted that the identification of a crime and the punishment of the criminal

> does not serve, or serves only incidentally, to correct the offender or to scare off any possible imitators. From this dual viewpoint its effectiveness may rightly be questioned; in any case it is mediocre. *Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor.* If that consciousness were thwarted so categorically, it would necessarily lose some of its power, were an emotional reaction from the community not forthcoming to make good that loss. Thus, there would result a relaxation in the bonds of social solidarity. That consciousness must therefore be conspicuously reinforced the moment it meets with opposition. The sole means of doing so is to give voice to the unanimous aversion that the crime continues to evoke, and this by an official act, which can only consist in suffering inflicted on the wrongdoer. (Durkheim 1933: 63; emphasis added)

In this sense, the argument that supporters of international criminal justice are naive to believe that international criminal justice will prevent crimes against humanity by deterring would-be perpetrators somewhat misses the point. The real function of international criminal justice, to paraphrase Durkheim, is to institutionalize an official condemnation of certain actions (e.g., crimes against humanity) so that they are commonly understood to be the exception to the norm. If this condemnation is not

forthcoming then, to again paraphrase Durkheim, one could rightly question whether the bonds of social solidarity existed across international society. Indeed, because the rules of pluralist international society protected state sovereignty, and because they did nothing to prevent a culture of impunity from developing around egregious human rights abuses, critical commentators dismissed the idea of international society by referring to it as ''a global protection racket'' (Booth 1994). The fact that crimes against humanity are sometimes allowed to happen, despite the power of international society to prevent them, is an indicator that the bonds of social solidarity across nations is still limited. Yet a willingness to use national and international courts to condemn those actions and to punish their perpetrators does suggest that what is now held in common is not a tolerance of state sovereignty in order to advance an ethic of coexistence; rather it is a determination to defend an ethic of humanity by punishing individuals who violate its standards. As the following analysis shows, however, the interplay between these two ethics is by no means stable.

The pluralist ethic articulated by Bull manifests itself strongly in recent responses to the exercise of universal jurisdiction by national courts. Perhaps, the most well-known case in this regard is ex-Parte Pinochet, which saw the British House of Lords consider a request to extradite Augusto Pinochet to face trial in Spain for crimes he allegedly committed while he was the president of Chile. This ruling, which upheld the request for extradition and denied Pinochet the immunities he claimed as a former head of state, can indeed be interpreted as a shift toward a new solidarist order. Yet, it should also be noted that this decision was made on the grounds that all three parties (the United Kingdom, Spain, and Chile) had consented to this new regime by ratifying the 1984 Convention against Torture. Indeed, because all three states did not ratify the Convention until December 1988 the number of charges that could be bought against Pinochet dropped drastically once it was determined that the principle of sovereign consent ruled this case (Woodhouse 2000). Here, the judges were not acting (as they are sometimes accused of doing) on their own interpretation of a law derived from groundless notions of nature. They were instead acting in the space that had been delegated to them by states. What criminal lawyers and judges make of anarchy is in this respect still contingent on decisions made by governments on behalf of nation-states. Of course, the Pinochet decision did signal a shift toward a solidarist direction; however, it was one that derived its own legitimacy from what the authority states had delegated to national courts through the treaty-making process.

A less well-known decision illustrates a similar point. In the 2002 Arrest Warrant Case, the International Court of Justice (ICJ) upheld the Democratic Republic of Congo's (DRC) complaint against Belgium, and in so doing reaffirmed a fundamental principle of pluralist international society, which is that acting foreign ministers are immune from prosecution in the courts of another nation. In April 2000, a Belgian magistrate had signed a warrant for the arrest of the incumbent foreign minister of the DRC, Abdulaye Yerodia Ndombasi, for grave breaches of the Geneva Conventions and for crimes against humanity. The ICJ based its decision on the fact that it had been "unable to deduce from practice that there exist under customary international law any form of exception to the rule according immunity . . . to incumbent Ministers of Foreign Affairs" (Guillame 2002: 24). Yet, in both its concurring and dissenting opinions, the Court went way beyond its brief by offering normative positions that encapsulate the pluralist–solidarist tension in English School theorizing. For instance, Judge Gilbert Guillame warned that allowing national courts to exercise universal jurisdiction risked creating "total judicial chaos." He continued by arguing that it would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for an ill-defined "international community." Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward (Guillame 2002*a*: 43).

For the solidarists, ad hoc Judge Christine van den Wyngaert (who would later serve as Judge at the International Criminal Tribunal for the Former Yugoslavia [ICTY]) directly addressed the potential costs of this pluralist position. "In the abstract," she notes,

> the chaos argument may be pertinent. This risk may exist, and the Court could have legitimately warned against it in its Judgment without necessarily reaching the conclusion that a rule of customary international law exists to the effect of granting immunity to Foreign Ministers. However, granting immunities to incumbent Foreign Ministers may open the door to other sorts of abuse. It dramatically increases the number of persons that enjoy international immunity from jurisdiction. . . . Perhaps the International Court of Justice, in its effort to close one box of Pandora for fear of chaos and abuse, may have opened another one: that of granting immunity and thus de facto impunity to an increasing number of government officials. (van den Wyngaert 2002: 187)

What is interesting about this exchange is not merely that it provides a perfect illustration of how the tension at the heart of English School theorizing manifests itself in practice, but that both Guillame and van den Wyngaert could agree that at the level of ICCs individuals could not claim immunity

from prosecution because of their official status. This suggests that the fear of judicial (and implicitly political) chaos, which exists at the level of national courts exercising transnational or universal jurisdiction, is mitigated once that process is delegated to international courts that have the support of a broad consensus across international society. The fact that we in effect have two laws on sovereign and diplomatic immunity – i.e., a law for national courts and a law for international courts – illustrates this. The point is that because it is imprudent (and possibly imperialistic) for national courts to act unilaterally to prosecute state officials accused of universal crimes the norms of pluralist international society (such sovereign and diplomatic immunity) still find favor. Yet, this has not stopped states innovating to find ways of responding to a cosmopolitan consciousness that demands the punishment of those individuals whose actions offend humanity. Indeed, the creation of international courts in this respect is an excellent example of Wendt's (2003) point that the kind of unit-level agency that makes a society unstable will inevitably be delegated upward if that society is to achieve its original purpose of responding to the unit's (in this case the individual victim's) demand for recognition.

Before moving to discuss the creation of the ICC in this context, it is worth lingering on the fate of the piece of Belgian legislation that had led to the Arrest Warrant judgment, because this, as Steven Ratner (2003: 888) puts it ''is a textbook case of the intersection of law and power in the international arena.'' The ICJ's normative concern that a state's exercise of universal jurisdiction might undermine order between states was not the only objection to this act. Nor perhaps was it the main reason why Belgium eventually reformed its laws so that its courts could only exercise international jurisdiction if there was a link with Belgium in terms of the nationality or the residence of the plaintiff or the accused (Ratner 2003: 891). The most outspoken and certainly the most powerful critic of Belgium's stance was indeed its NATO ally the United States. For instance, in June 2003, Secretary of Defense Donald Rumsfeld threatened to withhold funding for the alliance's new headquarters in Belgium and suggested that US officials would not travel to that country unless the law was rescinded (Ratner 2003: 891). This exercise of material power and realpolitik came on the back of requests that top US officials, including President H.W. Bush, be investigated for war crimes allegedly committed during the 1991 Gulf War. The fact that Belgium caved in to US demands by reforming its laws does not weaken the normative arguments of those pluralists in the ICJ; it suggests that there was more to the US argument than pure self-interest. Indeed, it demonstrates that when a single state is relied on to exercise

universal jurisdiction it, and indeed the judicial process, is more vulnerable to the corrupting influence of power. In this sense, both the ICJ's Arrest Warrant ruling and the fate of the offending legislation demonstrates the instabilities caused when a cosmopolitan consciousness emerges to challenge a pluralist order.

Responding to reasonable demands for just change

The fact that the ICTY, which received its mandate from the UN Security Council, was able to indict Slobodan Milosevic while he was serving as the head of state illustrates the point that international courts can act where national courts cannot; and it is just one way in which the experience of the so-called ad hoc tribunals of the 1990s pushed the solidarist agenda forward. Firstly, their very existence was testimony to the growing significance of a cosmopolitan consciousness that shared a common interest in the prevention and punishment of actions that offended a shared conception of humanity. This definition had previously found expression in a loose body of international humanitarian and human rights law, but by codifying and acting on it in an impartial way, the ad hoc courts had an important practical impact. As Antonio Cassese (2002: 16) notes, both the ICTY and the International Criminal Tribunal for Rwanda (ICTR) accumulated jurisprudence regarding the interpretation of offences that ''could be drawn upon by those seeking a permanent, effective, and politically uncompromised system of international criminal justice.''

Yet the ad hoc tribunals also pushed the solidarist agenda forward by holding up a mirror that exposed the inadequacies and the inconsistencies of an international society where the UN Security Council more or less acted as a sovereign (and unaccountable) body. Again Cassese (2002: 16) captures part of this when he notes how the ad hoc courts helped to publicize the inhumanity of the events in the former Yugoslavia and Rwanda. The tribunals, he argued, helped to ''shock the world out of its complacency'' and made the argument for a permanent ICC hard to oppose. Of course, the argument that an ICC may have deterred the worst abuses in the former Yugoslavia is undermined by the fact that the ICTY was in fact created in 1993, two years before the Srebrenica massacre took place. Yet, this point pales in significance when read in the context of the Security Council's inadequate response to the crimes against humanity in both the former Yugoslavia and Rwanda; and it does not address the counterpoint which is that if the Security Council is prepared to act on a

duty to punish, then it makes sense, if only from an economic standpoint, to have a standing ICC in place. Furthermore, the deterrent effect of the law as Durkheim noted, is often weak, but logic demands that if it is to have any chance of complementing the duty to prevent, then the law has to carry with it a credible threat of being enforced and that this too suggests the need for a permanent ICC.

If this lesson created the pressure to turn the exception (i.e., ad hoc ICCs) into the norm (i.e., a permanent ICC), the charge that international criminal justice was selective created a pressure to create a court that was independent of the political machinations of the Security Council. It is worth pausing here to clarify what is meant by selective justice in this context, and why it exposes what Wendt would identify as the instability of international society in the mid-1990s. At its most basic level, the accusation being made is that the institution of international criminal justice that emerged in the mid-1990s was merely a tool of great power interest. From this perspective, the tribunals for the former Yugoslavia and Rwanda had little to do with justice. Rather, they were political tools that were used by Security Council members for the purpose of disguising their own selfish response to these humanitarian crises. The corroborating evidence for this argument could be found in the fact that resolutions proposing international courts for Chechnya, Tibet, Colombia, the occupied territories, or Northern Ireland would never have survived the veto of the permanent member whose interests and/or actions were implicated. This is not to argue that international courts are needed to investigate these situations. Merely the argument is that if the cause of universal justice did demand such an investigation, it would have most probably been denied by the operation of power on behalf of particular interests.

At a deeper level of analysis, however, the full costs of selective justice begin to appear. It is being argued here that the operation of international criminal justice helps to reaffirm a cosmopolitan consciousness based on humanity by acting, at ''the moment it meets with opposition'' (Durkheim 1933: 63), to condemn and punish the wrongdoer. If this is the social consequence of international criminal justice, then what does it mean when that process is made contingent on the interests of the unaccountable powers that sit on the Security Council? One conclusion is that the humanity of those victims of ''universal'' crimes in (again for the sake of argument) Chechnya, Tibet, Colombia, the occupied territories, or Northern Ireland is denied because in these cases justice inconveniences power; and in this respect the social benefit of the ad hoc tribunal (i.e., its reaffirmation of the cosmopolitan consciousness based on humanity) is at

once canceled out. This is what it means to say that selective justice is no justice at all. Because it is selective, it reaffirms humanity and inhumanity at the same time. The overall effect, however, is not neutral. From one perspective the ad hoc court's reaffirmation of humanity signals a gradual and therefore prudent move in a solidarist direction; yet from another perspective, the UN Security Council's continuing unwillingness to deal with injustice elsewhere is the reaffirmation of a world order built on hypocrisy. The effect of selective justice in other words is polarization; this was the unstable situation that existed in the mid-1990s.

A world society?

The kind of immanent critique that centered on the charge of selective justice had a powerful influence on the delegates that attended the 1998 Rome Conference. It was articulated not only by NGOs who spoke on behalf of victims whose voice might otherwise have been silenced had the conference been attended only by states, but also by so-called ''like-minded states'' who coalesced around the idea of a Prosecutor who could investigate without Security Council authorization (Schabas 2004*a*: 16). Of course, this coalition ultimately carried the day, and Article 15 of the Rome Statute enables the Prosecutor to ''initiate investigations proprio motu [i.e., of his own accord] on the basis of information on crimes within the jurisdiction of the Court'' (Rome Statute 1998). This holds out the prospect that a universal value that transcends states (i.e., humanity) can be reaffirmed by a process (i.e., criminal justice) that has little or no state involvement. Of course, the Prosecutor will probably rely on state cooperation for the collection of evidence and the arrest of the suspect. Yet, evidence obtained from nongovernmental sources is admissible, and if one considers the growing role of private military companies (PMCs) in the security sector, it is not unreasonable to consider the possibility that they too might provide policing when these states are either unwilling or unable. Finally, one might argue that the Prosecutor, the Court, and any future use of PMCs is ultimately funded by the Assembly of State Parties, and that this radically limits the Court's independence from international society. Yet even here the Rome Statute holds out the tantalizing prospect of the Court being funded by nonstate private donors (Rome Statute 1998: Article 116). In this respect, criminal justice might genuinely be considered to be an institution that operates independently of international society. It might in other words be considered to be an institution of world society.

This demanding definition of world society has hung over English School scholarship in part because of a desire to keep the symmetry between Bull's concepts of international system, international society, and world society and Wight's (1991) realist, rationalist, and revolutionist traditions of international political thought. The idea that world society would occupy the vacuum occupied by the state as it withered into history helps to explain why it has until recently been the most underdeveloped part of the English School research agenda (Buzan 2004). It is argued here that the Rome Statute offers a vision of this revolutionist concept of world society, but for compelling normative reasons, as well as for some pretty obvious self-interested reasons, states have shied away from writing and signing their own death certificates. The ICC is different to the courts of international society (i.e., to national courts exercising universal jurisdiction or to ad hoc UN courts) because it promises to act when states or the Security Council are unwilling or unable to act. Yet at the same time the Rome Statute acknowledges the significant normative benefits for world order of states and the UN Security Council. In this respect, it seeks not to overthrow international society but to complement it. It cannot, therefore, be interpreted as an institution of international society, nor can it be interpreted as an institution of world society understood in revolutionist terms. If the ICC is to be interpreted using the English School framework, then that framework needs reworking. Before addressing that issue, it is worth elaborating on how exactly the ICC complements the institutions of international society.

The role that the Security Council and national courts play in the new regime is most evident in Articles 16 and 17 of the Rome Statute. Article 16 states that

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

This check on the Prosecutor's independence recognizes two things: first that the pursuit of justice may clash with the common interest in the pursuit of international peace and security; and second that the UN Security Council is still best placed to decide when a threat to international peace and security is a suitable reason for postponing the pursuit of justice. The difference between this and the old regime, however, is twofold: first, the world does not have to wait for the Security Council to start an investigation nor does it have to hope that the permanent member will not block that investigation, since under Article 15 the Prosecutor can

proceed *proprio motu*; and, second, even if the Security Council was minded to intervene it would take a consensus across nine of its voting members (i.e., the number needed to pass an affirmative resolution) to block the Prosecutor's investigation. This innovation, in other words, turns the exception (i.e., the pursuit of justice) into the norm, and then democratizes the decision on when to declare what is now the exception (i.e., the pursuit of international peace and security). This legal innovation responded to the fact that there is now more scope to pursue justice without destabilizing international society. It also recognized that the particular interests of the permanent (and unaccountable) five should not be allowed to stand in the way of justice. However, it is also an acknowledgment that peace and security between states is a normative goal that the ICC should complement and not put at risk; and by maintaining that the Security Council as the body that decides when exceptional means are needed to protect international peace and security, the Rome Statute is not overthrowing international society.

The idea that the new regime should complement the better aspects of international society, rather than overthrow it entirely, can also be found in Article 17. Indeed, this article codifies the principle of complementarity which states that

> the Court shall determine that a case is inadmissible where . . . the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. . . .

This principle recognizes the practical problems the ICC would face if it was expected to investigate every report of a crime under its jurisdiction. It also recognizes the strength of the normative argument that justice is better served by courts that are closest to the actual crime. This again has a practical element to the extent that evidence might not be as readily available if proceedings are moved too far from the place where the crimes were committed. But, it also recognizes that the victim's pursuit of justice is not altogether satisfied by the cosmopolitan idea of a world society, and that criminal justice can in fact play a key role in reconstructing what is also a necessary part of the good life, which is recognition within one's local or national community. This is why at the center of the ICC regime there is not only an expectation that states will respond to their responsibility to prosecute individuals who commit one of the core crimes on their territory, but also the hope that because states are prompted to act in this way the ICC will in effect be redundant.

Yet the reality is that local, national, regional, and international societies are not always willing or able to see through a judicial process that recognizes a victim's humanity. The ICC was created to make certain that these people can, at the very least, secure recognition as human beings because world society recognizes that the acts they have endured are crimes against humanity and that their tormentors will be punished. The point, however, is that the ICC also recognizes that where possible, it is normatively desirable for this process to be conducted at a local or national level, since it is here that the individual's humanity is not only recognized, but that the human desire to belong to a particular community can also be met. In this respect, the ICC not only complements international society's purpose of maintaining international peace and security between states; it also recognizes that a pluralist society of states that complements humanity is normatively preferable.

So, how might a reworking of the English School framework accommodate this new regime? On the one hand, the ICC is qualitatively different from a solidarist conception because not only does it ask states to cooperate toward achieving a common goal, it also asks them to delegate the decision on when and where international criminal justice should be administered by a supranational court that acts in the name of humanity. This would imply that the English School idea of world society is appropriate, but as noted the ICC is not so revolutionary that it seeks to overthrow the state system or international society. In fact, the ICC recognizes that international society can work to reconstruct humanity at the moment humanity meets its opposition. The ICC seeks to complement international society by filling in for it when it does not meet that purpose. It is argued here that this principle of complementarity is at the heart of Kant's vision for world order. Indeed, Kant (1991: 108) uses the word "complement" when he describes the ideal relationship between national, international, and cosmopolitan law. Antonio Franceschet's discussion of the four projects of cosmopolitanism (Chapter 7) captures this idea of the centrality of Kant's vision. For this reason, it is appropriate that the new regime articulated in the Rome Statute be conceived of as an evolving part of a Kantian world society.[3]

US opposition to the ICC as a means of reconstructing American exceptionalism

Although, this definition of world society differs greatly from the one Wendt offers in his 2003 article, the above analysis does prove certain

aspects of his analysis correct. The ICC grew out of what he would call the ''instabilities'' caused when the society of states tried to respond to a growing cosmopolitan consciousness based on humanity. When states sought to exercise universal jurisdiction in this area, it created a significant pluralist backlash that stressed the importance of state consent and sovereign/diplomatic immunity; and when the Security Council created ad hoc international courts it exposed the fact that international society was not fit for purpose because the processes of international criminal justice were potentially (if not actually) corrupted by rules that privileged the interests of unaccountable great powers. In response, states delegated the decision of when and where to prosecute to a supranational court that they thought was better placed to act in an impartial manner, and better placed to act when states were unwilling and unable to do so.

A Wendtian analysis might also claim that there is inevitability to this process, and that by being so opposed to the ICC, the United States is not only missing an opportunity to shape the institutions that are emerging at a supranational level, but that it is also wasting valuable political capital. This would only be half correct because of course the United States did play a major role in drafting the Rome Statute and President Clinton signed the Rome Treaty with a view to addressing America's remaining concerns through the PrepComm process (Scheffer 2002). However, the Bush Administration's decision to ''unsign'' the Rome Treaty, to withdraw from the PrepComm process and to attack the Court at (almost) every opportunity does suggest that the United States was unmoved by the accusation that as a great power it had to make its leaders accountable to the impartial application of this aspect of international criminal law (Magliveras and Bourantonis 2003). Indeed, the evidence presented in these final sections demonstrates that if US opposition to the Court is not unsustainable, it is at least highly costly in ideological terms. And, to the extent that it damages America's image as a leader that others wish to follow, it is ultimately counterproductive. Thus, in taking up the issue of US opposition, this section will build on what has already been said of this issue by addressing the relationship between collective accountability and insecurity.

US rhetoric against the Court centers on those points of instability that the Court was designed to address. For example, it argues that the Court is a threat to international order because the Prosecutor is independent of the Security Council; and that the Prosecutor is a threat to liberty because he is unaccountable (Grossman 2002). Both of these points are incorrect because as noted the Prosecutor is checked by the Security Council and he is ultimately accountable to the Assembly of State Parties that elects him

and can remove him. Yet, the United States insists that the Independent Prosecutor's office is vulnerable to politicization in the way the Security Council is not. The irony of this argument has not escaped critics of the US position. For instance, Samantha Power nicely summarizes the difficulty the United States has in making its point stick.

> In saying that it wants to protect itself from a political ICC, the United States is seeking more than reasonable assurances about the Court's responsible execution of its mandate. The United States is reserving the right to define the term political in the context of the Court's actions. Of the 180 UN members who do not hold a veto on the Security Council, only some will share America's definition. Many deem the Security Council to be the epitome of a politically motivated institution and want an independent ICC precisely because they believe it will not be driven strictly by great power politics. (Power 2000: 171)

This goes to the heart of the accountability problem that is helping to construct resistance to American hegemony as exercised through the society of states. Yet aside from the argument about international peace and security the United States is still unable to accept the prospect of an Independent Prosecutor exercising jurisdiction over its citizens. It tried to avoid this by first limiting the means of referral to a Security Council resolution (which it could of course veto), and second, by limiting the jurisdiction of the Independent Prosecutor so that he could only investigate crimes where the accused was the national of a state party. If this proposal had been adopted, then the United States could guarantee its citizens exemption from the Court's jurisdiction by simply withholding its consent from the Treaty of Rome. Article 12 of the Rome Statute, however, allows the Prosecutor to investigate *proprio motu* in cases where the territory on which a core crime was allegedly committed is that of a state party (Kaul 2002). Thus, US servicepersonnel in Bosnia for example fall under the general jurisdiction of the ICC despite the fact that the United States has withheld its consent.

The United States seizes on this fact as an example of the Court's illegitimacy. Sovereign consent to a treaty, which of course in the American system means ratification by the US Senate, is from this perspective central to the legitimacy of international society. International law that bypasses the ratification process has a source other than ''the people,'' and is therefore undemocratic and illegitimate (Grossman 2002). There is an obvious and in many respects compelling logic to this normative argument. But, what it fails to address is how states (in particular the great powers) are held accountable for the profound influence they have on the

lives of people who, because they are excluded from a democratic process based on the nation-state, are in effect disenfranchised. This is a Wendtian-type ''instability,'' which is particularly acute in contemporary international relations, dominated as it is by a superpower unwilling to accept the outcomes of multilateral dialogue. Yet, the faith in the American political and judicial process is so complete that it leads the Bush administration to believe that the only reason why an international court may wish to assert a complementary jurisdiction over the US national process is to politicize and therefore corrupt it. Rather than seeing the ICC as an institution that responds to the accountability gap at the core of international society, the United States dismisses it as an undemocratic and therefore illegitimate institution.

Both advocates and opponents of the ICC are therefore interested in accountability. The difference, of course, is exposed by the question, accountable to whom? Where advocates of the Court believe all individuals, regardless of their citizenship, should be held accountable to a Kantian conception of world society, US opponents of the Court generally argue that citizens need only be held accountable to laws they have consented to through their national parliaments. Indeed, the US rejection of the ICC is not merely a question of defending US national interests, it is about defending first, the principle that accountability exists at the level of the nation-state and second, the idea that the US system provides a perfect (and therefore nonnegotiable) example of that principle. Indeed, American officials have used opposition to the ICC as a means of (re) constructing this image of the United States. For instance, after negotiating exemptions from the Court's jurisdiction for UN peacekeepers (see Stahn 2003), US Ambassador John Negroponte was insistent. ''Our Declaration of Independence,'' he noted,

> states that . . . ''governments are instituted among men, deriving their just powers from . . . the consent of the governed'' . . . We have built up in our two centuries of constitutional history a dense web of restraints on government, and of guarantees and protections for our citizens. . . . The history of American law is very largely the history of that balance between the power of the government and the rights of the people. We will not permit that balance to be overturned by the imposition on our citizens of a novel legal system they have never accepted or approved, and which their government has explicitly rejected. (Negroponte 2002)

Of course, there may be nothing wrong with this position. After all, the US political and judicial system is probably fit for the purpose of punishing US citizens who commit any of the core crimes listed in the Rome Statute.[4]

Wendt's instability thesis, however, becomes particularly relevant when US foreign policy is unable to follow through on the implications of this argument and allows other nations to decide for themselves how they should deal with their own mass murderers. Despite rejecting the ICC, in other words, the United States continues to support the institution of international criminal justice through the (unstable and old) institution of ad hoc Security Council courts.

An examination of how the United States responded to the situation in the Darfur region of Sudan can illustrate why this policy is unstable. Unable to look the other way because of pressure from Congress and the State Department (in fact Colin Powell went further than the International Commission on Darfur and defined the crimes as genocide) the Bush administration had to deliver an alternative to the proposed response, which was a Security Council referral to the ICC. It would be immensely damaging to the administration if its opposition to the ICC and its expected veto of the referral was interpreted as protecting the killers. It thus proposed either a new ad hoc court or an extension of the ICTR's jurisdiction to cover the situation in Darfur. The problem with this alternative was that there was no enthusiasm either in Congress, which reminded the administration that it had criticized the financial inefficiencies of the ad hoc courts; nor in the Security Council, which reminded the administration that international society had rejected the ad hoc approach in 1998. Ultimately, the administration's reluctance to endorse the ICC led it to an isolated position and it had no other option but to abstain from the vote on what became resolution 1593 (2005) (Ralph 2007: 173–6).

The implication of this referral can be read in two ways. To the extent that Congress had passed the Darfur Accountability Act, which called for prosecutions in ''a competent international court of justice'' and the administration had not vetoed a referral to the ICC, one might conclude that the administration had in effect recognized the legitimacy of the ICC. However, to the extent the administration was able to use the Security Council referral process to negotiate exemptions for its own citizens suggests that US policy had not really shifted at all. In fact, one might argue that US policy had in effect turned the ICC into a kind of permanent ad hoc court by limiting the Prosecutor's jurisdiction. In this second interpretation, the original accusation of selective justice looms large. Indeed, this was duly noted by one perceptive questioner, who asked the State Department spokesperson to explain why:

the US government believes that citizens of Sudan, which signed the Rome Statute but has not ratified it and, therefore, is not a state party to it, should be subject to its jurisdiction when the crux of the American argument is that US citizens should not be subject to its jurisdiction because the United States is not a state party to it. (Anonymous 2005)

The response was that this was (again) an ''extraordinary situation'' and that because the Security Council was empowered to declare such exceptions, Sudan was obliged to cooperate with the ICC, even though it was not a party to the Rome Treaty. The United States, in other words, is happy to support the ICC as long it can control the means of referral and it can do that when situations are referred through a Security Council resolution. Yet, this is not a stable policy. It is merely a reminder of the inconsistencies of an international society that privileges the decisions of unaccountable great powers.

Conclusion

While Constructivist and English School approaches to International Relations have broad research agendas, it is fair to say that those agendas overlap on the questions of what kind of social structures exist beyond the state and how institutionalized practices help to reaffirm those structures in ways that constitute national identities. They may also share an interest in normative arguments about the moral purpose of the state and whether an international society of states can devise rules and sustain practices that not only respond to demands for just change but also have a constitutive effect on states so that they too will respond to such demands. Informed by this shared approach, this chapter has argued that in the mid-1990s international society reached a tipping point. The common interest in international criminal justice was being frustrated by rules that privileged the particular interests of the permanent powers on the Security Council. With the creation of the ICC, however, the society of states delegated authority to a supranational court that will, at least in theory, be able to respond to the common interest by pursuing justice in ways that are not tainted by the political machinations of the Security Council. The hope of ICC supporters is that the power of the criminal justice process to reaffirm the bonds of human solidarity will no longer be corrupted by the charge of selective justice.

These new rules are, however, inconsistent with certain views of US interests and its identity. In fact, its opposition to the ICC is not merely

about protecting an interest in acting free from international accountability, but also about sustaining an image of the United States as an example to, and the leader of, other states. The nationalist argument that is interested in sustaining this image goes as follows: the United States does not need to submit itself to international accountability because it is the model political and judicial community; and because it is a model of good governance it should be empowered to decide when international criminal justice is employed as an exception to the rule that states are sovereign. In fact, when one realizes that the ICC would not restrain US foreign and security policy any more than would the proper execution of American law in American courts, then interest based arguments lose their explanatory value (unless of course the United States wishes to change its own law to be able to commit actions outlawed by the Rome Statute). In this respect, the act of opposing the ICC can only be truly understood as part of a social process to reaffirm an image of America as an exceptional state that is an example to, and the leader of, other states. By creating the ICC, however, international society has demonstrated that it wishes its leaders to be accountable before an international rule of law the purpose of which is to protect the most fundamental universal values. Indeed, if the United States wishes to restore its image as a world leader, then it must reverse its opposition to the ICC and accept the ironic fact that for a short while at least it will be identified as a follower.

Notes

1. For a similar argument, see Fehl (2004).
2. Following Carl Schmitt (1985: 5), who famously noted that ''[s]overeign is he who decides on the exception,'' one might argue that the great power's veto on the Security Council makes it sovereign over international society.
3. Some may rightly point out that Kant did not advocate an international criminal court. For an argument that this inconsistency in his thought should not prevent Kantians from supporting supranational institutions like the ICC, see Habermas (1997).
4. One should note however the controversy surrounding the 2006 Military Commission Act (MCA), which clarified the legal regime governing Guantánamo Bay, where it is alleged acts of torture occurred. Section 7 of the MCA provides that ''no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained . . . as an enemy combatant or is awaiting such determination.'' To guard against the charge that this is illegal under international law,

Section 6a(2) states that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441 [i.e., the War Crimes Act as amended by the MCA]." For commentary, see Dorf (2007) and Stewart (2007). In *Boumedienne* v. *Bush* (June 12, 2008), however, the US Supreme Court, in a 5–4 decision, overturned the MCA. Under the ruling, foreign nationals were entitled to habeas corpus rights and allowed, therefore, to access US federal courts to challenge their detention.

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Part III

Cosmopolitanism and Global Order

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6

Political Evil, Cosmopolitan Realism, and the Normative Ambivalence of the International Criminal Court

Patrick Hayden

A number of commentators have suggested that the establishment of the International Criminal Court (ICC) is a cosmopolitan moment in our globalizing world (Ralph 2003; Franceschet 2005; Roach 2005). Its appearance would seem to mark the successful realization of certain cosmopolitan ideals and practices. While some backers of the ICC might regard its creation as evidence of the progressive ''enlightenment'' of humankind, this chapter adopts a different approach, arguing instead that the ICC is best characterized in terms of *cosmopolitan realism*, that is, a critical cosmopolitanism shorn of historical and moral idealism. This approach is adopted for several reasons. Most importantly, I contend, the creation of a cosmopolitan ''regime'' leading to the establishment of the ICC has been motivated more by the terrifying experience of political evil than by the triumph of enlightened moral consciousness, that is, by the horror that humanity inspires rather than by Kantian awe at the ''moral law within'' (Kant 1997: 133). Further, the cosmopolitan law underwriting the ICC can only be properly understood with constant reference to the phenomenon of political evil, in two ways: first, as a way to make the historical experience of evil intelligible and second, as a way to subject the perpetrators of evil to political judgment and legal accountability. From this perspective, the ICC should be regarded as the latest effort to juridify evil.[1]

The basis for this chapter comes from Hannah Arendt's (2004: 303) claim that while the ''shrinking of geographic distances'' throughout the twentieth century made humanity ''a political actuality of the first order,''

it also rendered ''idealistic talk about mankind and the dignity of man an affair of the past simply because all these fine and dreamlike notions, with their time-honored traditions, suddenly assumed a terrifying timeliness.'' For Arendt, the major weakness of the cosmopolitan tradition has been its tendency to succumb to idealistic illusions while neglecting the cruel realities of political life. Thus, while Arendt's work exhibits a strongly cosmopolitan sensibility, it is a sensibility conditioned by an uncompromising willingness to face up to the moral and political horrors of modern life: the ''dark times'' of political evil which shake our sense of reality and threaten our capacity for judgment, responsibility, and action. Following Arendt's lead, this chapter argues that a critical and realistic cosmopolitanism must start from and respond to the lived reality of the shared experience of extreme political evil.

What most distinguishes cosmopolitan realism from other versions of cosmopolitanism is that it begins from and continually refers back to the shared experience of extreme evil. While it regards the formal juridification of evil as necessary in order to achieve justice, it refuses to lose sight of the fact that the most egregious of international criminal acts – genocide and crimes against humanity – are acts of evil, the meaning of which is irreducible to the category of criminal transgression. The juridification of evil is necessary for mechanisms of justice, but by itself is insufficient to grasp the political significance of the elusive experience of extreme evil. For this reason, cosmopolitan realism is predicated on recognition of the ineliminable human capacity for evil as a political reality, the risk of which the juridification of evil cannot dispel altogether. It also exposes an inescapable paradox at the heart of the juridification of extreme evil: that the occurrence of evil can only be eliminated *completely* by generating further acts of evil against humanity. Political responsibility, as a necessary supplement to the juridification of evil, requires understanding and acceptance of this paradox.

My reading of Arendt's cosmopolitan realism implies that the process of translating horrifying atrocities into politically intelligible and legally sanctionable crimes provides a new juridical idiom for resisting evil actions. This commitment, however, also cannot escape from the condition of normative ambivalence that necessarily accompanies moral and political confrontation with evil. Cosmopolitans can seek to eradicate evil through moral perfectionism, or accept the capacity for evil while resisting it whenever possible, but not both. This, I think, means that we can support the aims of the ICC and resist threats to the human status, but to do so responsibly requires accepting rather than dismissing normative

ambivalence in the global age, if we wish to remain in touch with reality and not succumb to the dangerous illusions of cosmopolitan idealism.

Evil: Political not metaphysical

In the post-Holocaust age, ''evil'' has become synonymous with genocide and crimes against humanity. This familiar public discourse has helped to justify the idea of an international legal and political order predicated on the suppression of such evils, irrespective of territorial borders. In practice, however, the categorical promise to ''never again'' allow great (or what Arendt calls ''extreme'') evil to go unchallenged has been betrayed with astonishing regularity. There is a way to negotiate (not suppress) this paradox, but only if we accept both the persistence of the capacity for evil *and* act to reduce the risk of its occurring needlessly. This means as well, accepting the normative ambivalence within which international efforts to prevent, suppress, and punish genocide and crimes against humanity will remain, inasmuch as this ambivalence is a reflection of the place of evil in the human condition.

We can better understand the normative ambivalence that arises from efforts to condemn the most egregious atrocities through a consideration of how evil can be conceived in the age of genocide. Much of the philosophical canon is predicated on the idea that evil is a problem to be neatly solved. Philosophers and theologians have long struggled with the problem of theodicy, of how to reconcile the existence of evil with belief in a benevolent and perfect God (Bernstein 2005: 2–3). I will not rehearse the various and usually elaborate attempts to explain (or justify) evil when viewed as a metaphysical conundrum. In any event, given the historical and metaphysical rupture symbolized by Auschwitz, we cannot rest content with debating the problem of evil in purely religious or philosophical terms. Rather, evil has become a concrete lived experience which defines, in large part, the self-understanding of our age – the age of genocide (Power 2002). Because of this experience, Arendt (1994: 134) was to argue that the problem of extreme evil as a *political* phenomenon forms the background against which all attempts to understand the contemporary world and our responsibilities within it necessarily must be made. The political question that arises concerns the meaning of the modern human condition inescapably framed within the horizon of once ''unimaginable'' acts and actors that have now become all too human. The search for the unassailable truth of how to reconcile good and evil in a transcendent

order and thereby rid the earth of evil (if only through redemption) is now replaced by a more worldly yet no less challenging question: What is the meaning of the great political evil that confronts us as humans today and what ethical, political, and legal responses can be offered?

Arendt is perhaps the foremost thinker of the postmetaphysical meaning of evil in relation to the age of genocide. While Arendt was deeply knowledgeable of theodicy and the traditional problem of evil (see Arendt 1998), her concern with evil was motivated primarily by the political catastrophes of imperialism, totalitarianism, and the Holocaust. In struggling to make sense of modernity's darkest moments, Arendt sought to shed evil of its supernatural connotations by treating it as a political phenomenon mediated not through divine or demonic forces but through the actions of ordinary individuals and the power relations of social institutions within which these actions are inscribed. Arendt (2004: 592) argues that the traditional metaphysical approach merely reduces evil to a sterile scholastic problem which makes it possible to shut our eyes to the material reality and political significance of the systematic extermination of millions of people. She thus sought to change our perspective on evil and give expression to its unique character as something made concrete under historical circumstances.

For Arendt evil in the age of genocide ''has to do with the following phenomenon: making human beings as human beings superfluous'' (Kohler and Saner 1992: 166). It is the systematic destruction of people's human status by means of rendering their particularity, that is, *who* they are as unique human beings, superfluous. The logic of superfluity – what Arendt (2004: 384 n. 54) referred to as the ''modern expulsion from humanity'' – is not merely to kill people, but to completely dehumanize them, to strip them of all dignity and to treat them as nothing more than manipulable and expendable matter. Arendt's notion of superfluity is intended to shift our thinking to the question of what it means to be human. The answer to this question rests upon the fragile interrelationship of the human condition of plurality and having a place in the public world shared with others. Political evil thus entails a double process of superfluity – destroying the fact of plurality in the pursuit of an ideal of homogeneous ''Man'' (as opposed to the lived reality of heterogeneous ''men''), and denying individuals moral, juridical, and political standing as unique persons within a community founded on reciprocal recognition of equal status. The result is an assault on the very idea of ''humanity'' itself. For Arendt, extreme political evil is to be identified specifically with the calculated attempt to make the human status embodied within particular people superfluous,

and thereby to exterminate humanity as such by ''refusing to share the earth'' with a particular group of people (Arendt 1963*a*: 268). Arendt insists that because evil occurs on a collective, political plane, it requires a political response of articulating institutional arrangements and a juridical discourse for inscribing political evil within a global legal order, such as with a permanent ICC (Arendt 1963*a*: 270–2). But in doing so, we must remain aware of the normative ambivalence that Arendt cautions, conditions such endeavors.

Cosmopolitan realism and the juridification of evil

In her book, *Evil and Modern Thought*, Susan Neiman (2002: 7–8) stresses that the problem of evil ''is fundamentally a problem about the intelligibility of the world as a whole.'' The appearance of evil events threatens our trust in the world and disrupts our sense of reality through which we interpret, understand, and interact with the world in which we live. In Arendtian terms, evil destroys the public roots of ''common sense'' (*sensus communis*, the sense of a human community), the communicatively shared measure of human experience through which we have a meaningful place in the world with others (Arendt 1992: 40–6, 72–7). Evil thus provokes an ethical crisis in that it may jeopardize our ability to judge and to act; ethical paralysis, if not outright nihilism, can be a destructive effect of evil actions. This provides a way to understand ethical and political responses to evil as attempts to render intelligible the seemingly unintelligible, to make orderly the potentially chaotic, and to reconstruct a sensible world – however precarious – from the reality fractured by the experience of evil. Thus, the event of evil is both interruptive and inaugurative, since it ruptures our sense of the familiar while opening up possibilities for the world to take on a new meaning. As Arendt (2004: 576) concludes, no matter how much the Holocaust constitutes an epochal break, it is still ''historically and politically intelligible.'' As such, it gives rise to the collective demand for moral judgment, responsibility, and accountability sufficient to its reality; in short, justice must be restored.

One expression of this demand is the notion of crime against humanity, which can be read as an historical construct that attempts to translate the sense of extreme evil into juridical discourse and thereby to make it more recognizable, rationally comprehensible, and ''familiar.'' In the words of Laurence Thomas (2003: 205), the notion of crime against humanity denotes ''a level of callousness that embodies the very essence of evil itself.''

The expression ''crime against humanity'' first appeared in a joint declaration issued by the French, the British and the Russian governments in 1915, condemning the massacres (the term genocide was not yet in use) of Armenians by the Turkish government.[2] Yet, it only became a justiciable crime within positive international law at the time of the Nuremberg trials, when the International Military Charter referred to crime against humanity as a type of war crime committed against civilian populations (in this case, on the part of the German state against its own citizens).[3] Developments subsequent to Nuremberg indicate that the predication of crime against humanity upon the ''war nexus'' has been removed, and it is now defined as a crime by state or nonstate actors against any civilian population that can take place in either peacetime or wartime (Ratner and Abrams 2001: 54–8, 67–8). Furthermore, Article 7 of the ICC Statute codifies a notable expansion of the acts constituting crimes against humanity, adding torture, rape, enforced disappearance, and apartheid to the list enumerated by the Nuremberg Charter.[4] Genocide is understood to be the most egregious crime against humanity; genocide requires intent to ''destroy in whole or in part'' while other crimes against humanity require a policy of ''widespread or systematic'' violations against given groups.[5] Functionally, the notion of crime against humanity serves to bring evil within the purview of the rule of law and prosecutable crimes so that perpetrators may be held accountable for ''the great evils they visit upon humankind'' (Robertson 1999: 375). As such, it is an indispensable component of the universal juridification of evil into criminally liable acts (see May 2005).

Nevertheless, Arendt expressed reservations about the limitations of legal concepts to convey fully the experience of evil translated formally into the doctrine of crimes against humanity: ''We attempt to classify as criminal a thing which, as we all feel, no such category was ever intended to cover,'' she writes (2004: 568–9). ''What meaning has the concept of murder when we are confronted with the mass production of corpses?'' In a letter to her friend and mentor, Karl Jaspers, Arendt reiterates her desire to demythologize those who commit atrocities and thus avoid reference to ''satanic greatness'' when thinking about the evil perpetrated in the Holocaust, yet she insists on the irreducible difference between ''a man who sets out to murder his old aunt and people who . . . built factories to produce corpses'' (Kohler and Saner 1992: 69). She holds that while murder is intended to destroy a particular in itself, crimes against humanity are intended to eradicate the universal ''concept of the human being'' without which particularity as such could not exist. Despite recognizing this distance separating our conventional understanding of murder and the

radically new type of crime that can ''explode the limits of the law,'' Arendt (2004: 379) argued for the ethical and political necessity of formulating a cosmopolitan law – a law of humanity ''guaranteed by humanity itself'' – capable of satisfying the need for justice, even though this law and the justice it provides will remain imperfect precisely because the concrete experience of evil always has the potential to shatter established ''common sense'' and confound our moral expectations.

While Arendt drew some inspiration from the classical and Kantian cosmopolitan traditions, she thought that what was missing from these approaches to cosmopolitanism was the modern experience of extreme political evil. For Arendt, the reality of genocide and crimes against humanity requires the amendment of cosmopolitanism in two fundamental respects: first, it must relinquish the ideal of human perfectionism and ever progressing human history and, second, it must replace the certitude of moral transcendentalism with the uncertainty of political action and the vulnerability of the political itself. Arendt thus suggests a kind of cosmopolitanism that can be depicted as distinctively realist rather than idealist. Yet, this is not a political realism shorn of the ethical demands of cosmopolitanism, rather it is a cosmopolitanism tempered by the reality that organized programs to annihilate the human status now constitute a ubiquitous possibility of political life. The primary emphasis here is that political thinking and action must respond to the facts of a changing political reality grounded in awareness of human imperfections and limitations, that power is constitutive of political action yet is inseparable from responsibility, and that skepticism is needed regarding the possibility of progress in politics, at least in a teleological sense implied by moral and political idealism. Indeed, in her essay, ''Karl Jaspers: Citizen of the World?'' Arendt (1968: 84) insists that ''in light of present realities'' Enlightenment cosmopolitanism looks like ''reckless optimism.''

While Arendt does not flinch from drawing this conclusion, she also tells us that in conjunction with the darkness of the twentieth century a major historical transformation occurred. Previously, the idea of humanity was no more than an abstract concept. Now however, humanity has become, Arendt concludes (1968: 82), ''an urgent reality.'' Using the work of Jaspers to reflect upon cosmopolitanism in the present, Arendt appeals to the intensification of world interconnectedness from the nineteenth century onwards in order to describe how a *cosmopolitanized* humanity has been forged by cultural, economic, social, political, and legal forces on a global scale – shadowed, she ruefully notes, by a fearful symmetry of colonial conquest. This process has both universalized the model of the

sovereign state and forced each country to become ''the immediate neighbor of every other country (Arendt 1968: 83).''[6] Arendt's cosmopolitan realism thus begins from the historical reality that ''for the first time . . . all peoples on earth have a common present,'' but it is a common present brought into existence unintentionally, as it were, and fraught with danger. Against cosmopolitan idealists, Arendt contends that there are no guarantees this newly formed humanity will find itself enthused about the ideal of a worldwide civilization it is thought to embody; indeed, the ever closer proximity to other peoples is just as likely to lead, she says, to ''political apathy, isolationist nationalism . . . mutual hatred and a somewhat universal irritability of everybody against everybody else'' as it is to peace, mutual understanding, and global justice (Arendt 1968: 83–4). Moreover, any sense of unity or solidarity shared by the peoples of the earth is, in the first instance, merely negative: because there is no common past upon which the new humanity is based, nor a common future which can be assured, what binds humanity together is the ''fear of global destruction'' in the present. Right here and now, other human beings may act in ways that bring about the ''end of all human life on earth'' (Arendt 1968: 83). It is no wonder then that Arendt's version of cosmopolitanism leads to the rather ambivalent assertion that the ''solidarity of mankind may well turn out to be an unbearable burden'' (Arendt 1968: 83).

But, it must be noted that this ambivalence is motivated not by indifference or resignation, but by an acute sensitivity to the dangers of prescribing a programmatic or abstractly formal solution to the political problems of the present. The tangible reality of humanity and the dangers inherent within it is not simply a bare fact – it is an urgent problem that demands new forms of political action, but with the recognition that such actions will always come up against other actions which limit and contradict them. For this reason Arendt (1968: 83) argues that the negative solidarity founded upon humanity's potential obliteration can be made ''meaningful in a positive sense only if it is coupled with political responsibility.'' In order to disrupt the destructive logic of superfluity and to have any hope of preventing the completely free reign of evil, Arendt maintains that political power must be employed to create both human rights for all and the juridical–political institutions required to protect such rights and achieve justice in the event of grave violations of them. Arendt (2004: xxvii) puts it thus: ''Human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly

defined territorial entities.'' This new cosmopolitan law is urgently needed because the evil of crimes against humanity has ''become a precedent for the future'' and ''no people on earth . . . can feel reasonably sure of its continued existence'' without some legal protection (Arendt 1963*a*: 273). Only through an ambitious political ''framework of universal mutual agreements'' (Arendt 1968: 93) grounded on the intersubjective juridification of evil can the ''right of every individual to belong to humanity'' as a new cosmopolitan law be guaranteed (Arendt 2004: xxvii). But it is, Arendt (2004: 378) hastens to add, ''by no means certain whether it is possible.''

The ICC and the predicament of common responsibility

Arendt's cosmopolitan realism, I have suggested, seeks to avoid the despair of political realism as well as the false consolation of idealism by acknowledging simultaneously the thoroughly historical and contingent nature of ''actually existing'' cosmopolitanism and the necessity of acting to reinforce the fragile solidarity of the new human reality. A more recent version of this type of cosmopolitan realism has been developed by Ulrich Beck. Although, Beck does not frame his arguments from the perspective of political evil, his arguments are consistent with it, through what he calls processes of ''reflexive modernization'' based on two types of modernity (Beck 2003). ''First modernity'' refers to the rationalization and industrialization of society enabled by secular Enlightenment ideals, scientific developments, and technological controls. This conventional description of progressive modernization became problematic, Beck contends, with increasing awareness that its very successes have put human life at risk. ''Second modernity'' arises from the historical relocation of the category of risk: the primary threats to society no longer come from nature, but from the (frequently unintended) consequences of human action (Beck 1992). The ''risk society'' of second modernity has become increasingly oriented around the tensions between rapidly globalizing threats to human beings and the frequently state-based efforts to provide security from these. Because the new risks are ''deterritorialized,'' simultaneously local and global, they can no longer be viewed solely as national questions. The appearance of a ''world risk society'' thus offers the prospect of endowing ''each country with a common global interest'' and provides the basis ''of a global community of fate'' (Beck 2002: 49).

Global risk society demands an opening up of the scope of strategic action, not only on the part of the state but also of global corporations

and financial actors, as well as of transnational civil society movements. Here the ''meta-game'' of world politics is becoming increasingly inclusive and contested, primarily around the dynamic of applying the ''old'' rules (e.g., state sovereignty and territorial autonomy) and changing them in favor of new ones (e.g., morally conditional sovereignty and transnational regimes). A ''logic of rule change,'' according to which the norms and forms of political action are being reconsidered and renegotiated, now defines strategies of power in the global age (*Ibid.*: 3). What Beck's cosmopolitan realism emphasizes, however, is that the shift in perspective from the national to the cosmopolitan is not driven solely or even primarily by altruism or moral idealism, but by the interest in maximizing one's power position in a globalizing world (Beck 2006: 177). To cling to the nation-state orthodoxy today is to deprive oneself of the ability to act effectively so as to achieve one's ends. The actually existing world remains the touchstone for strategic action – as political realism always has advocated – yet the nature of this world has radically altered under globalization. Effective political actors must be collective and transnational, not solitary and territorially bound.

His version of cosmopolitan realism differs from other versions of cosmopolitanism in that it neither advocates nor diagnoses the demise of the state. In noting the historical contingency of the modern state, Beck underlines the mutability that forms of statehood have taken (e.g., the welfare state, the neoliberal state, and the ethnic state) as well as the potential new forms of statehood that are or can possibly emerge through the ''power opportunities opened up by cooperative transnational sovereignty'' (Beck 2005: 262). This may be the form of a protectionist transnational surveillance state – such as, for instance, the cases of the United States and the United Kingdom in the wake of 9/11 and 7/7 – or it may be in the form of a cosmopolitan state which adopts principles of cooperation, multilateralism, human rights, and ''constitutional tolerance'' toward nationality and positive engagement with global civil society (*Ibid.*: 95).

According to Beck, then, inasmuch as the concepts of power, action, sovereignty, and politics remain fixated upon the nation-state, they have become ''zombie categories''; signifiers of a departed Westphalian order kept hopelessly animated through the epistemic transmission of methodological nationalism.[7] Methodological nationalism is the conventional social scientific account of international politics which takes the ''objective'' demarcation between the national and the international as the ''fundamental organizing principle of politics'' (Beck 2005: 21). In this respect, writes Beck, methodological nationalism is a source of errors; it no longer

accurately represents the global reality of political life. In contrast, cosmopolitan realism recognizes that the classical limits between the national and the international have been erased, obscured, or transformed, that the distinction between separate spheres of political action must be freed of the dogmatism of the national perspective, and that our understanding of political action must be reinscribed within a critical cosmopolitan outlook.

The core of Beck's argument for our purposes is this: Reflexive modernization arises from awareness that the primary threats to human existence no longer come from nature, but from humanity itself (Beck 1992). For Beck, the reflexive preoccupation with the simultaneously local–global dangers to humanity suggests the need for a reinvention of politics anchored in a ''new cosmopolitanism'' that can place ''globality at the heart of political imagination, action and organization'' (2005: 9; cf. Beck 1997). To do so means that a static, idealist conception of cosmopolitanism must give way to a realist, dynamic conception of *cosmopolitanization*: the ongoing historical process whereby the norms and forms of political action are reconsidered and renegotiated, and the very definition of humanity is contested and reformulated in ways that seek to preserve the universal and the particular as mutually constitutive rather than mutually exclusive. The actually existing world remains the touchstone for political action – as realism always has advocated – yet the nature of this reality has radically altered under globalization. To be ''realistic'' today entails a reflexive preoccupation with how to act in light of the mutually constitutive categories of the global and local, which in turn contributes to the cosmopolitanization of ''everyday consciousness,'' moral discourse, and political action (Beck 2002*a*: 17). The process of cosmopolitanization thus offers the prospect of endowing ''each country with a common global interest'' and provides the basis ''of a global community of fate,'' without negating the particularities of local communities and their unique ways of relating to historically universal humanity (Beck 2002*b*: 42; cf. Beck 1999).

Here, Beck strongly echoes Arendt: to privilege a cosmopolitan outlook is a principled political decision taken in light of concrete conditions and motivated by a commitment to create new political realities intended to protect the human status in light of local–global threats to humanity. Cosmopolitan realism speaks to the potential that diverse individuals, groups, and communities now have to *become* cosmopolitan ''on the basis of their own self-interpretation, articulation, mobilization and organization'' around the norm of historical humanity and the global threat of human superfluousness (Beck 2005: 15). Yet, there is no guarantee that this will occur or, if it does, that it will continue to do so, as Arendt and

Beck are fully aware. For both, cosmopolitanism cannot escape the unpredictability and uncertainty of normative ambivalence as long as it remains in touch with reality. From Beck's sociological perspective, this leads to several conclusions about the ICC that are at odds with the idealist conception of cosmopolitanism. First, the establishment of the ICC is to be regarded as the historically contingent outcome of a precarious struggle between various state and nonstate actors within the power network of global politics, not as the triumph of moral perfectionism. Second, this struggle is also being played out around the collective representation of historical humanity, the symbolic meaning of which serves as a materially regulative norm or rule giving rise to obligations on the part of states which have helped to redefine sovereignty in the global age. Third, because of the contingency of strategic confrontation and the constant interplay of dynamic power relations in global politics, the accomplishment of the ICC cannot be taken for granted – its existence is precarious and always susceptible to reversal.

While I think that Arendt would agree with these conclusions, what is more significant from an Arendtian perspective is that the historical cosmopolitanization of humanity adds new dimensions and even greater weight to the idea of responsibility today. Arendt argued that a sense of *global* responsibility is the key for moving from a negative prepolitical solidarity based on shame at the human capacity for evil, to a positive political solidarity founded on the institution of human rights and a corresponding body of cosmopolitan law. At its core, cosmopolitan solidarity is an expression of global responsibility insofar as it embodies a reflexive refusal to commit or be complicit with political evil directed against the human status. Yet, the reflexive component of cosmopolitan solidarity is critical, in that it proceeds from an awareness that the problem of evil cannot be reduced to a starkly simplifying Manichaean division of the world into ''good and evil,'' and that complicity with evil is all too easy and frequent in the global age of genocide. Consequently, an Arendtian perspective provides an important, if somewhat counterintuitive understanding of the normative ambivalence associated with global responsibility: because the capacity for evil is a permanent feature of the human condition (since it arises from the power to act which always retains an element of unpredictability), the most that we can do is ceaselessly resist evil acts in whatever way possible *consistent with respect for human plurality and agency*. We can only eliminate the capacity for evil as such by making humanity itself superfluous, that is, by destroying the plurality which makes us human. To believe that the capacity to commit evil acts can be

permanently expunged from the realm of human action would be to succumb to a metaphysical and political idealism dangerously immune to the realities of historical experience.

Given the great burden that humanity has become for itself, Arendt (2004: 303) prudently writes of the ''predicament of common responsibility.'' The thought that historical humanity is solely responsible for the evil it commits against itself when juxtaposed to the naively optimistic ''ideal'' of humanity crystallizes the paradoxical and disturbing reality of the common sharing of responsibility. Common responsibility proves to have a Janus-like quality; the ever-present threat of either causing or suffering evil leads humanity simultaneously to unite in solidarity and to recoil in terror. The burden of common responsibility is to face up to this normative ambivalence, to act for the sake of humanity without disavowing the human capacity for evil. Common responsibility as a principle of the solidarity of historical humanity means assuming the burden of acting in order to preserve a shared world where my fate is linked to that of others; here, we are responsible both for our own actions as well as the actions of others which we did not commit (Arendt 2003: 149). Common (or what Arendt also refers to as collective) responsibility is always political insofar as it emphasizes the social embeddedness of individuals. Common responsibility is, Arendt notes, imputable on the basis of association; since individuals are always already members of a community, they are responsible for its collective actions. Collective responsibility is ''vicarious'' in that we are liable for ''things we have not done,'' that is, we are liable for things done in our name by institutional structures whose foreseeable outcomes are the result of collective action. This ''taking upon ourselves'' the consequences for things we have not done individually is, Arendt insists, the political ''price we pay for the fact that we live our lives not by ourselves but among our fellow men'' (Arendt 2003: 157–8).

In the remainder of this chapter, I want to discuss two examples of the predicament of common responsibility that the ICC must confront, in light of the normative ambivalence arising from the complicated dynamics of local–global interpenetration, the differing ways that evil and justice may be interpreted morally and politically, and the unpredictability of human action. The first example, involving the ICC's first case in Uganda, may seem to have more immediate practical relevance than the second example, the post-World War II promise that ''never again'' should genocide and crimes against humanity be allowed to occur, yet both examples illustrate the necessity of reflecting as accurately as possible the lived realities of our pluralistic world in the realm of cosmopolitan imagination and action. For Arendt, plurality and the world are mutually constitutive:

on the one hand, the fact that people (''men'') and not one singular entity (''man'') inhabit the world is both the ontological condition and the achievement of politics; on the other, the existence and communication of the multiplicity of perspectives arising from human plurality constitutes our sense of reality and discloses the world as a common space for our appearance before each other (Arendt 1958: 7–8, 57–8). Human plurality gives rise to the world as a meaningful public realm, and protecting and preserving these many perspectives establishes the world as the fragile object of common responsibility. The predicament of common responsibility conveys the tension and ambiguity that necessarily accompanies the concurrent affirmation of the universalism of humanity and the particularism of plural others.

One especially acute example of this tension and ambiguity confronting the ICC is presented by the Court's first case. In December 2003, Ugandan President Yoweri Museveni referred the situation concerning the Lord's Resistance Army (LRA) to the ICC.[8] The LRA has been waging an insurgency against the Ugandan government in the north of the country for more than twenty years. The conflict, which stems in part from the loss of the north's military dominance within Uganda and the socioeconomic inequalities between the north and south has been especially devastating for the Acholi people of northern Uganda. The conflict is infamous for the brutal massacres of civilians and abductions of thousands of children carried out by the LRA, and for the internal displacement of most of the northern population (Allen 2006). In July 2004, the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, initiated an investigation into northern Uganda and in July 2005, the ICC issued arrest warrants for LRA leader Joseph Kony and four of his senior commanders, charging them with numerous crimes against humanity and war crimes.[9] However, since September 2006 peace talks have occurred between the LRA leadership and the Ugandan government, leading to an uneasy ceasefire and the signing of an agreement on Accountability and Reconciliation in June 2007.[10] The agreement resolves to hold consultations and develop mechanisms designed to incorporate traditional justice systems into the wider peace process.

Unfortunately, reactions to the northern Ugandan case have become extremely polarized. On the one hand, there are those such as international human rights organizations and international lawyers that insist the ICC should proceed with prosecution in order to fulfill its mandate (Branch 2007). On the other hand, there are those such as several northern Ugandan civil society groups and some international humanitarian organizations working in northern Uganda that view the ICC's proceedings as a

form of international law legalism which pursues formalistic universal justice at the price of sacrificing meaningful local mechanisms of justice (Allen 2005; Refugee Law Project 2005). The controversy around this case has put the ICC in an awkward position. Faced with the current situation, the Court has to decide whether to proceed with the case, or whether deference to nonprosecution is a legitimate option. Under the Rome Statute, deference to nonprosecution is possible under three mechanisms. First, a temporary suspension of investigation or prosecution can be granted if the Security Council determines these will interfere with maintaining or restoring international peace and security (Article 16). Second, deference can take place under the complementarity regime (Article 17), if there are alternative mechanisms of accountability in place that are deemed to fulfill the requirement of genuine proceedings. Finally, the Prosecutor can drop the case if he decides that this would ''not serve the interests of justice'' (Article 53(1)). The Article 53 provision is perhaps the most interesting potential avenue for action, in that it suggests the prospect of overcoming the ''peace or justice'' binary in favor of a more nuanced conception of political justice in which peace and (retributive or restorative) justice connect depending upon the particular needs and interests of plural social contexts.

The Rome Statute provides few answers as to how ''the interests of justice'' can be best served, but this ambiguity might be regarded as a strength rather than a weakness. Because the ICC is supposed to serve the justice interests of the victims of gross human rights violations and the interests of states affected by such crimes, as well as the interests of the broader international community or community of humankind, any insistence that only strict adherence to supposedly neutral legal formalism will satisfy the demands and needs of all three groups is plainly idealistic and potentially harmful. Rather than unreflexively following a formal procedure for the application of rules, the Prosecutor is actually empowered to exercise reflective judgment as to what course of action will serve the interests of justice. As McDonald and Haveman (2003: 2) point out, underlying the ambiguity of how and whether prosecutorial discretion should be exercised is ''the deeper and much more difficult question of what the Court is actually established to achieve.'' This is exactly the type of question that Arendt would have us ask of the ICC and, while the matter cannot be pursued in any depth here, it should figure in the exercise of reflective judgment which Arendt considered to be crucial to political action. Reflective judgment, according to Arendt, is a kind of exemplary ''interest in disinterestedness'' through which we think in the place of

those with whom we share the world (Arendt 1992: 73). The cooperation of imagination and reflection captures the particularity of specific evil actions while relating this uniqueness to larger collective histories and meanings of justice and injustice. To judge well requires the formation of an ''enlarged mentality'' which attains its moral orientation not from a higher standpoint above the world shared with others but from the particularity of their standpoints, their ''possible judgments,'' alongside one's own; community sense is then dialogically achieved rather than simply monologically deduced (Arendt 1992: 43, 67).

With this in mind, one significant component that must be taken into account in exercising reflective judgment in this case is the local process of making evil morally and political intelligible and reconstructing the sensible world shared with others. For the people of northern Uganda, this process cannot be undertaken through and translated solely into the idiom of international criminal law. This is because the atrocities committed during the conflict are regarded by the Acholi people in terms of the concept of *kiir*, or abomination (Liu Institute for Global Issues 2005; The Northern Uganda Peace Initiative 2005; The Justice and Reconciliation Project 2007). *Kiir* denotes ''evil acts'' that sever social relations, cause both individual and collective suffering and trauma, and violate the moral order upon which the integrity of community life depends. Two aspects of *kiir* are worth nothing. First, the effects of *kiir* do not end when the perpetrator's act has ceased, rather misfortune (especially sickness, infertility, and death) will continue to affect the victim (if he or she survived the initial deed), as well as the victim's relatives and community, until purification ceremonies are conducted to cleanse those involved in the abomination. Such ceremonies typically require the presence of the perpetrator and, when possible, the victim(s), and focus on restoration of social relations through public admission of wrongdoing, establishing the truth about the conflict in question, the determination by elders (*atekeres*) of suitable compensation, and employing rituals designed to facilitate forgiveness and reconciliation. Formal judicial prosecution without accompanying traditional cleansing ceremonies may, at least inadvertently, contribute to the continuing effects of *kiir*, which jeopardize the well-being of the community as a whole.

Second, the cleansing of grave offenses through traditional mechanisms not only helps to repair the broken social body but also contributes to the empowerment of victims of *kiir*. In other words, by translating evil deeds into the moral discourse of *kiir* and its corresponding traditional practices of healing and reconciliation, the Acholi people are able to exercise

''agency in the face of disempowering circumstances'' (Finnström 2003: 15). By reasserting their agency and holding perpetrators accountable according to traditional mechanisms, victims and affected communities make intelligible what has happened to them. The past no longer controls them, the present is no longer disordered, and the future becomes meaningful; in short, ''common sense'' or the sensibility of a shared understanding of reality is restored. From the Acholi perspective, seeking justice need not preclude the use of formal criminal law, but neither can justice be achieved if criminal trials completely replace customary practices.

While it would be contradictory to offer any specific policy prescriptions here, it can be said that a cosmopolitan realism informed by what Roach refers to as ''political legalism'' will reflexively seek out the most realistic course of action to best achieve justice in any given situation. Roach (2006: 8) defines political legalism as ''an informed and flexible adherence to the legal rules and principles of the ICC Statute'' resulting in a ''self-directed'' application of the rules that ''is both dynamic and open-ended, and is intended to represent the possibilities of the constructive intersection of politics, ethics, and power.'' The reflexivity of political legalism is especially relevant to situations in which transitional societies attempt to come to terms with a past of extreme political evil. Hence, in the case of northern Uganda, it is not realistic to insist on ICC prosecutions whatever the cost. In a transitional context it is realistic for the Court to take into account the particular justice interests of the locals affected by events on the ground, and to acknowledge that these might differ somewhat from those of the Court. It is, however, also realistic to expect the Court to fulfill its mandate of making sure that those responsible for the worst human rights violations are rendered accountable for their actions. Yet, this potentially can be done through several mechanisms, including local, customary mechanisms of restorative justice. Conversely, it would be unrealistic to insist that a blanket amnesty intended as a reconciliatory measure, yet without mechanisms of any type of procedural justice involved, can fulfill the function of accountability. In sum, what is needed is a realistic appreciation of the mutual constitution of universalism and particularism in order to ''reconcile cosmopolitanism with the unique legal, historical, and cultural traditions and memories of people'' (Benhabib 2005: 160).

Turning now to the second example, the categorical promise that ''never again'' should genocide occur, I briefly want to address the notion that cosmopolitan realism is an attempt to connect awareness of past evils committed against the human status with a promise for a better and less

horrible political future.[11] In her analysis of promising as a form of political action, Arendt (1963*b*: 175) notes that by its very nature the promise reveals the human condition of plurality: promises are always mutual, they are made between ''men'' and not ''man''. Promises have plurality both as their condition and their end; without plurality promises could not be made, and promises are made in order to preserve the plurality of ''human worldliness'' through the common bonds they entail. Further, the mutuality presupposed by promises discloses the ''syntax of power'' as the performative joining together of individuals with each other, the commitment to act together to establish and found a ''stable worldly structure'' or ''public body'' so that succeeding generations may continue to exercise their capacity to act. It is for this reason, Arendt writes, that ''in the realm of politics'' making and keeping promises ''may well be the highest human faculty'' (Arendt 1963*b*: 175).

On the one hand, then, the promise ''never again'' can be seen to represent a positive moment in the collective commitment to bring perpetrators of political evil to justice. Common responsibility was manifested, in part, by the performative power of making this promise to protect and defend human plurality from criminal attempts to make humanity superfluous. Indeed, the word responsibility has its roots in the Latin ''*spondeo*'': to bind or obligate oneself through a solemn promise, to make a sacred pledge. It is related as well to the verb ''*respondeo,*'' meaning to answer, to reply or respond to another (Wright 1982: 161–2; Agamben 1999: 21; Derrida 2001: 49–56).

At its extreme, as Nietzsche (1967: 279) warns, the excuse that one must become a ''monster'' in order to ''fight monsters'' can itself be converted into a principle of political action, most notoriously as camouflage for the purification of humanity. For the sake of humanity, cosmopolitan realism requires us to accept the limits inherent in the faculty of making and keeping promises. These limits also underscore the aporetic nature of common responsibility in light of the paradox of extreme evil. A variation on this theme appears in the writing of Jacques Derrida (1992, 1994), who suggests that all decisions of responsibility involve ambiguities, paradoxes, or contradictions which cannot be resolved logically into a dialectical third term. For Derrida responsibility cannot rid itself of this double bind, for to do so would be to eradicate the plurality and alterity of human beings which opens up the call to responsibility, of responding to the other and the political experiences of the twentieth century in the first place.

The promise ''never again'' is therefore a solemn pledge to the plurality of others with whom we share the world, a response that bears witness

both to the human capacity for evil and to the new humanity established in the age of genocide. It also reinforces the notion that the new humanity is a political community brought into being by the act of promising itself and sustained only by a reflexive commitment to be bound in the future by the pledge made in the past. It is a reality ''guaranteed for each'' only when the continued ''presence of all'' is promised (Arendt 1958: 244).

On the other hand, the promise contains a negative moment as well, namely, the implication that the future can be politically controlled or predicted. Arendt states that the function of promising is to cope with the ''twofold darkness of human affairs''; the unreliability of human beings who cannot guarantee that they will be the same people tomorrow as they are today, and the impossibility of foretelling the consequences of our actions given the contingency and unpredictability of human initiative (Arendt 1958: 244). The risk here is that the maxim of evil, ''everything is possible,'' will become harnessed to ostensibly humanitarian ends. For Arendt, spontaneity and unpredictability lie at the root of the human condition – making possible freedom and action – and the only way to constrain these absolutely is by attempting to destroy humanity itself. What must be avoided, then, is the danger of falling into the trap of thinking that the promise ''never again'' is a license to employ all possible means to secure the unhindered progression of a more ''genuine'' humanity, for falling into this trap is a recipe for grave injustice. Since the future of human history cannot be made fixed and stable, the potential for evil to occur will remain a permanent fixture on our political horizon. To believe that we can literally actualize the promise ''never again'' is to succumb not only to a performative contradiction but to the antipolitical fantasy of omnipotence, which would betray the very sense of responsibility that gave rise to the promise in the first place. For the sake of humanity in all its diversity, cosmopolitan realism requires us to accept the limits inherent in the act of promising in the public realm.

To promise ''never again'' thus involves being bound between the obligation to prevent, suppress, and punish crimes against humanity whenever possible, and the realization that the promise is caught in the unpredictability of an incalculable future of human action and plurality. To sustain the promise of ''never again'' we must heed both its positive and negative aspects, and embrace that it is a pledge simultaneously possible and impossible for us to fulfill. The predicament of common responsibility means precisely to live with the paradox that we must, here and now, resist evil and hold perpetrators accountable, but also admit the impossibility of guaranteeing absolutely the total elimination of evil in a future which

remains open.[12] As long as human beings exist the potential for evil action exists as well. But so too does the potential for cosmopolitan responsibility around the norm of historical humanity. This at least affords the possibility of justice – however limited or imperfect it must be – through ''realistically'' cosmopolitan institutions such as the ICC.

Notes

1. There is a vast literature on the concept of juridification and the various possible forms that it may take. In this chapter, I will assume that juridification (or judicialization) basically refers to processes of creating, expanding, and modifying the formal norms, rules, agents, and competencies of legal systems and the political orders associated with them, typically through the strategic interactions of state and nonstate actors. My thinking on juridification has been informed primarily by Habermas (1987, 1996), but see also Della Carpini and Trägårdh (2004).
2. The United States declined to join the declaration for the reason that it wished to maintain its ''neutrality'' in the war at this time. See Power (2002: 13) and Bass (2000: 108–10).
3. The Charter of the International Military Tribunal for Nuremberg, in Article 6(c), defines crimes against humanity as: ''murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on religious, racial or political grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.'' The other crimes within the jurisdiction of the tribunal were war crimes, crimes against peace (especially planning or waging a war of aggression), and conspiracy to engage in the aforementioned crimes. See ''Charter of the International Military Tribunal,'' available through the Avalon Project at Yale Law School, www.yale.edu/lawweb/avalon/imt/imt.htm
4. Rome Statute of the ICC, www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf
5. See the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948 / January 12, 1951), www.unhchr.ch/html/menu3/b/p_genoci.htm
6. In *The Origins of Totalitarianism* (2004: 379), Arendt writes that ''a world government is indeed within the realm of possibility, but one may suspect that in reality it might differ considerably from the version promoted by idealistic-minded organizations.''
7. Beck's characterization of ''zombie categories'' bears a striking resemblance to Arendt's assertion in 1945 that ''national sovereignty is no longer a working concept of politics'' yet it still ''leads the life of a walking corpse, whose

spurious existence is artificially prolonged by repeated injections of imperial expansion'' (Arendt 1994: 143).

8. ICC press release, January 29, 2004, at www.icc-cpi.int/pressrelease_details&id=16&l=en.html
9. One of the arrest warrants was subsequently terminated in July 2007, due to the death of the accused. See www.icc-cpi.int/library/cases/ICC-02-04-01-05-248_English.pdf
10. Available at: hrw.org/backgrounder/ij/uganda0707/
11. In this respect, cosmopolitan realism connects up well with the notion of ''cosmopolitan memory.'' See Levy and Sznaider (2002).
12. Here cosmopolitan realism parts ways with John Rawls's ''realistic utopia,'' which contends that ''the great evils of human history'' will ''*eventually disappear*'' once ''the gravest forms of political injustice are eliminated by following just (or at least decent) social policies and establishing just (or at least decent) basic institutions'' (Rawls 1999: 6–7).

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Four Cosmopolitan Projects: The International Criminal Court in Context[1]

Antonio Franceschet

The International Criminal Court (ICC) is typically recognized as a product of the cosmopolitanization of international law. Much of the debate on the ICC has centered on whether or not international politics and law can or ought to be reformed according to cosmopolitan moral standards. Many have sought to understand the ways in which the ICC was brought into being as a result of successfully framed cosmopolitan arguments (see Glasius 2006). The ethical justifications for the Court and the ways in which cosmopolitan principles are satisfied by its creation have also been analyzed (Hayden 2004). Rather than follow these paths, this chapter examines the ICC as the product not of a singular cosmopolitan morality, but rather four distinguishable, yet not disconnected, political projects.

The ICC is an interesting phenomenon because it consolidates earlier reforms to international law with seemingly more radical departures from the traditional, state-based order. Many miss this fusion of more "conservative" and "radical" politics that the ICC represents; there is a tendency to either exaggerate or underestimate the novelty and potential impact of the Court in world politics (cf. Wippman 2006). More pointedly, it would be incorrect to view the ICC as the latest idealistic application of hope onto a recalcitrant world of realpolitik. Moreover, it would be wrong to view the ICC as merely a continuation of earlier modes of legal cosmopolitanization of world order. Although the Court is built on the foundations of preceding international legal reforms, it also creates logics and dynamics that were not necessarily immanent to earlier, cosmopolitan-inspired reforms.

This chapter offers an alternative interpretation of the ICC. Rather than explaining this institution simply as an effort to moralize international relations through legalization, the ICC is analyzed in light of the manifold nature of cosmopolitan politics. Recognizing that the cosmopolitanization of international law comes not in a single or simple package is important to understanding the ICC for two reasons. First, the role and potential implications of the ICC in world politics are revealed in a more complete and complex light. On the one hand, the ICC is typical of many previous reforms to international law: it consolidates long-standing efforts to bolster the constitutional structure and regulative mechanisms of world order for the sake of universal individual rights. On the other, and in line with Jason Ralph's chapter in this volume, the ICC reflects different constitutional logics that, to a degree, build on the statist foundations of international law while transforming and surpassing them altogether. By unpacking the different political dimensions of cosmopolitan legalism, this chapter aims to demonstrate that the ICC is not simply caught between morality and politics, as many suggest. More accurately, the ICC is built on the variegated demands within the politics of a broad moral tradition, cosmopolitanism. Consequently, the ICC is an evolutionary and integrative institution that incorporates and perhaps synergizes the main tenets of cosmopolitan politics to have influenced the legalization of world politics.

Second, understanding the distinct dimensions of cosmopolitan politics sheds a more critical and nuanced light on state support for and – with the United States in particular – resistance to the ICC. Why a vast constellation of states, including many in the developing world that typically jealously guard their sovereignty, have backed a Court that effectively encroaches on several aspects of traditional sovereignty is a puzzle. By the same token, why the United States, despite its long support for international criminal justice, is hostile toward the ICC as currently constituted is a puzzle. Again, conventional analyses emphasize the antinomy of realpolitik and cosmopolitanism, but this is too simplistic. To suppose that, suddenly, cosmopolitan morality has influenced the majority of the world's states to put moral principle ahead of national sovereignty is facile. By the same token, that the United States' current rejection of the ICC is explainable only in terms of a selfish, noncosmopolitan foreign policy is unlikely, too. If, as I contend, cosmopolitanism is not a homogeneous approach to reforming international law and politics, the politics of state support for the ICC can be viewed as occurring largely *on* the terrain of cosmopolitan moral politics. Different states' interests are understood and

filtered in light of the various fragments of the larger cosmopolitan legal tradition; indeed, national interests and cosmopolitan interests are often mutually constitutive. This means that even opponents of the ICC like the United States are able to understand and frame their policy to the ICC partly on cosmopolitan grounds (although, it turns out, with far less plausibility than ever). I also suggest that it is becoming more difficult for any one state, including liberal great powers like the United States, to control the pace, direction, and implementation of cosmopolitan legal reforms.

This chapter first develops a conceptual typology of four distinct cosmopolitan political projects that have influenced international law. These four projects are labeled: *control*, *order*, *governance*, and *citizenship*. Cosmopolitans have supported the reform of world politics in ways that emphasize or privilege one or more of these objectives: control for the sake of rights enforcement; order for the sake of international peace and security; governance for the sake of democratic reform; and citizenship for the sake of a common humanity. Although, each of these projects supports the cosmopolitanization of international law, they do so in different ways. In particular, some cosmopolitanisms are focused primarily on reinforcing the sovereign state, albeit an ethical sovereign state, as the agency and locus of universal human rights protection. In the second section, I interpret both the objectives and implications of the ICC in light of these four political projects. Simultaneously, I analyze the politics of state support for the ICC in light of the different forms of cosmopolitanism politics at play. I conclude by suggesting that the ICC is not merely caught between the antinomies of *realpolitik* and ethics. More complexly, expectations of the ICC are shaped by different forms of the cosmopolitan political imagination.

Cosmopolitan politics and international law in context

Cosmopolitanism is a diverse intellectual tradition, with roots in antiquity, the Enlightenment, and also, arguably, the ideological practices of both Church and empire (see Schlereth 1977; Kleingeld 1999; Heater 2000; Hayden 2005: ch. 1). Although common moral themes unite cosmopolitan thought over time, for instance, that humans are primarily world citizens before they are members of a discrete political community, diverse political projects are advanced on such generic cosmopolitan premises. Many worry that cosmopolitanism is too ''idealistic,'' politically,

and, as Patrick Hayden's chapter in this volume notes in the case of Hannah Arendt, risks encouraging impotence in the face of evil. In this section, however, I suggest that cosmopolitanism is the inspiration of a much broader and also ''realistic'' ensemble of political projects than critics, even friendly critics, like Arendt, acknowledge. Not all of the four political projects outlined are typically construed as cosmopolitan, and indeed my analysis is possibly controversial for this reason. However, I submit that each of these projects – of *control*, *order*, *governance*, and *citizenship* – should be interpreted in cosmopolitan terms. Moreover, these projects have been the basis of significant reforms to the practice of international law.

The four cosmopolitan political projects constructed below are intelligible in light of the new claims to state sovereignty initiated in seventeenth century Europe. The idea of international law *per se*, i.e., as rules and norms that constitute and regulate *interstate* behavior, has its origins in a distinctly modern understanding of political authority. In the medieval order, overlapping and nonexclusive claims to authority among a variety of actors precluded a meaningful distinction between ''domestic'' and ''international'' law.[2] As sovereign states began to supplant nonterritorial organizational logics, the *jus gentium* or law of nations was gradually transformed from a law common to all nations to a law among sovereigns. The peace of Westphalia in 1648 suggested, although primarily in retrospect, a new constitutional order with no higher authority above sovereign states (Gross 1998). The political agenda of international law became a reflection of this new order: it constituted the agents' separate property entitlements (in terms of territory and population), it set forth some regulations on interactions among the agents, but the possession of any entitlements were precarious in the absence of enforcement of these regulations in the state of nature. As Thomas Hobbes argued, without a sovereign with power over possessive, egotistical agents, all title claims, even to one's personhood, were precarious (Hobbes 1968). By analogy, the same reasoning applied to states but with one difference: no suprastate sovereign was available much less desired. In this context, cosmopolitan politics – with its ancient and stoic roots – emerged anew in Enlightenment Europe. But the cosmopolitanism that emerged was an ambivalent structure: simultaneously it was a legitimation of, and a rational protest against, Westphalian international law.

Immanuel Kant's political theory is the archetypical example of this ambivalence in cosmopolitan politics in relation to international law, from the Enlightenment to the present (see Franceschet 2002). Kant

accepted and endorsed wholeheartedly the role of international law in constituting autonomous, sovereign states' existence; what he questioned and rejected, however, was the adequacy of extant international law – at least in 1795 – as a regulatory scheme preventing violence among them. Indeed, Kant viewed classical international law, as analyzed and extended by his intellectual predecessors, Grotius, Vattel, and Pufendorf, as ''sorry comfort'' (Kant 1991*c*: 103; see Franceschet 2006*b*). As simply custom following usage by states, international law's regulatory structure undermined its own constitutional pretensions. Most important, by including a virtual unfettered ''right'' to go to war, the international law of Kant's time essentially sanctioned the right of the stronger. Indeed, international law acquiesced not only to unilateral war-making but also to the taking of territory and entire countries by force, thereby endangering the very existence of law's subjects. For Kant, then, international law required reform. In particular, he advocated that measures be taken to retain and strengthen its rational, constitutional promise of respect for sovereignty while at the same time supplanting any anachronistic regulatory rules (especially the ''right'' to war) that legitimized states acting in ways that threatened the possibility of international justice. Equally important, he justified such reforms in light of the essential humanity of individuals as the fundamental moral subjects.

There are at least four cosmopolitan political projects because liberals, from Kant to the present, have viewed the sources and solutions to the problem of (international) politics in diverse, and not always entirely coherent, ways. On the one hand, liberals have framed the broad problem in a way that Kant arguably first conceived it: that there is a structural contradiction, grounded in the anarchic nature of world politics, between the constitutional idea of a world of free and equal states as legal subjects and a regulative order that does not actually enforce, and thereby limit, the rights of these subjects. As Martti Koskenniemi (2001) argues, international law has been viewed by liberals in this overtly reformist way, as a means by which to ''civilize'' international politics. On the other hand, there have been different emphases placed by liberals on what civilizing international law for cosmopolitan ends practically entails and, further, whether a world of free and equal states is sufficient to promote universal human rights.

Some liberals like Kant have emphasized strengthening and buttressing the constitutional order of world politics, making it more hospitable for cosmopolitan purposes. In other words, if the states system has a greater modicum of interstate order and justice, i.e., less or no war, humanity as

comprised by individual moral subjects will be safeguarded from violence in the process. But, contemporary cosmopolitans such as Jürgen Habermas (1997) and David Held (2005, 2002) have placed a greater emphasis on using international law in a legislative way to create fundamentally new constitutional and regulative institutions to protect human rights in a context of state failure and globalization. Although there is a common principle of humanity here motivating the cosmopolitanization of international law, it is expressed in distinct political projects that link legal means and moral ends differently. Whereas Kant wanted primarily to protect states from abuse by the stronger and to curtail unilateral judgments on force in external relations, Habermas and Held want to protect individuals also from the same problem of arbitrary power in all spheres of global life. Quite obviously, the distance between the late eighteenth century thoughts of Kant and early twenty-first century recommendations of Habermas and Held reflect very different political contexts and, by extension, different political projects. It is important to unpack and distinguish these projects in relation to international law.

Cosmopolitan control

Broadly speaking, cosmopolitanizing international law involves changing its rules, norms, principles, and practices in ways that enhance respect for individual rights globally. Today this is typically interpreted as enhancing the international human rights regime through, for example, building on international criminal law to enforce such rights. However, the possibility of rights enforcement presupposes the existence of a political authority that controls violence or force. The agent that legitimately exercises this control is the sovereign state as juxtaposed with the lawless anarchy of the state of nature. Although, perhaps political control is not typically viewed as a particularly cosmopolitan political project, many cosmopolitans, such as Kant, view sovereignty as *foundational* to achieving universal rights.

Kant's robust defense of the sovereign state is justified on cosmopolitan political grounds that have remained salient in international law reform for over 200 years. To have meaningful political rights, argues Kant, following closely from Hobbes, is to have an effective means of enforcement. Indeed, as he states in the *Metaphysics of Morals*, right entails the authority to coerce (Kant 1991*b*: 134). The only noncontradictory, universal way to ensure for rights is to supplant the state of nature, where everyone is authorized to coerce, with the sovereign state, where only public authority

legally coerces in order to uphold the overall system of rights (Kant 1991*b*: 137–8). Sovereign statehood is a cosmopolitan good, then, because it institutionalizes a rational control on violence in ways that provide universal, general protections for individuals over whom it has jurisdiction. Far from being an idealistic doctrine of wishful thinking, then, a signal moment in cosmopolitan politics emerges from Kant's idea that rights can only be executed in a context in which private violence is sharply marked from public coercion, particularly in light of the human capacity for evil. Hayden is surely right in the preceding chapter, then, to suggest that efforts to juridify and punish evil are inspired by cosmopolitanism. My point here is that this project actually predates the twentieth century, post-Holocaust context.

Viewed in such terms, international law, from the Westphalian treaties forward, can be viewed as an attempt to legitimize the public, ethical control over the use of violence. Liberal cosmopolitans such as Kant argued that international law is morally legitimate in a foundational sense but only to the extent that it constitutes states as institutionalized systems of rights protection. The project of cosmopolitan control emerges from this concern for equal rights enforcement in a world of potential violence, evil, and disorder. To the extent that international law has failed to adequately provide individuals *qua* individuals this kind of rights protection, the necessity of reform has been on the agenda, albeit in different ways, over the past 200 years.

How does the political project of cosmopolitan control influence international law? International law's legitimacy hinges, at least in part, on the support it provides for the development of effective local control regimes. International law must not be indifferent to the rights of individuals to a secure system of basic rights. However, the way in which cosmopolitan control has been inserted into international law in practice has evolved over time. Indeed, for much of the nineteenth century international law incorporated a ''standard of civilization'' which justified the denial of sovereignty to most of the non-European world (Gong 1984). In this context, liberals such as Kant and John Stuart Mill were ambivalent about the conditions under which non-European peoples ought to qualify for sovereignty (Jahn 2005*b*). While Kant thought any people might qualify for sovereignty, European or not, and argued that non-European states rightfully resist Western intrusion (Kant 1991*c*: 107), his criteria and standards for what constitutes legitimate statehood are clearly European. Thus, some argue that his international theory effectively condones the practice of colonialism (Tully 2002). Much less ambiguously, Mill argued

that non-European peoples did not have the level of civilization required for self-rule or local control (Jahn 2005*a*).

On the one hand, then, the politics of cosmopolitan control could be used to deny sovereign equality (Chandler 2003; Cohen 2004, 2006). On the other, if colonialism and external control mechanisms are viewed differently, the cosmopolitan political project has quite the opposite set of implications. After World War I, Woodrow Wilson's principle of self-determination anticipated changes in the way the standard of civilization operated in international law because it suggests that any nation is entitled to political sovereignty. After World War II, with the weakening of Europe's imperialist states, particularly France and the United Kingdom, a process of decolonization resulted in the recognition of virtually any and all states no matter their ostensible preparedness to govern.[3] Yet in practice, these changes are consistent with, rather than a contradiction of, the project of cosmopolitan control. Colonial imperialism and, consequently, external control mechanisms in general (such as Trusteeship), became viewed in the UN era as flawed precisely because they did not secure individual rights; to the contrary, these mechanisms became viewed as part of a systematic violation of human rights, newly defined (see Bain 2003).

The project of cosmopolitan control has thus shaped the constitutional nature of international law by influencing those practices which define legal personality and thus authority in international society. Recognition of sovereignty has hinged on capacity to ensure a system of rights within a state. Thus, sovereignty has not been defined as an absolute right to control within a state but as a conditional right for a much longer period of time than is often acknowledged.[4] As a conditional right, moreover, sovereignty in international law is located in states primarily because these units are viewed as, in practice, the best (but by no means perfect) currently available means of creating a system of individual rights for peoples. To anticipate below, the ICC is rooted in the notion of cosmopolitan control while creating a supranational judicial body in ways that suggest the need to have a response to failures of sovereignty at the state level.

Cosmopolitan order

Although conditional, the commitment of cosmopolitans to the state as a rights mechanism creates a problem: the potential for disorder and war among sovereign states. If rights are, to borrow Kant's phrase, grounded in the authorization to coerce, what is the moral basis of the external use of

coercion? If states as political authorities are unrestrained, each claiming a unilateral right to employ coercion when it perceives an abuse of its own rights, the state of nature is simply reproduced among states in Hobbesian fashion. In the absence of a single, centralized global control mechanism, which cosmopolitans have near universally rejected, what is the basis of international right? A political project that I call cosmopolitan order emerges from attempts to reconcile the internal and external sovereignty of states.

There are two related variations of the project of cosmopolitan order, both of which involve the reform of international law. First, there is the attempt to institute a form of *juridical pacifism*. Essentially, this means that states have to relinquish any claims to the right to use force in their international relations. War must be outlawed as an instrument of foreign policy. Second, however, and in recognition that attaining a condition of juridical pacifism is both unlikely in the short term and contingent upon the creation of ''ethical'' states in the long term, is the attempt to create a *collective enforcement* mechanism. With both variations, there is an effort to provide an international legal surrogate to a world state in ways that remove a right to unilateral judgments on the use of force.

Just as the domestic state of nature undermines the very possibility of individual rights, so too, argue the proponents of cosmopolitan order, do the effects of a state of nature among states. As Kant argues, the international state of nature tends to make any posited distinction between wars of aggression and wars of defense difficult, if not impossible, to ground (Kant 1991*b*: 165–70). Without a juridical order, with the authority to rule on the rival claims of states, the possibility of a ''just'' war is, strictly speaking, a contradiction (Kant 1991*b*: 167, 1991*c*: 105). Consequently, the death and destruction of individuals in war, both combatants and noncombatants, is a complete violation of their rights to life. In this context, only a blanket ban on force is compatible with cosmopolitan objectives.

However, advocates of cosmopolitan order among states recognize that peace must occasionally be enforced. Thus, as a surrogate for a global juridical body, the international community may collectively defend a state from attack. Drawing on the just war tradition, advocates of cosmopolitan order recognize that, even in the state of nature, it is possible to make relative statements in regard to ''just cause.'' If self-defense is justifiable or, more precisely, if a duty of states is to defend their citizens from unsanctioned violence (an external corollary to defending the system of rights discussed above), then collective enforcement is also a requirement for cosmopolitans. By the twentieth century, the normative force of

humanitarianism has also made collective enforcement against crimes against humanity and genocide a necessary extension of state duties, albeit perhaps imperfect duties. Although juridical pacifism is the default stance, collective security and enforcement is recognized as a back up mechanism to defend individual rights.

As a political project, cosmopolitan order has led to the most renowned and important reforms to international law. These reforms correspond to the juridical pacifist and collective enforcement variations distinguished above. Examples of the former range from the Kellogg–Briand pact, outlawing war to the ban on nondefensive force in both the League of Nations Covenant and United Nations Charter. Examples of the latter include the collective security provisions in the Covenant and Charter but also, in (possible) anticipation of the ICC, the Nuremberg judgment that the Nazis were guilty of crimes against the peace.[5] Additionally, the Genocide Convention and international humanitarian law are motivated partially by a perceived relationship between massive assaults on humanity and the preservation of international peace and security. More recently, collectivized security interests have converged with the idea of individual rights in the discourse of ''human security'' at the United Nations and in other multilateral institutions (Franceschet 2005). In sum, cosmopolitan order is the project of eliminating, if not reducing, the disorder and violence that threatens individual rights that stem from the structural pathologies in the states system.

Cosmopolitan governance

For many cosmopolitans, control and order are necessary yet insufficient political projects without fundamental reforms to governance structures and practices within states. A distinctive project of cosmopolitan governance entails the promotion of common standards in all states and societies with regard to democracy, the rule of law, and human rights. Cosmopolitanizing international law involves here using international legal standards to promote the reform and transformation of sovereign states in light of liberal ideological standards. However, in the process, international law itself is changed in ways that significantly alter its constitutional structure. These changes to international law create tensions and possible conflict even among different cosmopolitans.

Cosmopolitan governance goes significantly beyond the project of control. With control, as noted above, the objective is simply to provide a mechanism to supplant the state of nature. However, simply having a

control mechanism does not necessarily imply that it is either democratically accountable or optimally suited to maximizing human rights. Kant, for instance, distinguishes between having a state that has mere lawfulness and a state that has been reformed in ways that approach a transcendental standard, what he terms the "original contract."[6] The original contract is an externalized or politicized version of the categorical imperative – it stipulates that the state governs such that the freedom of the individual is made maximally consistent with the freedom of all citizens. Although, all states enjoy a presumptive and basic legitimacy in that they provide a framework of law, only republican states, Kant claims, come close to achieving a more perfect system of rights implied by the original contract. Although, the discourse on the purposes of international society has certainly evolved since Kant, his is an early example of the cosmopolitan governance project. In this project, international law is purposive in that it constitutes a world of liberal democracies.

A world of liberal democracies is a corollary of cosmopolitan order among sovereign states *qua* states. To even begin coming close to juridical pacifism and a collective enforcement regime, as discussed above, requires a change to the internal character of sovereign states. Drawing on Kant, advocates of the so-called democratic peace thesis hold that democracies do not go to war with each other (Doyle 1983*a*, 1983*b*). Rather, they war only in self-defense or to repel aggression from nondemocracies. The essential point here is that there is no external control mechanism over and above all states, sovereignty gives them freedom to choose whether and when they will obey international law and morality. Ultimately, it is internal constraints or self-restraint that is required to produce cosmopolitan order. Democratic accountability and proceduralism change the way states view the use of force: given that decision-makers are accountable to the citizens who must pay war's high costs, restraint and moderation is more likely in democracies than other regimes. Moreover, a community of democratic states is more likely to project and employ the legalistic restraints from the domestic context to the international realm. However, by the same token, these restraints would not be as salient or effective among nondemocracies or between democracies and nondemocracies. There is an ever-present potential conflict, then, even within the project of cosmopolitan governance, at least as long as there is a division between insiders and outsiders in the democratic community. However, this tension can perhaps be gradually lessened over the longer term with the diffusion of democratic norms.

A virtue of international law is that, in delegating significant authority or control to sovereign states, it creates a bulwark against unwarranted

external intrusion and domination. International law protects states from the moral arrogance of larger powers wishing to impose their own view of the good life onto other, particularly weaker, powers. However, this virtue is potentially a vice. If international law is viewed as a mechanism that promotes tolerance of legitimate and reasonable differences, it is a virtue. As Tan (2000) argues, a cosmopolitan commitment to universal individual rights ought to include support for the right to enjoy a distinctive cultural, social, and political context. If, on the other hand, international law is viewed not as a framework for tolerance but rather of complete indifference and neutrality with regard to individual rights, it is a potential vice, one that the cosmopolitan governance project seeks to eliminate.

International law is a political site on which different and competing agendas are pursued, cosmopolitan and not. The cosmopolitan governance project is to tip the rules, norms, and standards of international law away from a mere modus vivendi among regimes to that of principled tolerance. This is a challenge because many states interpret rules and norms designed for the latter, such as Article 2(7) of the UN Charter (that prohibits intervention), as a pretext for the former, ''live and let live'' attitude when it comes to the denial of fundamental rights. However, there is significant disagreement, too, among cosmopolitans when it comes to countering a neutralist conception of international law, and how to employ international law to promote democratic governance and human rights in illiberal and rights-violating states. In particular, some cosmopolitans, like Kant (1991*c*: 96), prohibit intervention and reject the presumption that liberal states have a right to impose their standards coercively on other states; reform and change seemingly must originate from within these regimes. Others, however, argue that liberal states can claim some authority in international law to coerce and force regime change under certain circumstances (Buchanan and Keohane 2004; Tesón 2005). This conflict among cosmopolitans is important but should not be overstated, however, as the end state is less controversial: the gradual convergence of a universal system of rights in all states and societies.

The cosmopolitan governance project has also had a profound impact on the direction and practice of international law. The development of international human rights law, including the International Bill of Human Rights, regional human rights treaties, and specific conventions on genocide, women's rights, and racial discrimination, to list a few, has rendered the argument that international law is and ought to be neutral on domestic governance difficult to sustain. More recently, democracy and the rule of law have been promoted through international law and intergovernmental fora.

As I argue below, the ICC is animated by the project of cosmopolitan governance but in ways that have generated controversy.

Cosmopolitan citizenship

Animated by the three political projects discussed above, the cosmopolitanization of international law assumes that individual rights are best secured in and through sovereign states, albeit democratic sovereign states, in a rule-governed international order. However, sovereignty is an instrumental value rather than an absolute value, an institutional means to the end of general, universal rights for individuals (Pogge 2002: ch 7). Human beings are members of particular sovereign states but they are also, and primarily, members of the universal community of humankind. In short, there is a cosmopolitan community that overlaps and transcends the group memberships of international politics. A project of cosmopolitan citizenship aims to articulate, develop, and enforce the global rights of individuals independent of national membership. Although not an outright rejection of the dominant, statist cosmopolitanisms above, this project exacerbates certain longstanding tensions in the constitutional foundations of international law.

Sovereign statehood and national citizenship are incomplete and contested political projects. International law has been a site used to advance these projects in the modern era. In particular, the ideas that only states possess legal personality, and that, as a corollary, individual rights are secured in and through particular states, have figured prominently in modern accounts of international law. As Claire Cutler argues (2001), by positing states as the only consequent legal subjects, international law has served to reify states while ignoring the reality of nonstate actors such as private corporations and individuals. But there is no necessary reason to limit legal personality and rights to states; indeed, for long periods of history individuals and private companies did enjoy certain rights in international law prior to the full consolidation of sovereign states in the eighteenth and nineteenth centuries.[7] Wary of the totalizing projects of states and nations, not least in the aftermath of the Holocaust, cosmopolitans have sought to reconstruct international law in ways that promote the rights of global citizenship.

Even deeply statist cosmopolitans like Kant envisage the need for a form of global citizenship rights. The Third Definitive Article of his ''Perpetual Peace'' argues that individuals, as members of the human species, have

certain innate rights to a share of the earth (Kant 1991*c*: 105–6). Such rights are supraterritorial rather than contingent on the arbitrary political borders and arrangements that have historically evolved. Although Kant spoke primarily in terms of a limited right to hospitality when traveling, he recognized that individual rights do not stop at state borders. He also wrote positively of cosmopolitan solidarities and sympathies of an emerging global civil society: ''The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*'' (Kant 1991*c*: 107–8). Kant is significant because, although he is committed to states as mechanisms of political justice (the legacies of control and governance, discussed above), he also acknowledged that states and international law were incomplete without a form of cosmopolitan citizenship. Kant's ideas on world citizenship in international law are suggestive of radical implications for world legal order, yet are perhaps underdeveloped all the same (Archibugi 1995; Kleingeld 1999).

A number of significant developments in international law have served to forward the cosmopolitan citizenship project. In addition to the international human rights law noted above, states have created what one scholar has called an ''atrocities regime'' in reference to crimes against humanity, genocide, and war crimes (Rudolph 2001). This regime includes practices such as ''universal jurisdiction'' whereby states reserve the right to prosecute and punish individuals found guilty of such violations no matter where they occurred. Treaties protecting refugees are another example of the protection of individual rights beyond the states system. In each of these examples, the idea of equal protection under the law, no matter one's citizenship, location, and position in global society, is at the core of cosmopolitan citizenship. The ICC, as will be analyzed below, is a widening and deepening of the enforcement of universal rights in line with the project of cosmopolitan citizenship.

The typology of cosmopolitan political projects elaborated above is significant. There are four implications that emerge from viewing the international legal reform through the lenses of these distinctive projects. First, the process of cosmopolitanizing international law cannot be easily reduced to any one set of reforms or initiatives. Certainly the notion of promoting universal, general, and individual rights unites all cosmopolitan thinking, from Kant to the present. But, the application of this ideal through international law has been carried out in distinct ways that privilege different political goals: *control, order, governance,* and *citizenship*. Second, consequently, cosmopolitan ideals are not, as often complained,

utopian in that they have no grounding in extant practice or interests; indeed, these ideals have been part and parcel of international law and legal reforms for centuries. Nevertheless, thirdly, there are tensions within the cosmopolitanization of international law and this should not surprise. Indeed, different states and other actors have emphasized cosmopolitanism in different ways that match their own values, priorities, and interests. Fourth, each of these four projects remains important and is not necessarily eclipsed by the others. In other words, there is nothing to suggest that cosmopolitan control becomes an irrelevant objective even if states and societies develop an interest in cosmopolitan citizenship; this is, as argued below, illustrated by the nature of state support for the ICC. Moreover, in managing the tensions and problems of world order, there is no guarantee that states, individually or collectively, will interpret and institutionalize cosmopolitanism in ways that can incorporate all of the different projects discussed above. Perhaps, as Isaiah Berlin observes, not all good things come together (2002: 172–3).

The ICC in context

International criminal justice and individual accountability in international law have had a sporadic and limited history (Bass 2000). After the Nuremberg trials, there was strong interest among states in creating a more permanent mechanism of its kind to provide enforcement capacity for the nascent human rights regime (Sands 2003). However, this interest quickly dissipated, particularly with great powers, once the Cold War erupted. Neither protagonist in the bipolar conflict was willing to support a supranational enforcement body that might conceivably hold states' political and military leaders accountable, thus constraining their freedom to maneuver (Schabas 2001: 8–9). After the Cold War, however, the immediate political context changed. The possibility for a permanent international criminal court re-emerged and, with unexpected quickness, the Rome Statute was signed by 120 states in 1998 and ratified by a sufficient number of states by 2002 to create the Court. At the time of writing, the Rome Statute has 139 Signatories and 105 Ratifications and the ICC has commenced investigations and prosecutions in a handful of African cases.

To achieve this wide degree of support, and so rapidly, the ICC promised to deliver changes to international law and world order that were, in the 1990s, viewed as long overdue and urgently needed.[8] The end of the Cold War seemed to provide a unique and historic opportunity to transcend

realpolitik. Many argued that it was no longer necessary to trade human rights for national security in the absence of superpower rivalry (an argument that has perhaps lost some of its force in the so-called global war on terrorism after the September 11, 2001 attacks). The way the Cold War ended, with the perceived triumph of liberal democracy over rival ideologies, created a high degree of normative consensus on the need to strengthen and extend the enforcement of universal human rights. Additionally, the reality of crimes against humanity and genocide in the former Yugoslavia and Rwanda, and the creation of ad hoc Tribunals by the UN Security Council to convict individuals in those states, led many to see the logic in a permanent, impartial body to deal with future incidents.

Some might be tempted to view the ICC as simply the product of a ''cosmopolitan moment,'' a brief time when idealism was cheap and easy but is sure to fade when state interests and ideologies shift back to enduring national interests. Certainly the ICC would not exist now, and in its current form, in the absence of some favorable circumstances noted above, i.e., the conjuncture of the Cold War ending, the dominance of liberalism, and urgency of human rights atrocities. However, the unique features of the immediate post-Cold-War period do not suffice as an explanation of the politics of the ICC. Indeed, it is too short and superficial a context. The ICC should be understood in relation to a much longer cosmopolitan epoch that has shaped state interests and ideologies in a much deeper way than is normally imagined. Thus, as Jason Ralph claims, the Rome Statute is part of ''evolutionary rather than revolutionary change'' to international law and politics (2007: 28). The ICC builds on and consolidates earlier amendments to international legal order while also pushing beyond its previously set constitutional limits with respect to defending and protecting universal human rights. While most states are attracted to both of these features of the ICC, they are also, in the case of the United States, repelled at the very same time. The four cosmopolitan projects of the previous section are important to any understanding of these political realties.

The ICC and control

The ICC contributes to the cosmopolitan project of legitimizing and enhancing appropriate forms of state control. When Trinidad and Tobago spearheaded a resolution in the UN General Assembly in 1989 directing the International Law Commission to pursue the possibility of a

permanent international criminal court, it was primarily motivated by a concern with combating the narcotics trade and transnational crime (Schabas 2001: 9). There was insufficient support for an international court with jurisdiction over activities beyond the so-called core crimes, i.e., crimes against humanity, genocide, war crimes, and aggression. Yet Trinidad and Tobago's initial motivation is telling: states are interested in international legal mechanisms to augment their control capacities. Although issues like drug enforcement and terrorism are not, at least not yet, included in the mandate of the ICC, the institution could eventually be delegated the authority to deal with such issues. The key point here is that the ICC aligns with the long standing project of providing support and legitimacy for states as mechanisms of rights enforcement.

As an ensemble of practices and institutions that provide a system of rights enforcement, each state in international society is continually challenged to reproduce the necessary means, both material and ideational, to remain effective. Thus, regardless of their particular and sometimes divergent interests and rivalries, states have a common interest in bolstering the practice of statehood as an authoritative idea and practice.[9] International law's support for state efforts to suppress and punish private violence and criminality, both inside and outside of their territory is foundational to the project of cosmopolitan control. Rules governing extradition, although not universal, are one way in which international law supports rights enforcement. The centuries old rules against piracy and the rights of states to enforce this crime on the high seas are similarly important. Indeed, these examples suggest that even highly effective and capable states have an interest in an international law that entrenches and improves their function to uphold a system of law and rights enforcement.

The ICC is an appealing institution to the vast majority of states because it builds upon and extends the legacy of cosmopolitan control. The Rome Statute buttresses sovereignty by recognizing that states are the default mechanisms of rights enforcement in world politics. The complementarity principle in the Rome Statute (Article 17) gives the ICC authority only when states are deemed unwilling or unable to exercise control and enforce the law. In cases of incapacity, states can request the ICC to take on its sovereign functions as Uganda has done in relation to the crimes of the rebel Lord's Resistance Army.[10] The ICC can also act in the absence of a request in situations of state weakness or failure. The majority of the world's postcolonial states, regimes that jealously guard their sovereignty,

have supported the Court as a means of suppressing and punishing the private use of illegal violence.

Cosmopolitan control in the areas of war crimes, genocide, and crimes against humanity appeals to states as rational actors capable of defining collective moral interests. The established laws against piracy noted above are significant because the crime is defined as an affront to the civilized community of states; freedom from piracy is therefore a public good that requires enforcement by states. Similarly, massive human rights violations have become defined by states as *erga omnes*, that is, as crimes that affect everyone, no matter where they have occurred. Because states are limited and finite control mechanisms, the ICC provides a solution to the collective action problem of enforcement. As Caroline Fehl's chapter in this volume notes, the ICC can be explained as enhancing the current enforcement regime for an undersupplied global public good (see also Rudolph 2001).

Nevertheless, the ICC's powers suggest a radical deepening of the cosmopolitan control project. In essence, states are potentially sharing or ceding a great deal of control to a supranational agent with independent authority. States are no longer, at least with respect to the core crimes, the sole control mechanisms on their own territory or over their own citizens. This move recognizes, as Eric Leonard puts it, ''the state's historical failure to protect the rights of the individual [which have] made it necessary to transfer sovereignty to another entity, a transnational entity'' (2005: 102). The majority of the world's states have, with the ICC, consented to the notion that cosmopolitan control may, at times, require an independent judicial and enforcement agency. This effectively yet subtly amends the global constitutional order.

The important exception is the United States. The United States accepts that *other* states are real or potential failures as cosmopolitan control mechanisms, and thus that there is the occasional need for international and even, as with the ad hoc UN Tribunals, supranational enforcement. The United States wants to retain a more traditional cosmopolitan control regime for two reasons: First, the United States is not willing to cede any control over its own jurisdiction despite the fact that the complementarity principle ensures a safeguard against external intrusion (Tucker 2001: 79). Second, the United States also does not want an independent supranational authority providing the global public good of enforcement. Even though most states perceive that the public good of cosmopolitan control is woefully undersupplied without the ICC, the United States is happy with the exceptionalistic nature of Security Council's control over

massive human rights abuse. Thus, it should be underscored that the United States is not against the project of cosmopolitan control *per se*, only the legal weakening of its own exclusive and exceptional legal controls on its own territory, over its own soldiers and citizens, and as a great or imperial power in world order.

The ICC and order

The ICC builds on the ongoing political project of cosmopolitan order. It contributes simultaneously to the regulative ideals of juridical pacifism and collective enforcement as related means of reducing and eliminating violence in world politics. With respect to juridical pacifism, the ''right to go to war'' has long since been formally rejected in international law, and the Rome Statute consolidates this gain by including aggression as a criminal offense. (At present it remains for State Parties to define aggression for the ICC, but it is significant that a diplomatic framework to achieving this goal has been created.) With regard to collective enforcement, and following the Nuremberg precedent, the ICC creates criminal liabilities for individuals as a way of restraining and punishing aggression; by holding the individuals who make state decisions accountable, states as corporate actors are put under legal control (Schabas 2001: 2). Interestingly, the Non-Aligned Movement bloc of states, a relatively heterogeneous group of developing countries, pushed hardest for the inclusion of aggression as a core crime (Schabas 2001: 16). These are states who have been most vigilant about respect for their sovereignty and, particularly during the Cold War, were subject to superpower interventions. This is significant because it reveals again that the ICC is understood by many states as a completion of a Charter-based legal regime that supports and protects state sovereignty and not, in this way, a quantum leap beyond the states system.

Yet, the ICC extends and deepens the institutionalization of cosmopolitan order. The UN Charter formally takes the rights of war and peace from the exclusive discretion of individual states. However, although the Charter formally denies states a right of punishment for aggression and war crimes, it does not create an explicit or effective replacement for self-help. The large bloc of ''like-minded states'' was adamant about creating a truly independent court precisely to remove the right to punish from the logic of realpolitik and unilateral, politicized judgment (Benedetti and Washburn 1999: 15). The taint of ''victor's justice'' and bias that attends

to trials and punishment carried out by states as ''interested parties,'' to quote Gary Jonathan Bass (2000: 204), has plagued most previous efforts at international criminal justice including the important Nuremberg precedent. In addressing this problem the ICC promises to complete the project of cosmopolitan order.

The ICC also responds to the recognition, by states and other actors, that violence perpetrated by substate and nonstate actors is a potentially significant threat to international peace and security. The relatively uncontroversial cases of international aggression, such as Iraq's invasion of Kuwait in 1990, have been exceptional in the Security Council's post-Cold War experience. The majority of international crises have been internal conflicts and aggression, for instance, in places like Yugoslavia, Somalia, and Sierra Leone. Cosmopolitan order dovetails here with the project of cosmopolitan control, as states have interests in the ICC as a regime of conflict and crisis management (see Rudolph 2001). However, this motivation for the ICC is still firmly a question of producing order. Just as states recognized after World War I that localized conflicts can create destabilizing system-wide effects (with an assassin's bullet in Sarajevo snowballing into years of trench warfare), states today recognize the implications of intrastate violence in a thoroughly globalized order. Thus, holding substate actors to criminal sanctions can be an effective means of enhancing cosmopolitan order.

Opposition to the ICC by the United States is, again, not necessarily a rejection of cosmopolitan morality and legalism. It is, instead, resistance to a supranational entity, and one that the United States and other great powers do not control, having authority over the enforcement of world order (Ralph 2007: 53). Indeed, as Steven Roach argues, although the ICC's legitimacy derives in large part from its legal function and authority, the Court will also be a political actor, with significant discretion in choosing where and when to enforce international peace and security (2006: 6). Not unlike previous imperial powers, the United States views itself as the source of (cosmopolitan) order (see Mayerfeld 2003). To that extent, the ICC is perceived as a challenge to the political foundations or conditions of that imperial version of cosmopolitan order. That over 100 states reject the United States' hubristic claims to authority suggests a profound loss of moral hegemony despite a clearly unrivalled military power. The message of the ICC controversy is clear, for most of the world, cosmopolitan ends must include cosmopolitan institutional means. As Marlies Glasius claims (2006: 117), the ICC has a democratizing effect in international relations by creating a more level playing among states in world order.

The ICC and governance

The ICC contributes to the project of democratization, the rule of law, and human rights within states. It also thereby expands the international community of civilized states that respects and enforces rights both at home and abroad. In other words, the ICC reinforces trends that move international law away from indifference with respect to the internal political life of states. Yet there are serious concerns that, not unlike other global governance institutions, the Court will reinforce asymmetrical relations between more powerful Western democracies and developing states and societies. Some worry that the ICC's enforcement powers may undermine democratic capacity and control within states by privileging external accountability over local efforts to deal with human rights abuses. However, there is reason to hope that, compared with alternative institutional arrangements, the ICC will err on the side of principled tolerance rather than arrogant intrusion into particular circumstances.

The Rome Statue requires State Parties to align domestic law with the international definitions of the core crimes, with the extradition requirements of the Statute, and the need for courts to exercise universal jurisdiction (see Schabas 2001: 19). As William A. Schabas claims, ''The influence of the Rome Statute will extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to greater zeal in the repression of serious violations of human rights'' (2001: 19). On the one hand, this internalization of international legal norms coheres perfectly with the consent-based or voluntary traditions of international law. On the other, however, there are limits to consent as international law is moved further away from traditions of indifference to the domestic governance of sovereign states.

Liberal democracies have typically projected their domestic values and norms onto global politics. As Jonathan Bass (2000) argues, liberal democracies have used the discourse of ''legalism'' to justify criminal trials at the international level after defeating illiberal adversaries. Indeed, without the ideas and actions of liberal democratic states, individual criminal accountability would not be applied in global politics: ''liberal ideals make liberal states take up the cause of international justice, treating their humbled foes in a way that is utterly divorced from the methods practiced by illiberal states'' (Bass 2000: 18). The ideas and actions of liberal states have uplifted and civilized international politics: the punishment of defeated states, in the Nuremberg and Tokyo trials, for example, is guided by legal process rather than the capricious politics of revenge. Yet,

liberal states have tended to apply legalism in a highly selective and asymmetrical way against defeated states and the so-called uncivilized. The charge of ''victor's justice,'' as discussed above, has a basis in fact as liberal states have generally refused to submit to legal judgment on their wartime conduct against illiberal regimes. Bass suggests that liberal states have thus combined both principle and ''selfishness'' in their pursuit of international justice.

Yet once new, liberal cosmopolitan international norms and standards are widely accepted it becomes difficult to control their future application. Once the community of states and global civil society come to accept the discourse of legalism the expectation is that all states submit to accountability, and not just in rare instances after world wars. As Fehl's chapter in this volume argues, liberal norms of domestic and international accountability have become constitutive in world politics. The discourse of a community of civilized states has become an external standard of legitimacy to define insiders and outsiders in the society of states, and most states want to align themselves with the new mainstream. This dynamic was apparent in relation to the negotiations for the Rome Statute and in the subsequent drive to achieve sufficient Ratifications to bring the ICC into reality. In particular, the so-called Like Minded Group of states in favor of a strong, independent court was influential precisely because it framed its agenda in terms of the high moral ground of legalism over the traditions of national selfishness and exceptionalism. The Like Minded Group was a heterogeneous group of states that, precisely because they wanted external legitimacy, resisted the injunctions of the United States to water down the future court's powers. Ironically, the United States, as a key historical actor in the pursuit of international accountability given its support for Nuremberg, was cast as the state outside of a strong intersubjective consensus on the meaning of international justice.

Even with a wide intersubjective agreement across states on the need for a supranational accountability mechanism, the ICC will operate on the terrain of a highly stratified and unequal world order (Franceschet 2004, 2006*a*). As Andrew Hurrell suggests, the contemporary international legal order is bifurcated between states that tend to be rule-givers and states that are rule-takers (2001). The ICC is situated in a context in which weaker states are made subject to external, international norms of accountability and have far less ability to rely on internal, domestic processes of internal accounting. The ICC has already encountered this problem in Uganda.

When the Ugandan government claimed it was unable to prosecute its Rome Statute obligations against members of the rebel Lord's Resistance

Army, it requested that the ICC step in. However, the government subsequently changed its tune and offered amnesty in exchange for peace with the rebels. Many NGOs and civil society leaders in the local population, those most affected by the decades of violence, have endorsed the idea of legal amnesties as a means to peace; they have argued for traditional justice mechanisms in place of criminal prosecutions. Nevertheless, the ICC has refused to recognize the amnesties and is pursuing the case, thus apparently thwarting a peace settlement. Adam Branch argues forcefully that the ICC's actions are in contradiction with the ''normative commitment to democracy and political autonomy'' (2007: 193). Moreover, the ICC's insistence on proceeding against the wishes of the local population ''removes the site at which the meaning of justice is decided upon and from which justice will be realized out of the community.'' Consequently, the ICC ''creates a kind of political dependency among the citizenry, mediated by global law'' (Branch 2007: 194).

Whether the ICC's decision to continue the case in Uganda is appropriate is beyond the scope of this chapter. But, the issue points to the tensions within the cosmopolitan governance project. If Roach is correct, that the ICC is not just a legal but also a political actor, it will no doubt have to be sensitive in the way it handles its judgment of domestic situations in order to maintain its legitimacy as an impartial actor (see Roach 2005). Yet, as Eric Blumenson notes, ''Because the ICC has jurisdiction over nationals of states with very different legal and moral cultures, it is also obliged to consider how much room there is for diverse state approaches to these issues'' (2006: 853).

The ICC and citizenship

The ICC's most radical elements contribute to the project of cosmopolitan citizenship: it challenges the totalizing claims of sovereign states in world order. The ICC makes individuals the subject of international law rather than just states. It is individuals who are to be prosecuted and punished and individual victims are also able to participate. Moreover, individual defendants enjoy equal protection under the law provisions (Articles 52–55). Beyond this, there are different elements of crimes in the Rome Statute that pertain to enforcing women's and children's protective rights, thus building on a concept of cosmopolitan citizenship that is sensitive to the unique vulnerabilities of certain categories of human beings. Additionally, the Rome Statute views the core crimes as injuries against humanity as a whole rather than states (Schabas 2001: 22; Leonard 2005: 100). As Marc

Weller argues, ''the ICC adds a missing piece to the international constitutional design for the protection of the fundamental values of the international community as a whole'' (2002: 692).

That a majority of states endorses the ICC suggests that, in principle, cosmopolitan citizenship is no longer thought of as subversive to international law, provided that we view such law as appropriate not just to an international society but to a world society (Ralph 2007). However, it is far from clear that the project of cosmopolitan citizenship is the first motivation of state supporters, as clearly the projects of *control*, *order*, and *governance* are fundamental features of the ICC too. Additionally, US opposition to the ICC cannot be interpreted merely as a rejection of the cosmopolitan citizenship project *per se*, but as a rejection of the supranational enforcement agency on its behalf. As Ralph states, US opposition is ''about defending the privileges that powerful nation-states have'' in international society (2007: 53). Nevertheless, neither state supporters nor resisters to the ICC are capable of fully controlling or forestalling momentum in favor of cosmopolitan citizenship in international law. As Ulrich Beck argues, a number of forces now combine to decouple ''the political'' from the state, a process that he calls ''the politics of politics'' (2006: 99). Thus, it is very likely that states' domination of international law as a site of politics will continue to be challenged by institutions such as the ICC.

Conclusion

E. H. Carr writes:

> The utopian sets up an ethical standard which purports to be independent of politics, and seeks to make politics conform to it. The realist cannot logically accept any standard value save that of the fact. In his view, the absolute standard of the utopian is conditioned and dictated by the social order, and is therefore political (2001 [1939]: 19).

Subscribing to some version this dichotomy, most assume that cosmopolitanism is utopian because it is extremely difficult, if not impossible, to apply an abstract morality to an international political system characterized by realpolitik (see, e.g., Hoffmann 1981: ch. 1). This chapter inverts this assumption, and thus challenges Carr's dichotomy. I suggest that the fact of realpolitik, that is, the tendency of states to act primarily as a consequence of a perceived national interest, occurs on the contested terrain or social order of cosmopolitan politics. This terrain should not be exaggerated, but it is not

simply an epiphenomenal or utopian artefact if one takes seriously the impact of ethical reasoning and moral norms in world politics. Cosmopolitan reasoning and norms justify the many international legal reforms that both states and nonstate actors have supported and applied to world politics through international law over the past two centuries. Cosmopolitanism may be abstract, but cosmopolitan *politics* – played out by various agents, state and nonstate – incarnates ideas into the social order of institutions, interests, and practices.

The cosmopolitanization of international law is not a monolithic or unilinear process because there are, I have argued, at least four cosmopolitan political projects – *control, order, governance,* and *citizenship*. These projects are obviously not airtight categories because there is a generic core they share, namely the idea that universal, general, individual rights ought to be promoted and protected in world order. Moreover, these projects can build on one another and, in some instances, create synergies and new political possibilities; for instance, if cosmopolitan control is secured, it creates the political space and freedoms for the development of an enlightened and educated public, one empowered to demand accountability from states when it comes to decisions to engage in war, and one that is capable of viewing violent atrocities against noncompatriots in other states as a crime against humanity. Nevertheless, there are, I submit, few guarantees of any necessary developmental logic from one cosmopolitan project to the next. For instance, political conditions may limit developments in cosmopolitan order even if the conditions of control and governance have been salutary, i.e., effective systems of rights enforcement and even democracy have prevailed. Although Kant envisaged a cosmopolitan universal history as a plan or map for the species' development (1991*a*), he also recognized that, in real terms, we face the possibility of profound failure and, as Hayden's chapter noted, inability to counter radical evil.

The ICC is explainable in terms of its potential contribution to the four cosmopolitan political projects analyzed above. The ICC reinforces the notion that state legitimacy hinges on an effective capacity to enforce a system of rights, rather than claims to absolute sovereignty. It also reinforces the idea that peace and legal order must guide interstate politics rather than merely a balance of power and realpolitik. It further promotes democracy, the rule of law, and a culture of human rights within states rather than an international order that is indifferent to domestic governance. Finally, and most radically, the ICC promotes the ideal of cosmopolitan citizenship rather than a world in which states alone are determinative and important legal subjects. In each of these ways, the ICC reflects and (re)constitutes a

fundamental ambivalence within modern cosmopolitan politics, from Kant to the present: that sovereign statehood is both legitimated and yet also constrained, because it can be subordinated to higher moral and political goals. Despite the ICC's supranational authority and supraterritorial jurisdiction, it must continue to generate support from the national and territorial sources (see Rodman 2006: 35). Nonetheless, that the vast majority of the world's states have given this support, despite opposition from the United States, suggests strongly that cosmopolitanism is *both* utopian and also "conditioned and dictated by the social order," to use Carr's words.

Notes

1. I would like to thank Stephanie Carvin, Susan Franceschet, Will Greaves, Ewan Harrison, Jim Keeley, and especially Steven C. Roach for helpful comments on this chapter.
2. On this transition from medieval order to the logic of sovereign territoriality see Spruyt (1994).
3. As Edward Keene (2002) argues, by the mid-twentieth century, civilization became defined in ideological rather than cultural terms. The Nazi and Japanese imperial aggression and wartime atrocities demonstrated that European, and indeed industrialized, states, were uncivilized by virtue of aggressive and illiberal belief systems.
4. Certainly some states have attempted to define sovereignty in absolute terms in the area of individual rights, thus denying any responsibility to outside standards. More often, states deny that a particular incident or case involving human rights is legitimately subject to international concern or scrutiny. Moreover, states have varying degrees of success in deflecting criticism based on their leverage or power resources (see Forsythe 2000).
5. I say "possible" anticipation of the ICC only because the Assembly of State Parties must still define aggression before the Court can attempt any prosecutions of state leaders on this charge.
6. See the note in "Perpetual Peace" (Kant 1991*c*: 118–19).
7. Edward Keene's analysis of Hugo Grotius's writings demonstrates that seventeenth century legal thinkers and actors assumed that individuals and corporations had certain rights to appropriate land and colonize, to coerce, and sign treaties or contracts (Keene 2002).
8. On the unexpectedly rapid diplomatic and legal process leading to the Rome Statute, see Benedetti and Washburn (1999).
9. This is a point made by many scholars working in the English School approach to international politics (see Bull 1997; Jackson 2000).
10. Indeed, Adam Branch claims that Uganda's government has cynically instrumentalized the ICC in its conflict with the Lord's Resistance Army (2007: 179).

8

The Cosmopolitan Test: Universal Morality and the Challenge of the Darfur Genocide

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While the International Criminal Court (ICC) is in some respects a triumph of moral universalism, it is also an institution that depends on the state system for implementing the rules and principles of cosmopolitan morality. As the preceding chapters have shown, the ICC is cosmopolitan at the abstract level, but less so at the practical level. This predicament is what reflects the permanent tension between the scope of law (or broad discretionary power) and the efficacy of the ICC's proscriptive norms against genocide, crimes against humanity, and war crimes. In this case, state sovereignty both enables and limits, respectively, the capacity of the ICC to serve the interests of justice. A responsive ICC, therefore, is not simply one that upholds its negative responsibility to refrain from judgments that would ''not serve the best interests of justice,'' but, rather, is one in which positive cosmopolitan duty is conceived of in terms of serving the best interests. The ICC's universal morality thus turns on both of these discretionary responsibilities, but stresses the latter, since cosmopolitan justice, unlike international justice, focuses on the individual in order to promote fairness and equality.

In the Darfur situation, the Sudanese government's unwillingness to uphold its negative responsibility to refrain from committing atrocities shows just how far we still have to go to promote cosmopolitan justice. What I want to suggest here is that striving toward cosmopolitan justice, via the ICC, can be characterized in terms of a cosmopolitanism test. This test involves meeting the four criteria specified earlier in the introduction

to this book. To recall, they include: (*a*) the state's negative responsibility to refrain from harming its citizens; (*b*) the state's positive duty to cooperate with the Court; (*c*) the Court's negative responsibility to refrain from any improper exercise of its discretionary power; and (*d*) the Court's positive responsibility to *seek* to promote cosmopolitan justice. Passing the cosmopolitan test, as I see it, clearly requires the state to carry out its responsibilities. Yet it also requires the Court to act judiciously and assertively, in a way that allows it to further its ''fourth'' responsibility. In the case of Darfur, the ICC has done something rather interesting: It has asserted its investigative and prosecutorial power to the point of imposing its positive global responsibility on an uncooperative Sudanese state that has failed to fulfill its negative and positive responsibilities. What, then, does this mean for cosmopolitan justice?

My answer to this question is that rather than showing the actual strength of cosmopolitan justice, the ICC's statist character has, in the case of Sudan, exposed the disjuncture between state and global responsibilities, and in so doing, revealed the institutionalized limits of the ICC's own statism. This does not mean, however, that state politics has, and will continue to, offset the Prosecutor's cosmopolitan intent. On the contrary, it suggests the weak institutional context of its intent, and the consequent need to develop its institutional ties and organs in order to materialize the very strength of this intent. While the ICC has shown great resolve in investigating and prosecuting the perpetrators of the Darfur genocide, the Darfur situation has exposed many of the underdeveloped institutional ties and/or concerns that have limited the impact of its cosmopolitan intent. If this true, then the ICC should receive an Incomplete (''I'') for its efforts, with a very wide timeline for reassessment. I would prefer to employ the latter to evaluate its efforts and performance, and to stipulate a very wide timeline for reassessment. To be fair, we need to realize that the high-intensity conflict of the Sudan presents many challenges. Sudan's pattern of noncooperation with international organizations makes exact figures impossible, but United Nations (UN) estimates suggest that the fighting in Darfur has killed more than 400,000 and displaced more than two million (Centre 2006). These massive numbers of killed and displaced have resulted from the Sudanese government's policy of directing its counterinsurgency efforts at civilian targets in villages rather than military targets associated with rebel strongholds. The Khartoum government has carried out its war in large part through the use of Arab militias, known as the *Janjaweed*, which it has supported through the provision of weapons, funding, intelligence, and (perhaps most significantly) impunity. It is this

question of impunity in particular that the international system now seeks to address through the possibility of prosecution at the international level.

This chapter begins with a detailed overview of the Darfur crisis, with special attention paid to events since 2002, the point when the Sudanese government commenced its policy of targeting Fur civilians rather than rebel military targets. After surveying the history and complex political challenges posed by this conflict, I shall turn to the actions that the international community have taken to address the atrocities in Darfur, focusing on the Security Council's decision to refer the Darfur situation to the ICC. Here I argue that the Prosecutor's cosmopolitan intent raises more questions of the ICC's institutional effectiveness than it provides answers to the open-ended dimension of positive global responsibility. Thus, it is the answers to this former challenge that will pave the way, in the future, for a clearer assessment and understanding of the latter challenge.

The crisis in Darfur

The present crisis in Darfur, between the rebels on one side and the government and the *Janjaweed* (a term traditionally meaning a bandit on horseback) on the other, has long roots in the region's history. Complicating the Darfur crisis is the broader context of civil war in Sudan, which lasted from 1983 through the conclusion of the Comprehensive Peace Agreement in 2005. This civil war, Sudan's second fought along the North–South divide, initially served to obscure from the outside world the activities of the *Janjaweed* and their government sponsors in Darfur.

Darfur is a region in western Sudan along the Sudanese border with Chad. It derives its name from the Fur sultanate, the first Islamic sultanate in the region (Flint and de Waal 2005: 3). Dar means home or abode, so Dar Fur was literally the home of the Fur, despite the fact that the region has always been ethnically mixed (Daly 2007: 5). While all Darfurians are Muslims, the population is divided with respect to race and tribal affiliation. These divisions constitute the lines of the present conflict. The privilege for certain minority groups has come at the expense of other regions of Sudan, including Darfur. A particularly telling incident was the government's bargain with Libya during the 1980s. According to the terms of this bargain, the government obtained weapons from Libya and, in exchange, allowed Libya to use Darfur to stage its attacks on Chad. Libyan leader Colonel Gadaffi's dream of pan-Arabism in Africa fuelled the rise of Arab supremacist ideology in Darfur, which began to emerge in the 1980s.

The war between Chad and Libya increased the level of Libyan activity in Darfur, including Libya's provision of weapons and funding to Arab paramilitary groups (Johnson 2003: 140). This deepened the divide between Arabs and Africans in the region. These Arab militias would later be recognized by the government in 1989 through the Popular Defence Forces Act (Johnson 2003: 140). This was the beginning of the *Janjaweed* and of government support for these paramilitary groups.

The environmental, social, and political conditions in Darfur had converged in a manner that unleashed a horrific conflict. In the context of famine and the increasing availability of weapons, the rise of an Arab supremacist ideology would prove disastrous for Darfur. This ideology emanated not from northern Sudan, where Arab supremacism had long been a hallmark of political life, but from Libya. This new ideology began to emerge as a political force in Darfur in the early 1980s, when an organization calling itself the ''Arab Gathering'' suggested that the time had come for the Arab majority to take political control of Darfur, by force if necessary. This group began to instigate attacks against non-Arabs in Darfur, and would eventually issue documents that were both battle plans for the *Janjaweed* and the ideological justification for the campaign based on Arab supremacism (Flint and de Waal 2005: 53). Such an ideology asserted that immigrants from Libya were the region's only true Arabs, and that they had discovered an empty land that they, as direct descendants of the Prophet Mohamed, were entitled to rule. The strand of Arab supremacism prevailing in Darfur was distinct from, and even more vicious than, the Arab supremacism that had characterized Sudanese politics and driven the conflict between the largely Arab north and the largely African south.

The ideological differences between Arab supremacists in Darfur and Khartoum did not prevent the government from utilizing, arming, and directing the activities of the *Janjaweed*. Both the government and the Arab militias in Darfur embraced some form of Arab supremacism, meaning that they were in some sense united against the non-Arab population of Sudan. Utilizing the Arab militias in service of its goals allowed the government to advance its own goals without expending its own resources. The government also took some other steps to advance its goals. In 1994, it moved to disenfranchise the Fur population in favor of Darfurian Arabs. As resistance in Darfur began to grow, the government started arming the militias and using them as proxies. The army and the *Janjaweed* began to work in concert, creating confusion among the population they

targeted, some of whom came to believe that the *Janjaweed* had replaced the Popular Defence Forces (Flint and de Waal 2005: 60).

Two years later, government officials visited neighboring states and solicited volunteers to join the militia. Promising money, guns, horses, and the unlimited opportunity to loot, they solicited 20,000 volunteers who were sent to government-sponsored training camps. In October 2002, the first major offensive against Fur civilians was launched. In this attack, and ones that followed, civilians were killed, wounded, raped, and their villages burned. By the beginning of the following year, hundreds of villages had been burned. During this campaign, the impunity with which the *Janjaweed* operated started to become clear. This freedom to attack civilians without consequence laid bare the degree of support that the militias enjoyed from the government and prompted some to suggest that the government's role extended beyond approval of the *Janjaweed*'s actions to directing the attacks.

The Darfur Liberation Front (DLF) began training that same year, and launched its first offensive operation in February 2002 (Daly 2007: 278). In February 2003, the DLF became the Sudan Liberation Army/Movement (SLA), indicating that its concern for the marginalized in Sudan extended beyond the boundaries of Darfur (Flint and de Waal 2005: 82). The following month, this new rebel organization issued a declaration demanding secular government and opposing the marginalization of the disadvantaged within Sudan. Early on in the resistance the rebels enjoyed some striking successes against government troops, including an attack in which the rebels struck an air base and destroyed a number of planes on the ground. On April 25, 2003, a joint attack between the SLA and the Justice and Equality Movement (JEM) on the air base at Fasher, destroyed bombers and gunships and killed at least 75 government troops (Flint and de Waal 2005: 99). The rebels also kidnapped a general in the Air Force in the course of this attack. This rather public blow against government forces constituted a pivotal moment in the opposition movement and instilled fear in the government that it could lose Darfur to the rebels. The humiliating defeat spurred the government into action. In response to the successes of the rebels, the government altered its strategy. Instead of striking at rebel positions, the government began to target civilians.

Rather than targeting rebel strongholds in the mountains, government forces and their *Janjaweed* allies struck at civilian targets in villages far from these areas (Flint and de Waal 2005: 104). The majority of attacks have occurred against villages without a rebel presence (Straus 2005: 127). The Arab militias were a key component of Khartoum's new strategy against the resistance movement. While the government has characterized its

actions as counterinsurgency measures, the situation is open to another interpretation. M. W. Daly argues that:

> Early in the cycle of violence, local police and other government officials decamped, leaving whole districts to fend for themselves. This in turn allowed the ''security forces'' to claim that those areas were under rebel control, this justifying the attacks that followed. In this way, the government and *janjawid* not only ''ethnically cleansed'' an area but also created the very recruits to the rebel cause it claimed to suppress. (2007: 284)

The claim that these actions were taken as part of a counterinsurgency campaign is belied by the government's recruiting. Khartoum only sought recruits for the *Janjaweed* from certain racial and tribal groups (Flint and de Waal 2005: 102). The government armed the *Janjaweed*, providing them with access to communications equipment along with new arms and military advisors.

Governmental support of the *Janjaweed* was evidenced both by the partnership between the Sudanese state and the impunity with which the *Janjaweed* acted. The paramilitary *Janjaweed* forces and official government forces have often acted together, suggesting the government's knowledge and approval of the *Janjaweed*'s acts (Straus 2005: 127). In particular, the government has often provided support through air power (Flint and de Waal 2005: 107). The use of air power, for instance, was often a key component of government policy, as in the town of Habila. A number of displaced civilians had congregated in that town, which the government bombed heavily, killing thirty people in one day alone. The government targeted the displaced as recruits for the rebel groups.

Other civilians faced a policy of famine. The cultivated food sources were destroyed and people were prevented from searching for wild food by the threat of violence. Taking together the effects of violence and starvation, Jan Egeland, the head of the UN's Office for the Coordination of Humanitarian Affairs, estimated that 10,000 people were dying each month (Flint and de Waal 2005: 112).

In response to international pressure about Darfur, the Sudanese government has relied on a strategy of delay, denial, and in some cases, outright deception. The government has denied its involvement in the attacks against civilians (Straus 2005: 128). While the government promised to disband and disarm the *Janjaweed*, its conduct suggests that it never planned to fulfill these promises. Instead, the Sudanese government has characterized common criminals – sometimes arrested long before the rebellion began – as *Janjaweed* and executed them (Flint and de Waal 2005: 11). In other instances, the

government conducted public disarmaments of the *Janjaweed*, only to return the weapons later. One such mock disarmament took place on August 27, 2004, when a UN Special Envoy witnessed 300 *Janjaweed* apparently being disarmed in the town of Geneina. Locals reported that the confiscated weapons were returned the following day (Flint and de Waal 2005: 111).

On April 8, 2004, the parties signed a ceasefire agreement that had been brokered by Chad, but this agreement failed to put an end to the violence. Negotiations between the government and the rebels resumed the following year, but these negotiations were complicated by fragmentation within the rebel movement. Objections from the JEM and a rival faction of the SLA undermined an agreement signed by the government and the SLA faction led by Minni Minnawi. The conditions in Darfur were such that then UN Secretary-General Kofi Annan called for the creation of a UN peacekeeping force of 18,000 to replace the smaller African Union (AU) force that was in Sudan (Fletcher 2006). This force has been frustrated by Sudan's noncooperation with the AU force, which consisted of the government's insistence that the force's role was limited to monitoring and such tangible steps as the government's refusal to provide fuel for helicopters (Bellamy 2005: 44).

The inability of the AU force to put a stop to the atrocities in Darfur prompted the Security Council to replace that force with a UN peacekeeping force. A UN force for Sudan was finally created by Security Council Resolution 1769 in August 2007, a move that Sudan finally agreed to accept (Sullivan 2007). Despite giving its support, Khartoum was later accused of throwing up obstacles to the deployment of this force (Sands 2007). In the interim, the UN took other steps in response to the Darfur crisis, including the referral of the situation to the ICC for possible prosecution.

Referral of the situation in Darfur to the International Criminal Court

The UN was somewhat slow to respond to the crisis in Darfur, in part because the AU took the early lead in attempting to resolve the situation. Over time, it became clear that the AU's steps were ineffective in putting an end to the war in Darfur, and further action was warranted. Sudan's noncooperation with AU efforts was mirrored in its interactions with the UN. Pursuant to Security Council Resolution 1564, the UN Secretary-General noted Sudan's noncompliance with previous resolutions on the Darfur crisis and created a Commission of Inquiry to investigate the

alleged violations of international law in Darfur. The Security Council found that the crisis in Darfur constituted a threat to international peace and security and, as a consequence of this determination, invoked its Chapter VII authority pursuant to the UN Charter. In this resolution, the Security Council requested that Secretary-General empower the Commission of Inquiry to ''ascertain whether or not acts of genocide have occurred'' and to identify the perpetrators with a view to holding them responsible for their crimes. In carrying out this charge from the Secretary-General, the Commission spent several months in Darfur and conducted an extensive investigation.

Based on its findings, the Commission found that the Sudanese government and the *Janjaweed* had committed serious violations of human rights law and international humanitarian law. The Commission determined that

> Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. (Darfur, International Commission of Inquiry 2005: 3)

While the Commission found that the government and the militias had committed these violations, it declined to characterize the abuses as genocide (Darfur, International Commission of Inquiry 2005: 4). The Commission's reluctance stemmed in part from the lack of distinctiveness between the victims and the perpetrators. The Fur, Massalit, and Zaghawa did not, in the Commission's view, constitute a protected group by virtue of their physical characteristics. Because of a long history of intermarriage and coexistence, members of the protected group share with members of the *Janjaweed* a common religion, language, and physical appearance (Darfur, International Commission of Inquiry 2005: 129). The heart of the distinction between the *Janjaweed* and the groups they target is instead subjective, meaning that it lies primarily in the manner in which the two groups perceive themselves and each other. These subjectivities, rather than any objective, observable distinction between them define the ''Africans'' and ''Arabs'' in Darfur. These perceptions of difference between the two groups have only grown in recent years with the escalation of the conflict between them (Darfur, International Commission of Inquiry 2005: 130).

Though subjective, the differences between these two groups are real. This, then, did not form the basis of the Commission's reluctance to treat the situation in Darfur as an instance of genocide. The real basis for the Commission's treatment of genocide lies in the requirement of intent. The crime of genocide includes both objective and subjective components.

With respect to the objective components, genocide can include the type of acts that the Commission found to be occurring. The subjective element, however, entails an intent to destroy the targeted group either in whole or in part. It was their perceived lack of this intent that made the Commission reluctant to characterize the situation in Darfur as genocide. The Commission noted that the acts it described could have been undertaken as counterinsurgency measures rather than genocide because the *Janjaweed* targeted young men rather than exterminating the entire population of certain villages (Darfur, International Commission of Inquiry 2005: 130). Likewise, the Commission inferred from the collection of survivors into camps that the intent to exterminate the Fur, Massalit, and Zaghawa was absent from the government's campaign against them. While the Commission would not preclude the possibility that certain acts within this campaign were motivated by genocidal intent, and that some individuals involved in the campaign were in fact motivated by genocidal intent, the Commission was reluctant to find that intent across the board.

The finding that genocide has not occurred in Darfur has been roundly criticized. Much of this criticism stems from the Commission of Inquiry's interpretation of the evidence (Byron 2005). The Commission accorded significant weight to the Sudanese government's relocating some civilians to camps for the displaced rather than exterminating them all, viewing this as evidence that the government lacked the intent necessary for genocide. Byron argues that, because the Genocide Convention prohibits attempts to destroy a group in whole or in part, this evidence should not be treated as exculpatory. It seems, then, that the Commission's findings that the government and its *Janjaweed* allies attempted to exterminate part of the population in Darfur could easily have supported the characterization of these actions as genocide.

Another basis for criticism is the Commission's interpretation of the appropriate burden of proof applicable to its activities (Fowler 2006). The Commission was not charged with determining guilt or innocence, but merely whether there was enough evidence to try those accused of criminal acts. Yet, the Commission seemed to hold itself to a higher evidentiary standard with respect to the determination of genocide. Others have been more willing to characterize the situation in Darfur as a genocidal campaign, including the United States. Former US Secretary of State Colin Powell, following his investigation on Darfur, testified to the Senate Foreign Relations Committee that genocide in Darfur had occurred and was ongoing (President and Secretary of State Characterize Events in Darfur as Genocide 2005: 266–7). Specifically, Secretary of State Powell testified that

the genocidal intent could be inferred from the deliberate conduct of the Sudanese government and its *Janjaweed* allies. This assessment of Darfur as genocide would be echoed by President Bush shortly afterward in a speech to the UN (Straus 2005: 123).

While the Commission of Inquiry refused to characterize the situation in Darfur as a genocide, it did find that violations of human rights and humanitarian law had occurred. In its report, the International Commission of Inquiry on Darfur interpreted its mandate as including the task of suggesting means for accomplishing the prosecution of these violations. As such, it included a list of possibilities for holding those suspected of crimes in Darfur responsible. The Commission recommended that the Security Council refer the situation in Darfur to the ICC for a number of reasons, including:

- the prosecution would be conducive to national reconciliation
- national prosecution would be all but impossible given the power and authority of the accused within the Sudan
- the authority of the ICC and the Security Council would be necessary to compel some of these personalities to submit to investigation and, potentially, criminal proceedings
- the ICC as an international body is best situated to provide a fair trial
- the ICC could act immediately to try the suspects, and
- the international community would not be financially burdened by this option.

The Commission found serious defects in the alternatives of trial in Sudan or before a mixed court containing prosecutors and judges from the Sudan and other states such as Sierra Leone (Darfur, International Commission of Inquiry 2005: 147). The Commission also doubted whether Sudan would agree to the establishment of a mixed court based on its previous lack of cooperation with the AU and the UN. Even if Sudan were to agree to the creation of such a court, the Commission claimed that the application of Sudanese law would be insufficient, as some Sudanese laws were ''grossly incompatible with international norms'' (Darfur, International Commission of Inquiry 2005: 147). Finally, such a commission would have to be funded by voluntary contributions, creating a financial burden on members of the international community who would have to fund such an effort.

This combination of the merits of an ICC trial and the shortcomings of other options prompted the Commission to advocate that the Security Council refer the Darfur situation to the ICC pursuant to Article 13(b) of the

Rome Statute. Sudan signed the Rome Statute in 2000, but has not ratified the treaty. Because Sudan is not a party to the Rome Statute that established the ICC, only a Security Council resolution could bring the case within the Court's authority. Despite the seriousness of the alleged crimes in Darfur, and the advantages of the ICC as a venue for trying those suspected of committing them, not all members of the Security Council shared the Commission's enthusiasm for the ICC as a venue for this case. The United States, because of its own objections to the ICC, favored an ad hoc tribunal of the type created by the Security Council for Yugoslavia or Rwanda or a mixed court like that created for Sierra Leone. Eventually the United States relented in the face of the horrors unfolding in Darfur and agreed not to veto the resolution to refer the case to the ICC (DuPlessis and Gevers 2005: 30). In a statement on the US position on the referral, acting Ambassador to the UN Anne Patterson stated that the United States maintained its reservations about the ICC, but found it ''important that the international community speaks with one voice in order to help promote effective accountability'' (United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court 2005). Ultimately, voting in favor of the Security Council referral was the only available ''alternative to inaction or unilateralism'' for the United States (Bellamy and Williams 2006).

The Security Council adopted the recommendations of the Commission in Resolution 1593 with eleven favorable votes and four abstentions (Williamson 2006: 21). The abstaining states included, in addition to the United States, China, Algeria, and Brazil. This resolution referred the situation in Darfur to the ICC despite the objections of Sudan, which (like the United States) has signed but not ratified the Rome Statute that created the Court. Even after the situation was referred to the ICC for investigation and possible prosecution, the Sudanese government would continue to manifest an attitude of noncooperation with the court by taking every possible step to dispute the ICC's jurisdiction and to impede its effective progress.

Darfur as a cosmopolitan test

The Darfur genocide is in many respects the type of situation that inspired the creation of the ICC. As we have seen, the referral of the situation in Darfur to the ICC seemed like a promising way to address the crimes that the Commission of Inquiry found to be unfolding in this region. The Sudanese legal system should have provided an inadequate venue for

trying these crimes because of the ties between the government and those accused of committing the criminal acts in question. However, the actions that are the subject of the ICC referral are either being carried out by agents of the government, in the case of the army, or by those enjoying government support, in the case of the *Janjaweed*. Given the government's support of these actions, it seems improbable that those engaging in them could receive a fair trial in the Sudan, even if the deficiencies noted by the Commission of Inquiry did not exist. Moreover, given the unlikelihood of obtaining justice in Sudan, the ICC provides a venue for prosecuting those responsible for the crimes committed in Darfur. My aim in this section is to elaborate on some of the concrete elements of what I was referring to earlier as the cosmopolitan intent of the Court.

The availability of this second venue for prosecution appears to promote a cosmopolitan goal of providing equal justice for all, irrespective of nationality. In Thomas Pogge's formulation, cosmopolitanism shares three qualities – individualism, universality, and generality – which mean that ''[p]ersons are ultimate units of concern *for everyone* – not only for their compatriots, fellow religionists, or suchlike'' (Pogge 2002: 169). Most cosmopolitans, following Charles Beitz, draw a distinction between moral and institutional cosmopolitanism (Beitz 1994: 124–5). The distinction is at the level of principle and structure. Moral cosmopolitanism entails egalitarian principles that treat everyone alike irrespective of distinctions like nationality. This is consistent with liberalism, which treats all individuals as inherently equal. Institutional cosmopolitanism takes a further step in disrupting the relationship between the individual and the state and, more significantly, seeking to dislodge the state from its status as the primary actor in the international system. Thomas Pogge's institutional cosmopolitanism, for example, advocates diffusing the sovereignty currently enjoyed by the state across a variety of different institutions, both smaller and larger than the state in geographical terms (Pogge 2002). The point of this proposal, for Pogge, is to break the monopoly of authority that the state enjoys over its citizens. The state is not eradicated, but it would compete with other institutions performing similar functions. Many cosmopolitans incorporate the state in some manner, acknowledging its utility, but they treat it as primarily administrative in its purpose and deny its moral significance (Gosepath 2001: 162). In this scenario, the role of the state is to implement universal standards via a quasi-federal structure.

The cosmopolitan test for the ICC is its ability to deliver on the promise of delivering equal justice for all individuals. Against a political system

composed of states, cosmopolitanism claims that all individuals are inherently equal despite their many differences. Charles Jones has described cosmopolitanism as ''impartial, universal, individualist, and egalitarian'' (Jones 1999: 15). Applying this set of standards to the problem of international criminal law, the cosmopolitan test would be satisfied if the ICC could deliver this impartial, universal, and egalitarian justice to all individuals irrespective of race, gender, class, or (perhaps most problematically) nationality. Because cosmopolitanism is based upon the inherent equality of all individuals, a cosmopolitan approach to international justice is one that would treat all individual defendants and victims equally, irrespective of their particular characteristics, including nationality. Even with respect to the core crimes as defined by international criminal law – aggression, war crimes, crimes against humanity, and genocide – the prosecution of individuals has, until now, depended upon the ability and willingness of state institutions to enforce the standards against these acts. Prior to the creation of the ICC, even these crimes subject to universal jurisdiction were prosecuted within the domestic institutions of *some* state or not prosecuted at all.

The ICC was created to address the inconsistencies within this statist framework. Universal jurisdiction reflects this cosmopolitan impulse to create a single standard of justice combined with a global ability to try those suspected of violating this standard. With respect to the prohibition of criminal acts, universality means that individuals can be prosecuted for these acts even if they do not violate the domestic law of the state where they took place. An exception to the general principle of territoriality, this aspect of universality is justified by ''the assumption that these crimes undermine the international community's interest in peace and security and by their exceptional gravity, 'shock' the conscience of humanity'' (Broomhall 2003: 10). This aspect of universality has been at issue in the context of Darfur, as some of the crimes under investigation by the ICC are not criminalized under Sudanese law. The other facet of universality, the jurisdiction to prosecute, is also at issue. Like the universal proscription of these criminal acts, the right of any state to try individuals accused of those crimes stems from the global community's interest in combating this narrow class of particularly heinous crimes (Weller 2002: 699). Under most circumstances, the ICC would act according to the basic principles that underlie state jurisdiction – a state party to the Rome Statute would be where the crime occurred, or the home state of the accused or the victim.

In this respect, the ICC does not act on universality alone (Weller 2002: 702). Instead, it is acting on the territorial or personal jurisdiction

possessed by its member states. Similarly, in the case of Darfur, the referral was made by virtue of the Security Council's Chapter VII authority to take whatever steps it deems appropriate in the event of a breach of, or threat to, international peace and security. Bassiouni characterizes the ICC's jurisdiction pursuant to Security Council referral as truly universal in that it extends even to non-state parties including, in the present instance, Sudan (Bassiouni 2002: 813). By providing an alternative venue for prosecuting those accused of international crimes, the ICC seeks to even out the inequalities of the purely statist approach to prosecution. If the ICC system were able to pass the cosmopolitan test, *all of the worst perpetrators* who commit crimes within the ICC's jurisdiction would be prosecuted for them, either at the level of domestic institutions or within the international institutional framework of the ICC. This would have the secondary cosmopolitan effect of securing justice for all victims of genocide, war crimes, and crimes against humanity, irrespective of their own particularities. Because the Sudanese government has yet to prosecute those most culpable for the crimes committed in Darfur (despite its claims to the contrary), the ICC will have passed the cosmopolitan test if it is able to provide justice for the victims in Darfur by prosecuting those (most) responsible for these crimes.

Cosmopolitan principles, statist system

The ICC embraces moral cosmopolitanism, but this moral cosmopolitan framework rests within an international system populated by states and subject to statist rules and norms. Prosecuting international crimes irrespective of who the perpetrators or victims are is certainly consistent with these attributes of individualism, universality, and generality identified by Pogge. The ICC treats individuals as having the same rights and duties irrespective of the states within which they are situated. Moreover, as many of the essays of this book have stressed, the ICC is a standing body, in contrast to the ad hoc tribunals that were created by the Security Council to try those suspected of offences in connection with Rwanda and the former Yugoslavia, making it less dependant on the power politics of the Security Council (DuPlessis and Gevers 2005: 24). The permanency of the ICC means that prosecution is in theory less arbitrary than relying on the Security Council to create venues for prosecution on a case-by-case basis. With respect to Darfur, these crimes have been committed by those with powerful allies in the government against those who have long been

targets of repression by the government in Khartoum. Against the distinctly non-universalist political situation, the referral of the situation in Darfur to the Security Council provides the hope of an outcome that is more consistent with a cosmopolitan morality. The Security Council's referral of the Darfur situation to the ICC, particularly in spite of Sudan's own non-ratification of the Rome Statute, suggests that cosmopolitan individualism has triumphed over legal positivism, which privileges state consent over individual well-being.

Yet this potentially cosmopolitan system of justice exists within the system of states and is subject to all that this interstate system entails. The ICC depends on elements of this interstate system for its success and, to secure the cooperation of states within this system, contains elements that reinforce the authority and sovereignty of the state (Broomhall 2003: 2). This is balanced against, and sometimes contradictory to, the universality to which the ICC aspires. The principle of complementarity, as noted above, provides for a second venue for trying individuals accused of committing international crimes. However, states retain primary responsibility for trying these individuals.

In other words, the ICC cannot proceed with a case against individuals where a state having jurisdiction over the matter has already taken appropriate action. The exception to this provision is where the state in question has not acted in good faith. Under such circumstances, as stated by Article 20 of the Rome Statute, 3: No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court (*a*) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (*b*) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The principle of complementarity established in these articles embodies both the promise and peril of embedding universalist cosmopolitan principles within a system of states. On the one hand, complementarity provides a mechanism for incorporating states into a cosmopolitan system of justice. The system applies a universal, impartial set of principles, but relies on the incorporation of states to do so. Where good faith investigation and prosecution occurs at the national level, the state is applying these cosmopolitan principles to those they are trying. Where the state is unable or unwilling to carry out this function, the ICC has jurisdiction to

step in and apply these same principles. In this way, complementarity creates a seamless web of institutions at the national and international level that are all applying the same set of principles through their respective mechanisms.

On the other hand, both of these alternatives – local trial or trial by the ICC – envision some degree of state cooperation, either in the state's investigating and trying suspects itself or in its acknowledgement of the jurisdiction of the ICC to do so. This cooperation has not been forthcoming from Sudan in connection with Darfur. The question of domestic prosecution has been an issue in the context of Darfur. The Sudanese government contends that it has established a local court for the prosecution of war crimes in Darfur. So far, this Sudanese institution, the Special Criminal Court on the Events in Darfur (SCCED), has proven to be strikingly inadequate as a vehicle for domestic prosecution of those responsible for the atrocities in Darfur. If genuine, this effort would effectively deprive the ICC of jurisdiction over the Darfur situation. However, it appears that the Sudanese investigations and prosecutions have been created for the purpose of shielding Sudanese nationals from international prosecution. Sudanese officials created the SCCED the day after the Security Council voted to refer the situation in Darfur to the ICC (Human Rights Watch 2006: 5). This special court, like others created by the Sudanese government to prosecute crimes of special interest to the government, is populated by individuals from the military or by lay people with little or no legal training (Lack of Conviction 2006: 7). Even more troubling, the SCCED does not appear to be prosecuting war crimes at all, but is instead prosecuting individuals for ordinary crimes occurring within the context of Darfur, including crimes like robbery and weapons possession (Lack of Conviction 2006: 10). Taken together, these circumstances indicate the Sudanese government's lack of will to prosecute war crimes suspects in domestic legal venues. It seems clear that the government created the SCCED for the purpose of claiming that it was investigating and prosecuting war crimes domestically, therefore depriving the ICC of jurisdiction on the basis of complementarity. Indeed, the SCCED seems less like a venue for prosecuting war crimes and crimes against humanity than one act in the Sudanese government's continuing efforts to thwart the ICC.

The referral to the ICC also reflects the mechanics of the state system. In this instance, the Security Council opted to refer the situation in Darfur to the ICC. While this aspect of Security Council jurisdiction is universal in the manner described by Bassiouni, this universality operates not according to cosmopolitan morality but according to the wishes of those states

on the Security Council and, in particular, the permanent members. Their motivations for doing so deserve a degree of scrutiny. The Security Council consists of fifteen states, ten of which are permanent members with veto power. These permanent members include the states that were great powers in the aftermath of World War II and include the United States, Russia, China, the United Kingdom, and France. The structure of the Security Council, particularly the veto, thus represents a type of continuation of the management of the international system by great powers and the great powers' possession of special rights and responsibilities in exchange for their performance of this role (Simpson 2004). While other states participate in the Security Council, they do so on a rotating purpose and lack the veto power of permanent members. The membership of the Security Council and its permanent membership have created some interesting power dynamics that manifest themselves in the Council's decision to refer the Darfur situation to the ICC.

The legal position of Sudan with respect to the ICC resembles that of the United States in some interesting respects. Both states have not ratified the Rome Statute and show few signs of doing so. Opposed to the ICC in principle, the United States abstained from voting on Security Council Resolution 1593, which referred Darfur to the Court. An American veto of this resolution would have defeated it, yet the United States refrained from vetoing the resolution in this case, stating that the United States recognized the need for the international community to act in response to the atrocities occurring in Darfur. Thus, Sudan finds itself within the scope of the ICC's jurisdiction despite its non-ratification of the Rome Statute, a position that the United States is highly unlikely to ever find itself in, by virtue of its permanent membership on the Security Council and the veto power that position carries. The referral of the Darfur situation to the ICC is, in this respect, an outcome of Sudan's position within the international system as much as a cosmopolitan conception of justice that is offended by the horrors of Darfur. The United States seemed not to recognize these contradictions inherent in the Security Council's referral of Darfur to the court, stating with respect to its abstention on the resolution that ''non-parties have no obligation under the Rome Statute [and so], the resolution recognizes and accepts that the ability of some states [including the United States] to cooperate with the ICC investigation will be restricted in connection with applicable domestic law'' (United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court 2005: 692).

Considerations of power politics may also be limiting the response of the United States and other great powers to the ICC referral. The American support for prosecutions in the Darfur situation stands in sharp contrast to a general pattern of noncooperation with the ICC. While the US objections to the ICC remain unabated, refraining from vetoing the referral of the Darfur situation to the ICC was not costly to the United States. Moreover, this measure allowed the United States to claim that it is acting with respect to the Darfur crisis, but did not entail significant costs as an intervention would have. The general inaction of the international community is at odds with the characterization of Darfur as genocide:

> Having been invoked [the Genocide Convention], did not – contrary to expectations – electrify international efforts to intervene in Sudan. . . . The lessons from Darfur, thus, are bleak. Despite a decade of handwringing over the failure to intervene in Rwanda in 1994 and despite Washington's decision to break its own taboo against the use of the word ''genocide,'' the international community has once more proved slow and ineffective in responding to large-scale, state-supported killing. (Straus 2005: 124)

The referral to the ICC, though appropriate as a response to the acts that have been committed in Darfur, is not sufficient to put an end to the mass killings. The Security Council could have taken more aggressive action to stop the atrocities, and some members argued that the Council should fulfill its ''responsibility to protect'' (Bellamy 2005: 47). Bellamy argues, correctly in my view, that military overstretch contributed to US unwillingness to pursue military intervention in Sudan (Bellamy 2005: 47). In this light, the referral to the ICC may appropriately be viewed, in part, as a low-cost war of responding to the crisis in Darfur without engaging in a more costly form of intervention.

Likewise, the response of Sudan has thrown cold water on the cosmopolitan pretensions of this referral. Successful prosecution of any perpetrators depends on a degree of cooperation from Sudan that has, so far, not been forthcoming. President Bashir has reportedly sworn ''thrice in the name of Almighty Allah that [he] shall never hand any Sudanese national to a foreign court'' (quoted in DuPlessis and Gevers 2005: 31). Sudan has refused to cooperate with the ICC and has, as of this writing, yet to allow ICC investigators into Darfur. The noncooperation of the Sudanese government has impeded the ICC's progress with respect to the Darfur investigation, but the ICC has nevertheless issued arrest warrants for Ali Muhammad Ali Abd-Al-Rahman (''Ali Kushayb''; Warrant of Arrest for Ali Kushayb) and Ahmad Muhammad Harun (''Ahmad Harun''; Warrant of Arrest for Ahmad Harun). More recently, the ICC Prosecutor, has sought

an arrest warrant for President Bashir himself on charges of genocide, war crimes, and crimes against humanity (Simons 2008). The announcement of these plans generated controversy not only because of Bashir's status as a sitting head of state, but also because such prosecutorial decisions are typically announced only after the pre-trial chamber has approved them (Pallister 2008). At the time of writing this, the chamber has yet to do so. Kushayb was formerly a senior commander in the *Janjaweed*. Harun now serves as Minister of State for Humanitarian Affairs and has – ironically – been placed in charge of investigating human rights abuses in Darfur (Simons 2007). That Sudan has placed one of the ICC's war crimes suspects in charge of the government's own Darfur investigation speaks to the degree of Sudan's noncooperation with the ICC's investigation and prosecution. Continued Sudanese defiance of the ICC and the Security Council means, in practical terms, that the investigation is stalled unless something can resolve the impasse.

Conclusion

The referral of the Darfur situation to the ICC and the hope that those involved in the criminal acts occurring in Darfur might be prosecuted (in spite of Sudan's policy of impunity for those involved in the Darfur crisis) provides hope that the ICC can continue to be responsive to even the hardest of referrals. However, as we saw, the cosmopolitan justice promised by the ICC exists within (and must contend with) a very statist international society and, by necessity, incorporates many of the aspects of this state system. The cosmopolitan justice that the ICC can deliver will depend on the willingness of states to act in support of this goal, both in the referral process and the subsequent prosecution of the crimes. In this case, the horrific nature of the tragedies in Darfur created an unusual degree of unity around the decision to refer the case to the ICC – a consensus not likely to be recreated. Nonetheless, because Sudan is a signatory, but not a party to the Rome Statute, this referral raises some interesting questions about the role of the ICC to implement its universalist principles.

Cosmopolitanism, as has already been noted, takes the individual, rather than the state, to be the basic unit of moral concern. It treats individuals as inherently equal despite differences like nationality, race, or gender. The cosmopolitan test for the ICC in high-intensity situations, like that of the Sudan, depend foremost on state cooperation to facilitate

its institutional effectiveness or capacity to apprehend criminals, bring them to trial, and to conduct fair trials. At the simplest level, the ICC passes the cosmopolitan test if it applies that universal standard of justice to all defendants accused of crimes within its jurisdiction. This application may occur in the form of investigation and trial by the ICC or within state systems according to the principle of complementarity. Yet its legitimacy as a fair institution depends upon its ability to do so. Moreover, because the ICC can deliver a universal and impartial standard of justice only when conditions within states and the state system allows it to; its cosmopolitan promise is still heavily dependent on the willingness of the state system to fulfill it.

As I argued in this chapter, the ICC will ultimately develop a highly responsive institutional framework for promoting cosmopolitan justice. But again, the ability of the ICC to pass the cosmopolitan test depends largely on the willingness of states and the state system to investigate and prosecute in a genuine manner. Had Sudan been carrying out genuine war crimes trials, there would have been no need to step in to exercise jurisdiction. Whether the Security Council will refer any particular situation to the ICC depends partly on the merits of the potential charges, but also on the interests of the states represented on the Security Council.

Nevertheless, the Darfur situation reminds us that with respect to the ICC, states still factor into the process in highly significant ways that both support and hinder its cosmopolitan work. Thus, while the ICC might articulate a cosmopolitan vision of justice, its embeddedness within the state system shapes the manner in which it implements that vision. At this stage, the results of the cosmopolitan test are mixed. While Darfur points to the potential for states to cooperate around the goal of implementing international justice, the noncooperation of the Sudanese government and the unwillingness of the Security Council (so far) to compel cooperation also suggest the limits of that potential within the parameters of the present international system. This does not preclude the evolution of a greater culture of accountability within that system that could lead to greater effectiveness in implementing the moral cosmopolitan vision of the court.

9

Justice of the Peace? Future Challenges and Prospects for a Cosmopolitan Court

Steven C. Roach

Since entering into force in the summer of 2002, the International Criminal Court (ICC) has acted upon four referrals, issued several international arrest warrants, and brought to trial two accused perpetrators. These events help to confirm what Moreno-Ocampo (2006: 1) has declared is ''a building network of international justice.'' The essays in this book have addressed this optimistic assessment from a variety of theoretical and practical perspectives. In so doing, they have showed the many ways that we can and should expect the ICC to serve ''the interests of justice'' and to provide a venue for holding fair trials. In recent months, in fact, the ICC has shown a strong desire to respond to high-intensity conflicts. This resolve reflects what I have come to regard as its cosmopolitan intent to promote global justice, or its ''positive global responsibility.'' Such an intent is unique and intriguing, since it arises from the independence of the Prosecutor's power, but is ultimately shaped by political factors and challenges at the national level.

The political challenges of Sudan and US opposition, as we have seen, raise important implications for understanding the Court's current and future development. For instance, should we expect the ICC's permanent prosecutorial power to promote and restore peace and security to conflict-ridden areas, such as Uganda and Sudan? Will its global responsibilities and the positive dimension of complementarity extend global governance and further reinforce solidarity around moral culpability? And how does its unstated policy of consistency promote peace through accountability?

As several chapters have shown, the situation of Uganda has raised considerable controversy regarding the discretionary power of the ICC. By the same token, the situations of the Democratic Republic of Congo (DRC) and Central African Republic (CAR) – the latter of which was referred to the ICC by the CAR government in December 2004 – indicates that the ICC will continue to succeed in prosecuting perpetrators of genocide, crimes against humanity, and war crimes. The ICC's discretionary resolve in these cases, especially in Uganda, also suggests that variations in national and global justice systems will continue to challenge the classical and positive dimension of complementarity.

What I want to do in this concluding chapter is to explore the concrete and speculative dimensions of this overarching challenge of reconciling peace and justice, and to address the implications of two other thematic issues: the global deterrent effect and global terrorism. All three issues, I contend, pose problems of extending global governance and will likely require difficult trade-offs. Yet the ICC's potential responsiveness to these problems offers ways of (re)thinking the evolving parameters global security.

The global deterrent effect

The ICC has emerged as perhaps the most prominent focal point of the so-called global deterrent effect. It is widely believed that an independent ICC Prosecutor will provide a credible-enough threat of prosecution to deter many would-be perpetrators of gross human rights abuses (Gallón 2000). As many of the essays in this volume have pointed out, the ICC stands ready to try any of the worst perpetrators of gross human rights abuses, regardless of the political circumstances. What is crucial to stress is that the ICC Statute does not recognize any amnesty law that could shield perpetrators of gross human rights abuses from prosecution. This formal prerogative also applies to state leaders who (self-)assist in the shielding of individual perpetrators. The late Augusto Pinochet is arguably the most high-profile example of these former limits of international prosecution. In designating himself as senator for life, for instance, he was able to confer upon himself the privilege of lifelong immunity from investigation and prosecution.

The ICC Statute, then, contains the legal rules and procedures that enable it to exercise jurisdiction over any perpetrator (see the Introduction). This legal prerogative constitutes the formal dimension of its deterrent effect. Its

material dimension, in contrast, refers to its operational effectiveness: its ability to apprehend, bring to trial, prosecute, and punish the worst perpetrators. If the ICC can operate effectively, it will likely send a credible signal or threat to would-be perpetrators that it can and will prosecute them for human rights atrocities. In this sense, perception and effectiveness remain closely linked, and are based on two causal factors. First, *sitting* state leaders must convince themselves that their power no longer entitles them to special privileges (i.e., diplomatic). Second, would-be perpetrators (leaders and/or commanders) must begin to rationalize the costs of ICC prosecution and punishment against the perceived, short-term benefits of committing abuses for the sake of promoting stability and preserving their power. This latter causal effect is important, since it points to ways of ascertaining deterrence through the public and/or private statements made by leaders. For example, ''I am liable to get into trouble for this,'' or ''I will be apprehended by the Court'' can be considered evidence of the ICC's deterrent effect. At this point, however, such statements remain confined to the private realm (and thus mostly speculative). When Eric Leonard and I examined the causal effects of the ICC on the DRC, it was apparent that the threat of the ICC's *proprio motu* power had induced Kabila to refer the situation to the ICC in order to assert some limited control over the legal process. Struett's comments of the Ugandan case suggest two reasons for evidencing this deterrent effect: the uncertainty of state leaders that the ICC will limit its investigations to the Lord's Resistance Army (LRA) rebels, and the decision to establish its national court to further pressure the ICC to drop its arrest warrants.

Given these uncertainties, it will be difficult, at least for now, to ascertain the causes of the deterrent effect. More importantly, there remain undeterrable factors, such as extremist ideologies and war, which reduce the margin of error for acting rationally, or result in spontaneous, hostile attacks against innocent civilians. These problematic factors may require statistical methods to ascertain the effect of deterrence, or more specifically, numerical correlations between the ICC's sustained involvement and the reduced (successful) or increased (failed) levels of violence in the regions where the ICC is operating. In my view, however, this type of method remains far too simplified to register the nuances and complexity of the ICC's deterrent effect. In fact, we may be better off at this stage to avoid ascertaining the degrees and levels of the deterrent effect, and, rather, to understand the developing relationship between the independence of the ICC and the perceived credibility of its threat to investigate

and prosecute. This will require us to develop policies of enforcement on a case-by-case basis.

Psychologically, the ICC's deterrent effect will be based on a dynamic mix of fear and reasoned debate. In its purest or strictest form, deterrence can be characterized as the *rule* of fear, as illustrated by the eye-for-an-eye metaphor in some countries. Precisely because of this ruling fear, however, there emerges what Cesare Beccaria (1963) referred to as the "timid credulity of the people," or the diminished capacity of people to reflect upon the ethics of their actions in relation to the imposition of law. If taken to its extreme, this emotive quality of deterrence may well have a counterproductive effect on promoting justice and the rule of law. For instance, the abuse of fear may facilitate dictatorial and repressive forms of rule in non-State Parties, insofar as state leaders may wish to frame the threat of ICC prosecution in terms of excessive foreign meddling or the impartiality of the ICC. This is why reasoned argumentation, or the capacity to reconcile one's differences (customs) with the Court's discretionary power, remains an important component of the deterrent effect. For not only does it prevent the rule of fear from devolving to groundless claims of excessive foreign intervention, it also forces the authorities of the ICC, as Struett has argued, to reason out its deliberations amongst themselves and to make persuasive arguments to state and non-state leaders.

In this way, the mix of fear and reasoned argumentation reflects a crucial difference between the global and the domestic rule(s) of law. The latter of course involves the state's sovereign ability to maintain a permanent standing army and police force. The former, meanwhile, does not involve such a force; it must instead rely on the normative pull toward compliance, in which states increasingly desire to fulfill their international obligations. Over the years, it could be argued that this normative pull has increased in strength, and that this has created a global space for promoting the rule of law. If this trend is true, then we need to ask how the ICC will fill or expand this space. My answer is that this task will depend on the ICC's willingness to operate consistently and to deal assertively (and with resolve) with the effects of high-political-intensity situations, such as Uganda and Sudan. Critics might claim that the ICC Prosecutor's *proprio motu* threat already ensures some given level of cooperation, and that the broad-based support and respect for the ICC will more likely than not compensate for any controversial decision to defer its responsibility to enforce (justice). But this of course assumes that states will always cooperate with the ICC in a genuine manner. The Darfur genocide, as Amy Eckert has shown, makes this position highly suspect.

In sum, if the Court is to deter would-be perpetrators, then it must balance the need for credibility and consistency against the political risks involved. It cannot simply rely on the effectiveness of its legal process to inject the needed fear in would-be perpetrators, but must also build a reputation for persuasiveness and assertiveness that will help to reinforce its independence and the legitimacy of its actions.

Peace and justice: Legitimizing the means and ends of criminalizing violence

Legitimacy in international relations refers to an institution's moral and political standing. Legal institutions enjoy a high degree of legitimacy because of the strong perception of their impartiality and fairness, or because most people tend to consider their judgment to be free of outside political influences. In some cases, it might be argued that political beliefs tacitly shape the way judges view the world, and that these influences reveal an important, inextricable link between moral reasoning and politics (political values). Many may consider this link a fact of life in international affairs. After all, legal judgments are intended to be binding to both parties to an international dispute. But the purpose of legitimacy in international politics is, as Thomas Franck puts it: ''to desire to be a member of the club, to benefit by the status of membership'' (Franck 1990: 40). This idea might explain why state leaders voluntarily comply with international rules in the absence of an official sovereign to enforce these rules.

Still, as Habermas has argued, legitimacy also involves ethical and moral claims to truth that help to substantiate the reasons and arguments of an open-ended and permanent dialogue. As such, it requires that we treat recognition and reason as fallible, and that such fallibility constitutes a struggle to reach consensus through democratic procedure and the force of the better argument. The struggle for recognition, therefore, is not simply about the desire to belong, but the demand to be recognized as a reasonable, trusted source of opinion. The discursive legitimacy of the ICC, as already mentioned, would require that all actors involved engage in reasoned argumentation in order to serve the ''interests of justice.''

We must therefore confront an important, foundational reality: that severe abuses violate the core of our moral conscience. Failure to redress this violation can, over time, become the source of long-held grievances and resentment. This is one reason the culture of impunity continues to

exist in many war-torn societies (Akhaven 2001). It is also why, as Patrick Hayden has suggested, we need to engage political evil and to not distance ourselves from the effects of violence. When we distance ourselves from violence, as Hayden points out, we also silently reproduce the effects of violence on some subliminal level. On the other hand, when we do confront violence by actively seeking to stop violence, we also may harm innocent civilians. It is this difficult trade-off or counter-effect that triggers an ambivalence toward violence: where normative responses to violence may well breed more violence.

A dialectical understanding of violence and justice, then, represents a possible exit strategy from this ambivalence. Frantz Fanon (1963), for instance, conceived of violence as the ''absolute means'' to overcome and transcend the violence embedded in the international system. He argued that violence was an absolute means of transcending the violent effects of colonial rule and the colonial system itself. Colonialism, in his view, extended deep into the muscles and minds of the colonial natives, leaving in the natives a negative self-image. Only a total counterstrategy could subvert the totalizing nature of such violence (armed resistance).

From this radical perspective, one could argue that the Court's operation in developing countries extends the violent, coercive tendencies of the international system to these countries. The ICC, in other words, is anything but engaged or sensitive to difference; rather, it is a legal instrument of violence used to extend hegemonic power through the hierarchically designed legal system. Some postmodern International Relations theorists insist that criminalizing violence in this manner disguises the actual extent and effect of Western coercive interests; that such power to criminalize also signifies the capacity of a global court to control and subjugate the less powerful or marginalized (Dillon 1998). This is an area of repression where violence disrupts time itself, where, as Jacques Derrida explains, ''Violence of the law before the law and before meaning . . . interrupts time, disarticulates it, dislodges it, displaces it out of its natural lodging: 'out of joint' '' (Derrida 1994: 37). We may demand that justice serve a higher purpose, but as Derrida insists, it is ultimately born out of imminence and in urgency; which is why it requires a pledge to, and ''engagement'' with violence that can never fully temper and mitigate the anger and hostilities underlying such a demand. In the case of the ICC, Derrida would thus argue that its evolving capacity to criminalize violence remains inherently problematic; for even if we assume its increasing effectiveness to serve the best interests of justice, it remains unclear if serving the interests of justice is really the same as achieving these ends.

For Derrida, because justice still seemingly serves the interests of the most powerful, it is only logical that the imposition of these interests would place violence before the global rule of law.

How, then, do we extricate ourselves from the presence of instability and the absence of justice and peace before and in the law? My answer is that while violence does exist before the law, the mechanisms of law challenging this spatio-temporal position of violence have not yet become adequately responsive to, or brought (the contested aspects of) politics into law. In other words, Derrida can be faulted here for failing to treat legal institutions as the normative mode for interrogating and contesting this violence (victims' rights). As the constitutive agent that occupies the ''absent'' in-between space between violence and law, the ICC might also help to rearticulate time as such (and its evolutionary dimension). The ambivalence underlying this role is that in order to promote peace, the ICC will have to investigate the violence of high-intensity conflict areas. Now it is quite possible that its role might increase hostilities. However, this effect seems quite unlikely, primarily because the ICC provides a discursive mechanism (for discussing and interrogating international violence) that remains relatively untested and undeveloped. Certainly some leaders will refuse to cooperate with the Court. But the permanent presence of the Court also assures that any targeted perpetrator will have to engage, or at least address the Court's demands.

Can we say, therefore, that the ICC is the timely response that has long remained absent and whose relative absence explains why national judiciaries have been allowed to confirm the violence before the law, by shielding international efforts to prosecute? As mentioned earlier, the complementarity principle, because it constitutes a positive framework for intermediating between the violence and war before the law, offers a context for rearticulating time in terms of the ICC's evolving capacity to serve the universal ends of justice and peace. In short, the ICC offers the hope that violence before the law will be actively intercepted and interrogated, and that the corollary of this process will, in fact, be the rearticulation of time in terms of the evolution of the cosmopolitan ideals of governance and citizenship. As Antonio Franceschet has argued, the integration of these two projects of cosmopolitan moral politics is what represents the immanence of the cosmopolitanization of the law.

This immanent project thus raises the question of how far we can apply the ICC's evolving capacity to today's high-profile security issues. One issue in particular is global terrorism, which the Court currently seems ill-prepared and unsuitable to address, but is likely to confront in some

manner in the future. Much of the ambivalence here, as I discuss below, has to do with the war on terror; more specifically the fear of allowing Western coercive interests to dictate the responsiveness of the ICC and to disrupt the Court's effectiveness.

The ICC and global terrorism

The war on terror refers to the concerted effort by the United States and other powers to aggressively destroy the global forces of terrorism. In response to the 9/11 attacks on the World Trade Center and the Pentagon, the Bush Administration undertook unprecedented steps (enemy combatants and preemption) to eradicate global terrorism. Ideologically, it has linked the idea of defeating the enemy with the idea of complete eradication. This idea assumes that the enemy does not respect or recognize the rules of warfare, and that its status lies somewhere outside the traditional scope of international law (the Geneva Conventions). Such extremist logic raises a curious question: Is the war on terror the logical corollary of the nature of global terrorism, in which unconventional tactics and violent measures, such as harsh interrogation tactics and the suspension of civil and political liberties are used to fight the enemy? Does the rather indiscriminate implementation of such tactics suggest a war on the very civil codes that International Criminal Courts seek to preserve and promote? Clearly, the idea of total elimination requires a totalizing ideology to justify its measures (Roach 2008). Yet countering this very totalizing logic calls attention to the ICC's own prospective role in addressing the political effects of this grand strategy, and in rearticulating the extended parameters of the rules of warfare.[1]

Indeed, if the current grand strategy of the war on terror continues on its destructive path, terrorist attacks will continue to proliferate. Such proliferation, in fact, is likely to amount to crimes against humanity that should attract the attention of the Court, especially if such attacks occur within the territory of a State Party. Granted, any indirect involvement of the ICC in this campaign is likely to remain limited, especially given that there is no crime of terrorism encoded in its Statute, and that terrorists are expected to be tried in military tribunals. Still, it is possible to conceive of the parameters of its limited role, which, in time, could complement its global positive responsibility. Again, this is why I have treated this responsibility as open-ended, since confronting threats to the global community remains an open-ended issue of reinforcing global solidarity. I also wish to stress here that such a role requires ICC authorities and other

policymakers to develop a balanced and pragmatic set of policy criteria/guidelines in order to promote and protect the ICC's independence from the political ambitions of certain powerful states. The difficult issue facing scholars and policymakers, then, is whether its limited role helps to serve the best interests of justice. Let me address this issue by setting forth some of the general parameters of its role.

The ICC, as we have seen, offers a legitimate venue for investigating and prosecuting murderous acts or crimes against humanity. Although terrorism is not encoded as an official act or crime under the ICC Statute, it is not unreasonable to think that an amendment to the Statute could encode terrorism as a crime against humanity (systematic attack against the civilian population). Clearly, the 9/11 attacks would warrant investigation and possible prosecution of this crime, as Roy Lee (2002) has suggested. And even if the United States would never allow the ICC to exercise jurisdiction over any heinous act committed on US soil, other cases may arise.

The point I want to emphasize is that the ICC's sustained presence or indirect involvement might help to further legitimize and complement a multilateral struggle against terrorism. The ICC's complementary role, as I see it, would operate on two levels. Either it could pursue judicial proceedings against the perpetrators of crimes against humanity; or it could actively adjudicate cases involving the treatment of suspected terrorists being detained at Guantanamo Bay. Whether or not some State Parties would balk at the ICC's involvement remains to be seen. However (the intention of) offering fair trials to terrorists would not be catering to individuals who have shown little regard for human rights norms. Rather it would demonstrate the moral and civil force of its judicial proceedings and allow decency and tolerance, via the implementation of political and civil rights of defendants, to take precedence over the intolerant and extremist demands of terrorists.

Protecting the civil and political rights of defendants would also have an important strategic benefit: it would downplay or possibly prevent the terrorists' ability to use the media images of tortured Muslims in order to mobilize and recruit militants. Again, critics might object that such protection would offer cushy treatment for those who are least deserving of it. But disregarding the trade-off between security and upholding these civil standards misses the larger point of the ICC's multifaceted role in protecting and promoting international legal norms. As we have seen, its independence and dynamics are designed to promote greater transparency of information and coordination among nongovernmental organizations (NGOs), international organizations, and states. From this standpoint, the

ICC's independence and permanent global presence would help, in various ways, to counter the perception of the illegitimacy of national courts. Indeed, by holding trials in The Hague, the ICC would help to counter the political effects that would arise from the contested, weak legitimacy of national courts (i.e., The Iraqi High Tribunal).

Still, the ICC's role raises a crucial question: how will the global rule of law deter terrorism? Terrorists, of course, are perhaps least likely to be responsive to, or deterred by, the threat of international prosecution. But this should not diminish debate about how best to use legitimate means to counter terrorism. In fact, the challenge, as I explained earlier in the context of deterrence, is to see the independence of the ICC as a source of confronting and understanding the political nature of heinous crimes (see Chapter 6). In other words, confronting terrorism (via the ICC) has a counterintuitive effect: it takes us beyond the formalistic nature of the deterrent effect and encourages us to devise new political strategies to criminalize international violence. What I want to emphasize here is that the ICC is dynamic enough to deal with terrorism, but that in order to indirectly target non-state actors, it will need to effectively consult with the United Nations (UN) and to target state leaders who harbor the terrorists. Because sitting state leaders are most likely to respond to, of even fear, international prosecution, the ICC might elect to target such leaders in order to diminish the threat posed by terrorism.

Given these parameters, it is not unreasonable to expect that the ICC Prosecutor will apply his or her discretion in the direction of this collective goal of countering terrorism. Clearly, this action would be one way of extending the ICC's novel dynamics to meet tomorrow's difficult security challenges. But whether this action remains consistent with the Prosecutor's negative and positive global responsibilities is not entirely clear. Much of this of course will depend on time and the increasing effectiveness of the ICC. But if innovative political strategies/policies will be needed to counter global terrorism, then the ICC's presence in this issue area might well be another way to strengthen the fragile solidarity at the global level.

Note

1. It should be noted that Carl Schmitt (1996) discussed this idea in terms of the total destruction of humanitarian-based wars.

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